

Legal Q&A

Your legal questions answered

Despina Priala explains what options are available to a buyer if the seller dies prior to closing

Q A week before we were set to settle on a residential investment property, I got a phone call from our solicitor saying that the seller had passed away and so the settlement would have to be cancelled. There were no outstanding conditions, so we had considered the sale a done deal and had already invested a lot of money in having plans drawn up, and we'd bought materials for a sizeable renovation.

I understand that we can wait for probate to be sorted out and try the sale again (though there are no guarantees it would go through), or should we just cut our losses and walk away, although I heard there could be a delay in getting our deposit back? What are our options? If we do decide to walk away is there anything we can do to speed up the return of our deposit?

A Where two parties enter into a contract of sale, each party must perform under that contract and carry out certain obligations placed upon them. But, 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 the property title to the buyer. So, then what happens 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.

If a party is no longer alive the buyer would expect all deposit monies to be refunded immediately. But who should return the money? The answer then is not that simple. The reason is that 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 complicates matters even further because a government body enters into the equation. 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 Queensland contracts of sale, a party is defined as including that party's executors, administrators, successors and permitted assigns. 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 held in trust. If the buyer has spent a substantial sum of money already (like in plans for a renovation) and still wants to go through with the sale, there is nothing to stop them from renegotiating a fresh contract with the executors. This situation does not give rise to any right to claim damages, however, so the deposit is all a buyer can count on getting back if the deal does not go through.

In order 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.

Disclaimer: The information in this article is of a general nature only and should not be relied upon as legal advice. You should seek advice for your particular circumstances before entering into any transaction.

Legal expert



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