WILLS & ESTATES BULLETIN – ISSUE #3

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THE QUEENSLAND SUPREME COURT DEFENDS THE FAMILY TRUST

Fordyce v Ryan [2016] QSC 307

1. Michael Quinn became a bankrupt in September 2015, and the Trustee in Bankruptcy (**TIB**) was appointed to manage his affairs.

2. Mr Quinn had been the director and sole shareholder of three companies which were trustees of the 99 George Street Unit Trust, the Shaw Street Unit Trust and the Fairdinks Discretionary Trust.

3. Each of the companies was deregistered and ceased to be the trustees of the trusts. Pursuant to the *Corporations Act* 2001 when a company is deregistered it ceases to exist and any assets it held on trust vest in the Commonwealth, administered by the Australian Securities and Investments Commission (**ASIC**).

4. The unit trusts owned property which vested in the Commonwealth as trustee, who holds the property subject to the terms of trust.

5. Mr Quinn was one of the beneficiaries of the Fairdinks Discretionary Trust. This was the only interest that the TIB had in any of the trusts. This interest arose as the TIB controlled his personal estate and stood to benefit if Mr Quinn received a distribution from the Fairdinks Discretionary Trust. However the TIB had no means of controlling the 3 trusts because it had no power under the trust deeds, or under the law of bankruptcy, to assume control of a trust of which a bankrupt is a beneficiary or an appointor. The TIB therefore apparently sought a creative solution to its yearning to repay Mr Quinn's creditors.

6. The TIB applied to the Supreme Court for the appointment of receivers to the three trusts so that each trust could be wound up and nominated independent professional liquidators to act as the receivers.

7. The TIB argued that the trusts were in want of a trustee, which was undoubtedly the case, but did not seek for a trustee to be appointed. This is a key difference, because a trustee would have a duty to all beneficiaries of the trusts, which for the discretionary trust would include a range of persons. Receivers would have no such duty.

8. The Court considered the two most prominent asset protection cases in the last decade concerning the interest a beneficiary has in a discretionary trust, being *Richstar*[1] and *Kennon v Spry*. [2] You will recall that in *Richstar* the Court found that a beneficiary of a discretionary trust had something akin to a property interest in the

[1] *Australian Securities and Investments Commission v Carey* (6) (2006) 153 FCR 509
[2] *Kennon v Spry* (2008) 238 CLR 366.

trust's assets for the purposes of the *Corporations Act* when seeking to make urgent injunctive orders. The Court found that the principals of *Richstar* are confined to the specific purposes of the *Corporations Act* and do not apply in the context of a bankrupt individual.

9. As to *Kennon v Spry* the Court acknowledged that the right of a beneficiary to the due administration of a discretionary trust:

> "*can be taken into account as part of the property of the beneficiary as a party to the marriage for the purposes of section 79 of the Family Law Act*" (at 36).

10. However the Court continued to say that "*these conclusions do not affect what constitutes property according to the general law"* (at 36) and thus distinguished *Kennon v Spry* as applying only to family law principles and not to trust law or bankruptcy law.

11. This confirms the general law position that a person who is a purely discretionary beneficiary of a discretionary trust (which will include most family trusts in Australia) has no property interest in the assets of the trust or otherwise associated with the trust. This limited nature of the interest of each discretionary beneficiaries interests means that their bankruptcy does not cause the TIB, who steps into their shoes, to have any particular right to insist upon the distribution from the trust or to take control of the trust. This is the main principle which provides family trusts with the asset protection features that they enjoy.

12. Judge Jackson accepted that the Court had power to appoint a receiver but did not consider it necessary. He noted that it was inappropriate to appoint a receiver for a trust when a trustee could instead be appointed who would then be subject to the duties of a trustee whereas the receiver would not be subject to such duties. Receivers at law have few duties to the beneficiaries of trusts or the owners of receivership property and instead hold their duties only to creditors. This, as you can imagine, can lead to wildly different outcomes when a trust is being administered by a receiver in place of a trustee.

13. The Court further noted that the particular skills set of a professional insolvency practitioner, such as a liquidator or receiver, was not needed for the ordinary administration of the trusts. The fact the trusts did not have a current trustee was not sufficient cause to need a professional insolvency practitioner. The Court made particular note that the assets of the trust were modest in the context or receivers' fees. Whilst it was unsaid in the judgement the clear implication is that insolvency practitioner's fees are more expensive than is ordinarily warranted in the operation of a commercial trust.

