

Rectifying mistakes in property settlement orders

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Section 79A of the Family Law Act 1975 (Cth) can be a useful tool for solicitors acting for parties in property settlement proceedings if there is a mistake in the orders and the judicial process has been undermined.

Have you ever sat through a gruelling family law mediation or negotiation, finally reached agreement, drafted and filed the consent orders, only to find out later that the orders contain a mistake and do not reflect the agreement reached between the parties? Here we consider issues which solicitors may face when seeking to set aside or vary orders made in property settlement proceedings in the Family Court, in particular where the error in the order arises from the solicitor's mistake.

It is vital for solicitors to keep file notes recording the course of negotiations, the offers made and the ultimate agreement reached. If there is a mistake and the orders do not reflect the agreement reached, the absence of a full and accurate record of the negotiations will significantly diminish prospects of establishing the mistake.

Property settlement orders

Orders in property settlement proceedings in the Family Court are made by the court under s.79A of the *Family Law Act 1975* (Cth) (the Act). This provides a mechanism for applying to set aside or vary an order made under s.79 and includes: "Where, on application by a person affected by an order made by a court under s.79 in property settlement proceedings, the court is satisfied that: (a) there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence (including failure to disclose relevant information), the giving of false evidence or any other circumstance ... the

court may, in its discretion, vary the order or set the order aside."

Where an error has been made in an order which results from a solicitor's mistake, the following questions arise:

□ Can the solicitor's mistake give rise to a miscarriage of justice arising from "any other circumstance"?

□ If so, what problems are likely to arise in trying to establish a miscarriage of justice?

Miscarriage of justice arising from "any other circumstance"

In interpreting the term "miscarriage of justice", authorities have tended to focus on whether an order has been unjustly obtained due to a failure to adhere correctly to the judicial process,¹ although it has been stated that the "judicial process" can refer to a variety of matters and circumstances which had an influence on the outcome of the litigation.²

In *Clifton v Stuart*,³ the Family Court of Western Australia held that the incompetence of a solicitor does not per se affect the judicial process. But in some cases, mistakes made by solicitors have been found to give rise to a miscarriage of justice, for example:

□ in *Lowe v Harrington*,⁴ the wife's solicitors put forward a set of minutes that were more advantageous to the husband than the parties intended them to be. The husband's solicitors were aware of the wife's mistake yet sat quietly while the orders were made;

□ in *Marzec v Marzec*,⁵ the judge made orders on the division of assets between hus-



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band and wife in the ratio of 75 per cent to the wife and 25 per cent to the husband. The orders failed to take account of certain matters. The effect of the mistake meant that the order, if carried out, would have resulted in the wife acquiring 98 per cent of the proceeds.

Although the decisions in these cases reversing the orders may provide some comfort to solicitors acting in property settlement proceedings, they are fairly fact-specific. It is easy to see how the courts were persuaded that a miscarriage of justice had occurred.

Unless the judicial process has been undermined, the court will not set aside or vary an order. So, for example, in *In Marriage of Rohde*,⁶ the husband alleged there had been a miscarriage of justice on the basis that information concerning his liabilities, which he had disclosed to his solicitor and counsel before judgment had been delivered, had not been disclosed to the court.

Geelong J in the Family Court held that there was no miscarriage of justice by reason of "any other circumstance".

Problems in establishing a miscarriage of justice

In seeking to set aside or vary an order under s.79A, the parties are entitled to adduce evidence of the agreement reached between them, including evidence of discussions which took place during the course of a settlement conference.⁷

The main problem solicitors often face in such situations is the lack of an accurate record of what transpired

during the negotiations. Negotiations of property settlements can involve rapid exchanges of offers and counter-offers covering a myriad of complex issues. There is often a considerable amount of to-ing and fro-ing. Even the most diligent practitioner can struggle in this environment to keep an accurate record of all of the discussions. Yet the failure to make detailed notes can be fatal to an application under s.79A.

So, for example, in a recent matter, orders were made under s.79 following a negotiated settlement reached at a conciliation conference. A few days after the orders were made, the solicitor for the husband sought the consent of the wife's solicitor to vary one of the orders on the basis that it failed to reflect the agreement of the parties. The wife's solicitor denied that the orders failed to reflect the agreement of the parties.

The husband's solicitor wished to apply under s.79A to have the orders varied. Aside from the issue of whether the judicial process had been undermined by the mistake, the husband faced the additional problem that the lack of any file note of the critical discussions meant that his prospects of succeeding on a s.79A application were seriously diminished. □

ENDNOTES

1. *Clifton v Stuart* (1991) FLC 92-194 at 78,338; *Marzec v Marzec* [2003] FamCA 1304.
2. *Suiker v Suiker* (1993) FLC 92-436 at 80,472.
3. (1991) FLC 92-194 at 78,338.
4. (1997) FLC 92-747.
5. [2003] FamCA 1304.
6. (1984) 10 Fam LR 56.
7. *Harrington v Lowe* [1996] 190 CLR 311. □