

Life cycle of litigation beyond life: deceased estates

What do you do when there is no-one to sue?

Supreme Court and County Court civil procedure in Victoria

Defendant is deceased or dies and **cause of action survives** (at commencement, during the course of proceedings or after judgment), if no grant of representation has been made.*

Supreme Court (General Civil Procedure) Rules 2015 (Vic) rules 9.08, 9.09 and 16.03(1)(b)
Proceedings can be commenced in the name of "Smith v the estate of A.B. deceased".

* N.B. There may be exceptions where a grant of representation has been made before commencing proceedings.

Notice should be given to persons who are interested in the estate of the deceased.

Application to the Court:

1. to appoint a representative of the estate for the purposes of the proceeding (rule 9.08(5)(a)(i) and/or 16.03(1)(b)); and/or
2. under 16.03(1)(a) to proceed in absence of a person to represent the estate.

Service of Application by summons

Application by summons to appoint a representative for the purpose of the proceeding should be personally served (if possible).

Personal representative **consents** to representing the deceased estate.

The court may order that the personal representative be made a party to the proceedings.

Where the proceedings originally named the deceased, the proceedings will be taken to have been commenced against the personal representative (rule 9.08(4)).

Amendment of proceedings after change of party.

e.g. Smith v XY as the representative of AB

Any order or any judgment made in the proceeding will bind the personal representative.

Personal representative **DOES NOT consent** to representing the deceased estate.

Court may **appoint another** to represent.

Court may use its discretion under rule 16.03(1)(a) to proceed in the absence of a person to represent the estate.

Any order or any judgment made in the proceeding will bind the estate of the deceased person as it would had a personal representative of the deceased been a party – rules 9.08(10) and 16.03(2).

Failure to proceed after death of a party

Where an order has not been made substituting a personal representative of the deceased party, the court may order that unless an application for such an order is made with a prescribed period of time, the proceeding is to be dismissed adversely to the party against whom liability survives – rule 9.10.

1. Cause of action survives

Whether a statutory cause of action survives will depend upon the intention of the legislation. For example:

- i. In *Bendigo and Adelaide Bank v The Estate of Mclean*¹ the Court found that the cause of action under a loan agreement and mortgage survived the estate under section 29 of the *Administration and Probate Act 1958* (Vic)
- ii. In *Occidental Life Insurance Co of Australia Ltd v Bank of Melbourne*² the cause of action against a director under section 130(4) of the *Companies (Victoria) Code* (now under the *Corporations Act 2001* (Cth)) was found to survive upon the death of the director.

2. Notice given before any further steps taken

Notice should be given to persons who, as far as the plaintiff knows, are interested in the estate of the deceased, before seeking to take any other step in the proceeding. This may or may not lead to the appointment of a person to represent the estate for the purposes of the proceeding.³

McMillan J in *Re Lauer; Corby and Anor v Lyttleton*⁴ held that in the interests of resolving a proceeding in a just, efficient, timely and cost-effective manner⁵, the associated time and expense taken to notify a personal representative (and/or interested party of the deceased's estate) should be minimised.⁶

3. Application to the Court

In *Australia and New Zealand Banking Group Limited v The Estate of Balding*⁷ the Court found that whilst a proceeding can be commenced against a deceased estate, for any steps to be taken in proceeding, it was necessary that a 'legal person' be served. To do this, the Court held that a plaintiff would need to make an application by summons directed to the person or persons most appropriate to represent the estate of the deceased⁸ and include as an alternative an application to proceed in the absence of a person to represent the estate.⁹

The summons will need to include details of the summary judgment sought where an order to proceed in the absence of a representative is made. The summons should also be supported by an affidavit verifying the facts on which the claim or part of the claim to which the application to appoint a representative and the application for summary judgement is based on.¹⁰

4. Service of the Application to appoint a representative by summons

An application to appoint a representative should be personally served by summons on the person(s) most appropriate to represent the estate of the deceased.¹¹ This can be a person who has been granted representation through a grant of probate or letters of administration,¹² a party that the Court would hold to have a likely interest,¹³ for example the deceased's next of kin¹⁴ (keeping in mind section 7 of the *Civil Procedure Act* as discussed above), or where a person has died intestate, State Trustees Limited.¹⁵

5. Consent

The Court will never make an order to appoint a representative where the proposed appointee is unwilling to act.¹⁶

6. Court may appoint another

In *Re Lauer; Corby and Anor v Lyttleton*, the deceased's children (interested parties) did not consent to be appointed as representative of the deceased's estate. The Court held that a solicitor, who had previously acted for the deceased prior to death and was therefore familiar with the deceased's case and well-positioned to represent the estate for the remainder of the proceeding, could provide consent to represent the deceased's estate pursuant to rule 16.03. However, it was necessary that solicitor notify the personal representatives of the estate (the children) to obtain their view on the solicitor being substituted as a party.¹⁷ Having notified the children in writing the solicitor was appointed to represent the interests of the estate of the defendant in the proceedings and, in accordance with rule 9.06(c), was added as a defendant in substitution for the deceased.

7. Amendment of Proceedings after change of party

[Rule 9.11](#) provides the procedure for the amendment of proceedings after a change of party.

You can read Part 1 on the Banking Code's new provisions dealing with deceased estates [here](#).

1. *Bendigo and Adelaide Bank Limited v The Estate of McLean* [2018] VSC 215, 22.
2. *Occidental Life Insurance Co of Australia Ltd v Bank of Melbourne* (VSC, O'Bryan J, No 2496/90, 31 May 1991, unreported).

3. *McLean*, above n 1, 27.

4. *Re: Lauer, Corby and Anor v Lyttleton* [2017] VSC 728. McMillan J, noted that 'case law suggest that ordinarily, attempts would be made to notify a personal representative of the deceased's estate.

5. Pursuant to section 7 of the *Civil Procedure Act 2010* (Vic).

6. *Re: Lauer*, above n 4, 62.

7. *Australia and New Zealand Banking Group Limited v The Estate of Balding* [2017] VSC 728.

8. *McLean*, above n 1, 27.

9. *Balding*, above n 7, 38.

10. In *McLean* at [37] the plaintiff made an application to appoint a representative of the deceased estate or alternatively proceed in the absence of a representative and also sought directions for the timetabling of a summary judgement application for the purposes of seeking orders for possession of property.

11. *Balding*, above n 7, 39.

12. *McLean*, above n 1, 28.

13. *Ibid.*

14. *Ibid.*

15. *Ibid.*, 30.

16. *McLean*, above n 1, 27.

17. *Re: Lauer*, above n 4, 61-62.



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