WILLS & ESTATES BULLETIN – ISSUE #10

Inside this issue:

MOIN
MORRIS
SCHAEFER

Cameron joins elite squad

Moin Morris Schaefer is very proud to announce that our own Cameron Cowley has recently fulfilled the requirements to be named an Accredited Specialist in Business Law through the Law Society of QLD.

This achievement puts Cameron in an elite group of only 24 lawyers who hold this type of specialist accreditation. When combined with Cameron's existing specialist accreditation through the Society of Trust & Estate Practitioners (STEP), Cameron is now one of only *three* lawyers to hold both of these accreditations in the whole of NSW (30,000 lawyers).

It is a truly magnificent achievement.

QUEENSLAND LAW SOCIETY
ACCREDITED SPECIALIST

MOIN
MORRIS
SCHAEFER

Help! My husband wants the house but I want to leave it for my children – what are my options?

Background

1. Humans are the most complex animal and we regularly make our family structures and lives more complex than ordinary simple estate planning can cater for properly. I am referring to blended families. Not only do interpersonal relationships between the people in the family become more nuanced, but financial structures and testamentary intentions become complicated. This complexity in family structures, family relationships and family finances then has to be carefully considered when preparing the estate plan.

2. The common scenario is - a person marries, has children and after some time separates, divorces and finally re-partners.

3. In this second relationship the parties want to know how they can make their wills in a way which provides for each other, as well as for their children from previous relationships.

Scenario

4. Jane Green is in her 50s, has 3 adult independent children and is divorced. She meets and marries John Brown. John is also in his 50s, has 2 adult independent children and is recently divorced.

5. Jane has the following assets:

    - a house on the top of a hill in a leafy suburb worth $2M debt free; and
    - cash and investments of $750,000.

6. John has the following assets:

    - $650,000 in listed shares within his self-managed super fund (**SMSF)**.

7. They are living together in Jane's house.

8. In her estate plan, Jane wants to provide that John can live in her home for as long as he likes but ultimately she wants the home to pass to her children.

What are Jane's options?

Options

9. The main options are[1]:

(1) **Mutual wills (Option 1)**

(a) Jane and John could enter into what is known as "mutual wills" (sometimes called contractual wills) whereby:

(i) Jane leaves her home to John under her will on the condition that, in his will, he leaves the property to Jane's children on his death, and

(ii) they each promise not to change their wills i.e. they make a contract not to change their wills or do any other thing which might frustrate their wills e.g. John would not be able to sell the property.

(b) Mutual wills are powerful legal documents. John's obligations would be binding on him and the Supreme Court would enforce it (presuming Jane dies and upholds her end of the contract).

(c) The risk with mutual wills is that they are a highly inflexible arrangement and only work for the family if their circumstances are predictable and indefinitely remain as the parties thought they would when they made their wills. Life however can throw up curve balls and make them inappropriate. For example, what if Jane dies, John inherits the house, John remarries, John separates and then he offers to provide the house or the sale proceeds from it in satisfaction of his property settlement with his third partner?

(d) What if John goes bankrupt and the house is sold to meet the debt to his creditors?

(e) What if Jane's children have inheritance impatience and they make a family provision claim against Jane's estate?

(f) I don't raise these challenges to demonstrate that mutual wills are never suitable, but to say that they must be approached with care and with an awareness of the risks.

(2) **Life interest (Option 2)**

(a) Jane could in her will grant a life interest in the property to John, with her children as the remainder beneficiaries to receive it on John's death.

(b) This would mean that John would be able to live in the property rent-free for his life. He is also entitled to all income from the property and would be able to rent it out. All capital repairs must be paid by the estate.

[1] I wouldn't pretend to have all of the options – the creativity of clients and fellow practitioners never ceases to amaze me.

(c) Again, the problem with a life interest is the lack of flexibility. John would not be able to raise finance against the property. He would have no incentive to improve the property or even properly maintain it. A life tenant has an obligation not to damage the property, but no positive obligation to conduct or pay for any repairs. For this reason many houses which are the subject of a life interest, fall into disrepair and are substantially deteriorated by the time of the death of the life tenant. The property also suffers from not being redecorated e.g. no new paint or carpets or renovations. The life interest relates to that property only, and is not portable to a separate property.

(d) John also has no interest in the property to assist him to pay for aged care (if thought necessary).

(e) However depending upon the property, and if the remainder beneficiaries are not immediate family members, life interests can be worth considering.