14. Lastly the Court addressed the TIB's underlying purposes in the litigation ie to obtain control of the discretionary trust so that it could arrange a distribution be made to the bankrupt which could then be paid to the bankrupt's creditors. The Court said

> *"But the question of a distribution from the assets of that trust is one of the exercise of a fiduciary or trust power in interests of the first principal beneficiary and the general beneficiaries (of whom the bankrupt is but one). If the Court in its supervisory jurisdiction over the trusts were to make a general administration order, it will be required to exercise that power in accordance*

with the established principles under the terms of the trust instrument. In my view it would be inappropriate for the Court to appoint a receiver who is not subject to the same fiduciary obligations." (at paragraph 75.)

15. The Court did not consider it appropriate that the TIB be given the power to order distributions from a discretionary trust. Instead this ought to have been undertaken by a trustee who is required to consider all of the beneficiaries of the trust, and not just the bankrupt.

16. It would rarely be in the interests of the beneficiaries of a discretionary trust for the trustee to determine that its assets be distributed out to a bankrupt who would not enjoy the assets in any event because it passes to their creditors.

Conclusion

The Court dismissed the application without making any orders. The somewhat surprising outcome of this is that there was no trustee appointed to the trusts and the administration of the trusts was not advanced in any way. The TIB failed on all counts. The Supreme Court defended the interests of the beneficiaries under the discretionary trust and that of the fixed beneficiaries under the unit trusts. The family trust remains an outstanding structure for holding and developing family wealth in a secure environment with unmatched asset protection features.

Cameron Cowley
June 2017

Informal Wills – when is it acceptable to attach a list of chattels to a will?

1. Many accountants and lawyers are of the view that rather than incorporating a lengthy list of specific gifts of personal items into a will, it is a better practice to simply have the will-maker prepare a separate list to be annexed to a will following its execution.

2. Such a practice is not without risk.

3. There are basic formal requirements for a will to be valid, which are as follows:

    a. It must be in writing

    b. It must be signed by the willmaker or at their direction

    c. It must have two witnesses, who must each sign in front of the willmaker

    d. And lastly, there must be an intention on the part of the willmaker that the document will operate as their will without more

4. Typically when a client prepares a list then the first 2 points are satisfied. Although the Courts have taken a somewhat lenient approach in what constitutes a document

for the purposes of a will. Any marks that can be interpreted, or sounds, images or writings that can be reproduced without aid may also qualify. For example, Courts have found that writings on a wall, notes on an iPhone and a computer file have satisfied these requirements.

5. An informal will is one that does not satisfy the above formal requirements. The Supreme Court has the power in Section 8 of the Succession Act to dispense with the formal requirements for a will. It is this power that an Executor would be relying upon to seek court approval of a list of specific gifts annexed to a will.

6. Even though the Court can dispense with the formal requirements, it still must be satisfied that the willmaker was making a testamentary disposition. A testamentary disposition is a gift of property intended to take effect following death. It is not merely a general statement or general information for an executor, but must be a genuine direction as to what will happen upon their death. This is not an easy barrier to overcome, for instance the Courts have rejected documents even where they were titled "Will" or where lists were prepared by the deceased. The Court must be satisfied of the deceased's testamentary intention – that they intended the document to have the effect of a will.

7. The onus of proving this is on the person propounding the document – in the case of a will with a list annexed it would be the executor of the will. The further a document strays from the formal requirements for a will, the less willing the court will be to make a finding that it's a will.

8. One of the first steps for any executor named in a will is to seek advice about the validity of the will and any other documents, such as a list which is included with the will or other documents that may be stored around the deceased's home.

9. The location of the document is important. Most lists are kept with the will, but it is not unusual for executors or relatives to find such lists within the home of a deceased.

10. The Courts have recognised that people, and elderly people in particular, often prepare such lists for the purpose of garnering attention or affection, and are cautious in this regard.

11. The benefit of a formally prepared will using a solicitor, and which complies with the formal requirements for a will is that it creates a presumption of testamentary intention. There is also a presumption of testamentary capacity, whereas with an informal will the person propounding it will also need to satisfy the Court that on the balance of probabilities the willmaker was of sound mind, memory and understanding at the time of executing the document. This may not be an easy task where the willmaker had medical issues or where they were of an advanced age at the relevant time.

Saving a penny, costs a pound

12. As can be seen above, the minor financial saving in having a willmaker prepare their own list of specific gifts is usually not worth the cost and anxiety caused in administering the Estate.

13. The greater the value of the specific gifts, both in financial and sentimental terms, the greater the need to have the gifts properly included into a valid will that complies with the statutory requirements.

14. Any willmaker contemplating drafting their own "homemade" will or codicil should seek legal advice about the consequences of such a document and how it may be interpreted by the Courts.

Richard Morris
June 2017

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