WILLS & ESTATES BULLETIN – ISSUE #6

Moin & Associates Wills & Estates Bulletin

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LAWYERS

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Foreign Wills

Are they valid in NSW and vice versa?

1. We had a request last year from a reader of our bulletins to provide some information on how international wills work and what rules apply.

2. Cross jurisdictional wills are an interesting area of the law, which is surprisingly not uncommon in regional NSW.

Probate for Foreign Wills in NSW

3. It is possible to have an internationally recognised will executed in NSW, and likewise there is provision in NSW law (Part 2.4 of the Succession Act) for the recognition of wills prepared and signed overseas.

4. Generally the rule is that if a will is valid according to the law of where it was signed, then it will be recognised as being valid in NSW.

5. The difficulty is more from a practical perspective, in that a foreign will requires specialised evidence (from a practitioner from that jurisdiction) to confirm that it complies with the law of that jurisdiction. This creates additional costs and complexities for the estate, particularly from a communication perspective. Translation certificates may be required, again adding costs and delay.

International Wills

6. From 10 March 2015, Australia formally signed up to the *Convention Providing a Uniform Law on the Formal of an International Will 1973* (the Convention).

7. The Convention was incorporated into NSW law via Part 2.4A of the Succession Act.

8. It allows for international wills to be automatically accepted in countries which have adopted the Convention, without the need for evidence referred to in paragraph 5 above.

9. An international will must comply with the Annex to the Convention. Essentially the requirements are:

    a. The will is in writing;

    b. It doesn't need to have been prepared by the willmaker;

    c. It can be in any language;

    d. It must have two witnesses *and* a person authorized to act in connection with international will (in NSW a lawyer or public notary)

    e. It must be signed on every page by the will-maker and the witnesses, with the usual attestation clause at the end;

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f. The pages must be numbered;

g. The will must be dated by the willmaker and the lawyer/public notary;

h. The lawyer/public notary must provide a certificate (as set out in the Convention) about the execution of the will and its storage.

10. Such a will and certificate is accepted as conclusive proof of its validity. The terms of the will are construed according to the law of the jurisdiction in which it was prepared and signed.

What countries are signatories to the Convention?

11. The following jurisdictions are currently signatories:

Canada (not all provinces)	Laos
Australia	Libya
Bosnia- Herzegovina	Niger
Croatia	Portugal
Cyprus	Russia
Ecuador	Sierra Leone
France	Slovenia
The Vatican	United Kingdom
Iran	United States of America
Italy	

Practical effect

12. Although the prospect of an international will available for clients, we still recommend in most cases it will be best to have a will for each jurisdiction where a willmaker has assets.

13. As tax and succession laws vary between jurisdictions, it is rarely appropriate to have one document governing all jurisdictions.

14. Extreme care must be taken though in ensuring that the multiple wills can co-exist and only apply to assets in each jurisdiction. If the documents are not properly drafted then the latest will may revoke the wills from other jurisdictions, producing consequences that are not contemplated by the willmaker.

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15. We recommend seeking specialised advice in relation to any estate involving cross-jurisdiction assets and investments.

Richard Morris

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Precision in Drafting:

The importance of identifying gifts properly

Court of Construction

1. In NSW if a term or provision in a Will is ambiguous or there is a dispute about its meaning, then interested parties can apply to the Supreme Court of NSW for a judicial ruling on the correct interpretation. The Court also has the power to rectify mistakes in a will and provide advice or directions on what the executors or trustees should do.

2. The Court determines how a will should be constructed by carefully reviewing the express words in the will in light of the circumstances surrounding it. The Court does not take evidence of the willmaker's actual intention.

3. Many of these applications can be avoided with careful drafting, however sometimes there may be details overlooked by clients in providing their instructions, or clients do not wish to incur additional costs in investigating matters further – such as via title searches for land.

4. Unfortunately, in seeking to save a $100 or even a few hundred dollars, their estate can be reduced by thousands or tens of thousands through costly litigation in determining the correct construction of their will.

Executor's role

5. Where there is more than one meaning or ambiguity regarding provisions of a will, the executors should not distribute the assets without a judicial decision on the correct construction, as this may leave them open to liability from the beneficiaries or others who are affected.

6. Solicitors and accountants advising estates should be extremely careful to not simply advise clients that particular terms should be interpreted from their own opinion or via previous cases that they have handled. Where there is ambiguity, it is prudent to make an application to the Court.

Recent Example – Arnot v Arnot (2017) NSWSC 1741

7. This case involved an estate with approximately $1.4 million in Australian assets, and other assets in the United Kingdom.

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8. The deceased had sought to gift their Unit in Sydney to a niece and nephew as tenants in common. The residue of the estate was then placed into a trust.

9. Such a specific gift is very common. In fact, many lawyers would not foresee any potential issue. The clause read:

   I DEVISE AND BEQUEATH *free of duties and taxes all my share and interest in Flat 20 [street address] Elizabeth Bay, New South Wales, Australia to such of my niece JENNIFER WARREN [the first defendant] of [address] and my nephew WALTER ARNOT [the second defendant] of [address] as shall be living at the date of my death and if both then as tenants-in-common in equal shares*

10. The gifted property was identified via a street address, which again is common practice for many lawyers.

11. Whether it was an oversight on the part of the deceased or their lawyer is unclear, but the issue arose as not only did the deceased own an apartment at that address, but also a parking space on a separate title to the unit.

12. The ambiguity flowed from whether the parking space was included with the gift or whether the parking space (valued at $70,000) was a separate and distinct piece of property that fell into the residue of the estate.

13. There are certainly arguments either way, and on the face of it an interest in land which is contained in an entirely separate certificate of title would not unreasonably be expected to fall into the residue.

14. However, the Court determined that the parking space was included with the unit. It came to this decision based upon the circumstances surrounding the gift, as the deceased had always treated the unit and parking space as one and the same – both in leasing the unit out and when she used the property personally.

15. All of the costs of the Court proceedings were paid from the Estate on an indemnity basis, meaning that most of the costs (usually 80%-95%) would have been borne by the residual beneficiaries.

Lessons

16. All of this could have been avoided with more detailed instructions, and possibly title searches on behalf of the deceased.

17. Relative to the value of the gift involved ($70,000) the proceedings would have been very costly.

18. It is incumbent upon practitioners to ensure that any specific gifts are identified with as much detail as possible, particularly gifts of land. I have personally acted in other litigation involved similarly ambiguous gifts drafted by lawyers who may have been overly reliant upon the description provided by their client.

19. For regional lawyers it is especially prudent to properly investigate gifts of land, as farming properties often have nicknames for certain sections and may be divided into

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any number of separate certificates of title. In our experience it is not unusual to have a farm comprised of more than 15 separate parcels of land.

20. It is up to the lawyer to ensure that the gifts are adequately identified, and as always you should be mindful of the fact that you owe a duty not only to the will-maker but also the beneficiaries of the estate.

Richard Morris
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- 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
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