(3) **Right to reside (Option 3)**

(a) Jane could grant John a right to reside in her home. She could specify the terms of the right to reside, including:

(i) John must pay the rates, insurance and maintain the property;

(ii) major capital repairs must be undertaken by her estate;

(iii) if desired, the right to reside terminates if John re-partners;

(iv) John is not entitled to rent the property out and if he vacates the property for 3 months, then the right to reside terminates; and

(v) on termination of the right to reside, the property passes to Jane's children.

(b) The advantage of a right to reside is that its terms are more flexible than a life interest. They can be tailored as desired with particular terms. The disadvantage is that John does not have any interest in the property, he cannot use it for security and cannot raise any money from it.

(c) It is possible to include a right to income from the property in a right to reside, however one must be careful that the right to reside is not so fulsome that it transcends a mere license and becomes an interest in land akin to a life interest.

(d) Provided the right to reside is personal to John, this structure also provides asset protection for Jane's children. If John becomes a bankrupt he has no interest in the property which can pass to the Trustee in Bankruptcy.

(e) The right to reside can be fixed to that particular property, or can be portable, allowing the property to be sold and replaced with a more suitable property, if allowed by the executors of Jane's estate (who are the owners of the property during the right to reside).

(4) **Option 4: Testamentary trust (Option 4)**

(a) A testamentary trust can be utilised to achieve the same effect as the above options but with substantially more flexibility for the distribution of income.

(b) Jane could establish a hybrid discretionary testamentary trust of which John and one of the children were trustees. John would be entitled to income, but not capital, from the assets of the trust and would have a right of residence in the property owned by the trust. Jane would leave her house to the trust.

(c) If Jane desired, she could also leave some income-producing assets to the trust.

(d) The children could also be income beneficiaries if desired.

(e) This provides a structure whereby:

(i) John can enjoy the Property for his life whilst preserving it for Jane's children;

(ii) children can have some involvement in the maintenance and preservation of the property;

(iii) the trust structure provides excellent asset protection in the event of any claim against John or the children;

(iv) income can be provided to John without there being a risk that the asset is part of his estate or at risk of being taken by his creditors or distributed to a later partner of John's; and

(v) income can be distributed to tax advantaged individuals.

(f) The trust could lend moneys to John to assist with his aged care if thought appropriate.

(g) The decision of the controllers of the trust (i.e. the trustees) and the appointors is the most critical decision in the establishment of a trust. Family dynamics and personal dynamics between the parties would need to be considered. It may not be appropriate to have a child and a husband together as trustees and, instead, it may be better that an independent person be trustee with John and in some cases it may be that John is not a trustee at all.

(5) The disadvantage of the testamentary trust option is that it is the most complex and costly to run, as the trust will need to lodge tax returns if it makes income. The complexity is not a burden if it can provide outcomes not available through other options.

Which option is appropriate will be determined by circumstances and client preference. Jane and John and their lawyer(s) will need to work with their accountant and financial advisor to ensure the option chosen fits their financial objectives.

Cameron Cowley

February 2019

Common Misconceptions and Family Provision Claims

1. Most of the general public is aware that when a person dies that it is possible for a Will to be challenged by someone who was left out of it.

2. Unfortunately in our experience there are many misconceptions and falsehoods that exist in the minds of the public. Perhaps surprisingly to most readers, this also extends into the legal fraternity, with our firm being involved in a number of litigious matters in the past year where it was clear that the solicitor acting for the other party did not understand or was not aware of the applicable law.

3. So what are the misconceptions?

Anyone can contest a Will

4. Wrong.

5. A person must be an eligible person, being:

    (a) A spouse or *former* spouse of the deceased;

    (b) A de facto of the deceased at their time of death. De facto is defined in the same way as in family law proceedings;

    (c) A child of the deceased (doesn't include step-children)

    (d) Someone who was a member of the deceased's household (at any time) and who was financially dependent upon the deceased (at any time);

    (e) A grandchild of the deceased who was also financially dependent upon the deceased (at any time);

    (f) A person who was living in a close personal relationship with the deceased at their time of death. For this to apply they have to live together – this includes boarders! The claimant must have provided the deceased with personal care and support – but not for payment. This excludes paid carers or other paid professionals.

If I leave them a gift then they cannot make a claim….

6. This one pops up regularly with clients who intend on disinheriting children or other relatives. If I leave my child a gift of $1 or $20,000 then they won't be able to make a claim as they have received something.

7. It is simply not true.

8. The Court looks at whether there was *adequate provision* for the claimant's *proper maintenance, education and advancement in life*.

