

BADENACH & ANOR v CALVERT (H12/2015)

Court appealed from: Full Court of the Supreme Court of Tasmania
[2015] TASFC 8

Date of judgment: 24 July 2015

Date special leave granted: 26 October 2015

The first appellant is a legal practitioner who was, at all material times, a partner of Murdoch Clarke Solicitors, the second appellant. In March 2009, the first appellant prepared and executed a will for Jeffrey Doddridge (“the testator”). In the will the testator left his entire estate to the respondent, whom he treated as a son. In 1984 the testator and the respondent had purchased two properties as tenants in common in equal shares. The testator had resided on one of those properties until his death. The testator had a daughter, Ms Doddridge, who was not included in his will at the time of his death in September 2009. Following her parents’ separation in 1973, Ms Doddridge had had no involvement with her father. After the testator’s death, Ms Doddridge made an application (“the TFM claim”) under the *Testator’s Family Maintenance Act* 1912 (Tas) (“the TFM Act”). The result of her application was an order that \$200,000 be paid to her from the estate.

The respondent commenced proceedings against the appellants in the Supreme Court of Tasmania, claiming that the appellants should have advised the testator of the possibility of a claim being made under the TFM Act. The respondent argued that the appellants were negligent in failing to advise the testator of the risk of his daughter making a TFM claim, and subsequently in failing to advise him of the options to ensure that the estate would not be affected by a TFM claim. This failure to provide advice breached duties of care owed by the appellants to the testator as their client, and to the respondent as the beneficiary of the will. The appellants argued that they did not have a duty to provide the testator with advice on evading or limiting the likelihood of a TFM claim.

At first instance, Blow CJ held that the appellants owed the testator a duty of care to ensure that his testamentary wishes be fulfilled. In the circumstances, this duty included making inquiries as to the existence of any family members who could make a claim under the TFM Act. However, his Honour considered that it could not be established that this inquiry would have prompted the testator to take steps to deplete his estate and frustrate a possible TFM claim by Ms Doddridge. On this basis, his Honour did not characterise the respondent’s claim as a loss of opportunity, given that the existence of the opportunity was contingent on the hypothetical actions of the testator.

The Full Court (Tennent, Porter and Estcourt JJ) allowed the respondent’s appeal, holding that the scope of the duty owed to the testator in contract and in tort by the appellants required that advice be given to properly ensure the fulfillment of the testator’s testamentary wishes. Additionally, the appellants owed a non-contractual duty in tort to the respondent as a beneficiary of the will.

The Full Court found that the trial judge had erred by failing to characterise the respondent's claim as a loss of an opportunity. The Full Court found that the loss had occurred when the testator was not given the chance to consider the steps he would take should a TFM claim arise.

The grounds of appeal include:

- The Full Court erred in framing the duty of care owed by the appellants to the testator by conflating questions of duty and breach.
- The Full Court erred in concluding that no public policy reason militated against the duty of care it formulated as owed to the testator and to the respondent by holding that such duty did not give rise to conflicting duties and did not offend the principles of coherence in the law and conformity with the statutory purpose of the TFM legislation.
- The Full Court erred in determining a case governed by ss13 and 14 of the *Civil Liability Act 2002 (Tas)* that causation had been satisfied by reference to tests based upon a claim for loss of opportunity or loss of chance of a better outcome under the will.