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## WHAT HAPPENS WHEN A SELLER DIES DURING A TRANSACTION?

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Report by Despina Priala | Priala Legal Pty Ltd | 1 February 2012

Where two parties enter into a contract of sale, each party must perform under that contract and carry out certain obligations placed upon them. If either party dies before the sale can be completed, then obviously that party can no longer perform under such contract. In the case where a seller dies before settlement, at a practical level, the seller cannot hand over title to the property to the buyer. What happens then to the sale?

Where a party dies after the contract is signed and before settlement occurs, the contract is then automatically terminated, (or discharged). What this means in simple terms, is that the contract is no longer on foot and the surviving party has no further rights or claims under that contract.

One might say that where a party dies during a transaction, what happens next is simple. Obviously, if a party no longer is alive, how can the contract be completed? It can't, therefore the buyer would expect all deposit monies to be refunded immediately. But by whom? The seller is no longer alive to deal with this. The answer then is not that simple. The reason is because when a person dies, all property held by that person as at the date of their death is then held by that person's executors and trustees under their Will. If there is no executor or trustee nominated or capable of acting at that time, then it is to be held by the Public Trustee, which dare I say, complicates matters even further by having to deal with a government body. The matter is again complicated depending upon whether the deposit monies were still held in a trust account at the time of death, or if they were already released to the seller directly under the terms of the contract.

In Qld contracts of sale, a party is defined as including that party's executors, administrators, successors and permitted assigns. I would expect the position to be the same or similar in other states. This means that a buyer has the right to deal with the seller's executors immediately. If a Grant of Probate is being obtained by the executors, it may be that the buyer may need to wait until such time as the Grant is obtained, to enable the executors to deal with the deposit monies

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held in trust, and to negotiate a possible fresh contract. To speed up the recovery of reimbursement of monies paid, it is suggested that the buyer immediately liaise with the solicitors acting for the seller at the time of death, who may then be able to provide contact details for the seller's executors and trustees. The buyer can then attempt to obtain the return of the deposit monies from the executors prior to, or following, a Grant of Probate being issued. In some states (NSW and Victoria) the process is a little easier in that certain legislation assists buyers with the right to recover monies paid.

In summary, the death of a party during a transaction can be awkward, tricky (and inconvenient to say the least), and proper legal advice should be sought as to the surviving party's rights in this regard.

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