9. There is no fixed position from a Court's perspective. In some circumstances $20,000 might be entirely adequate, and in others it might be $5,000,000. Each set of circumstances must be reviewed in context, looking at the relationships involved, the size of the estate and the need (financial and non-financial) of the claimant.

10. From an estate planning perspective, lawyers must advise their clients on the potential for claims and what would be determinative.

Notional Estate

11. NSW is the only state in Australia to have this concept. Talk to a lawyer from QLD or Victoria about notional estate and most will go pale in the face and run back to the warm embrace of the laws in their jurisdictions.

12. This is a concept that seems to escape many lawyers within NSW as well. It is far reaching and difficult to circumvent.

13. So what is notional estate and why does it scare lawyers and clients alike?

14. If a person brings a claim for family provision and the estate is not large enough to provide for them, then they can seek a notional estate order to "increase the pie". i.e

    (a) John dies with his only personal asset being a bank account with $20,000 in it.

    (b) He left 3 children and a second wife Maria. His Will gave everything to Maria.

    (c) One of John's children, Max, is a 40 year old surviving on Centrelink benefits, suffering from a back injury who has a drug addiction.

    (d) John also owned a house as joint tenants with his second wife Maria worth $500,000.

    (e) John had a life insurance policy payable directly to Maria for $1,000,000.

    (f) John had a SMSF with $500,000 in it, with all of his death benefits to be paid to Maria via a binding death benefit nomination.

15. On the above facts, John's "estate" is only worth $20,000. If Max wanted to bring a family provision claim then the estate of $20,000 is insufficient to provide for both him and Maria.

16. The Court then has the option of bringing in the "notional estate" to enlarge the pot of assets available to adequately provide for Max's proper maintenance, education and advancement in life.

17. Notional estate is property that has either already been distributed to beneficiaries or in John's case, property that is subject to a "relevant property transaction".

18. This includes acts and omissions, and applies to:

    (a) Jointly held property (deceased could have severed the joint tenancy prior to death – therefore half of John's house is available for Max's claim if the court deems it appropriate);

    (b) Life insurance (subject to the terms of the policy, John could have change the beneficiary of the policy to his estate or Max)

    (c) Superannuation – John could have changed his nomination prior to death to change the beneficiary to Max or his estate)

    (d) Transactions in the 3 years prior to death that were not for full value – i.e transferring land to a child in the 3 years prior to death for little or no value.

    (e) Powers of appointment in trusts.

19. As you can appreciate from the above, apart from divesting yourself of all your property and then living for 3 years, there is little that can be done to avoid the reach of a notional estate order. But the Court still must be satisfied that one is necessary, and that is not a given.

You must have a Will for it to be contested

20. A family provision claim can be brought even if there is no Will.

21. The claim can be directed against the rules of intestacy, by a claimant who has not been adequately provided for, and who can show that they have need and the deceased should have made provision for.

Richard Morris

February 2019

MOIN
MORRIS
SCHAEFER

Preparing for lost wills

1. Last edition of this bulletin we wrote about an unsent text message being admitted to probate as a valid will. But what happens when we know the deceased had a proper valid will, but it cannot be found?

2. Lost wills are the bane of the probate practitioner. Wills kept at the will maker's home are regularly unable to be located. As for wills held by law firms, whilst it is extremely rare for a will to be lost by a law firm, it does happen from time to time.

3. When a will is lost, all is not lost.

4. If the will maker has not died and has testamentary capacity, then they can simply make another will. If they have died, it may be possible to obtain probate of a copy of the will, if a copy exists.

5. There are 2 issues which must be satisfied. Firstly, the presumption of destruction must be overcome. That is, a lost will which was held by the will-maker is presumed to have been destroyed by the will maker with the intention of revoking it. If so, the will cannot be revived even if a copy is in existence. Earlier wills also cannot be revived, because (presuming the destroyed will was validly made) the latest will revoked the earlier wills when it was signed, and when that latest will is revoked by destruction then the will maker is intestate.

6. However, the presumption is rebuttable if it is possible to demonstrate to the Court with cogent evidence that either:

   (1) the deceased did not destroy the will; or

   (2) the deceased did destroy, or may have destroyed the will, but did not have any intention to revoke it in doing so.

7. As you can see, rebutting the presumption will be difficult in many circumstances i.e. if a testator dies and there has been no discussion of the will by the testator to any living person in the recent past, then there is simply no evidence to demonstrate that the deceased did not intend to revoke it.

8. There is a line of case law in relation to the presumption of destruction helpfully set out in the recent West Australian Supreme Court case of *Larussa*[2]. However, for the purposes of this article, it suffices to say that the presumption can be overcome.

9. The presumption of destruction does not apply if someone other than the will-maker holds the will when it is lost i.e. a solicitor.

10. Once the presumption is overcome or if it does not apply, it is generally a reasonably straightforward matter to then get a copy of the will admitted to probate. This brings me to my practice tip, (which is reasonably obvious!) and that is that all wills should be scanned electronically, and photocopied, immediately after they are signed. The will-maker may wish to keep a printed copy or an electronic copy – or both. However, it is a good idea to ensure the law firm holding the original will (if applicable) also

[2] *Larussa v Anna Carr as administratrix of the Estate of Giuseppe Larussa* [2016} WASC 332

holds an electronic copy backed up to a cloud-based backup. This assists to prevent loss of both the copy and the original will simultaneously.

11. In the recent case of *Re Ambrose*[3], a will was lost when a law firm's premises was renovated. It appears that the original will had been accidentally destroyed, along with other rubbish, as part of a renovation.

12. However, the solicitor had an electronic copy of the will. Davis J viewed the authorities in relation to whether a copy of a will can be admitted to probate and set out the following criteria:

    (1) there was actually a will;

    (2) that will revoked the previous will (if any);

    (3) the presumption of destruction has been overcome or does not apply (e.g. where a solicitor holds the will);

    (4) the terms of the will are clear; and

    (5) the will was properly executed.

13. Other usual criteria for admission of a will to probate would also apply e.g. there being no suggestion that the testator did not have capacity when making the will.

14. The copy of the will was admitted to probate (described as a 'photocopy will'). The matter was achieved without an oral hearing and no doubt brought great relief to the parties involved.

15. In *In the will of Gregory Thomas Barnes*[4], the Supreme Court of Queensland admitted a copy of a lost will to probate after considering the circumstances of the lost will. As always, context is crucial.

16. The Court noted the following matters as evidence that the deceased did destroy his will and/or did not intend to revoke it:

    (1) the deceased had discussed making a new will with his solicitor but had not made any firm decisions and did not proceed with a new will, thereby suggesting the deceased accepted his current will;

    (2) the will made provision for his siblings, and the deceased was on amicable terms with his siblings at the time of this death; and

    (3) the deceased had made comments to a family member that his will was "all sorted", with everything "filed together" and he had discussed with the executor of the last will the fact he would appoint him as his executor.

17. Each piece of evidence was not conclusive in isolation, but taken together was enough to satisfy the Court that the deceased did not intend to revoke his will.

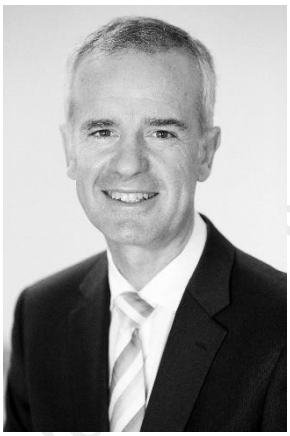
[3] [2019] QSC 3
[4] [2014] QSC 66

18. From a client's or other advisor's perspective, I encourage clients to keep an electronic copy of their current will in case their original will goes astray. Keeping in mind that the presumption of destruction may need to be overcome if the will-maker holds the original will at the time of its disappearance, it is still a worthwhile enterprise to maintain an electronic copy.

Cameron Cowley

February 2019

Our Estate Planning Team



Cameron Cowley

- Wills
- Testamentary trusts
- Trusts
- Superannuation including SMSFs
- SMSF nominations
- Taxation issues of estate planning
- Deeds of family arrangement
- Corporate succession

Greg Moin

- Wills
- Powers of Attorney
- Appointment of Enduring Guardians
- NCAT Reviews
- Farm succession
- Advanced Care Directives
- Corporate succession
- Aged Care Law
- SMSF nominations

Richard Morris

- Wills
- Deceased Estates
- Family Provision Claims
- Complex Estates
- Foreign Wills
- Capacity claims
- Informal Will cases
- SMSF nominations
- Special Grants
- Probate/ Administration

We stand by all of the legal information in this bulletin. However it is important to understand that it is not legal advice for you. Advice must be tailored to your circumstances, and every client's circumstances are unique. If you try to apply the above information to your

circumstances it may not lead to the outcome you seek. We would be most happy to provide tailored advice for you suited to your circumstances.