WILLS & ESTATES BULLETIN – ISSUE #8

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Downsizing Your Home, upsizing your superannuation

Background

1. The *Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No 1) Act 2017* will commence on 1 July 2018 as part of the Federal Government's measures to assist housing affordability.

2. The concept is that eligible home owners aged over 65 will be able to contribute an extra $300,000 into their superannuation sourced from the sale proceeds of their home. This $300,000 is in addition to their existing contribution caps and other restrictions.

3. The contribution has the exciting name of "*the downsizer contribution*".

4. The downsizer contribution can be made even if the relevant person has a total superannuation balance greater than $1.6M. It will however count towards your transfer balance cap for your pension account.

5. The downsizer contribution can only be made once and cannot be repeated if you downsize your home again. You will need to make the contribution within 90 days of settlement of the sale.

6. If a home is owned by a spouse or indeed by both husband and wife, then each spouse is able to contribute up to $300,000 i.e. $600,000 in total. The contribution by both members cannot exceed the sale proceeds of the home.

7. Of course, there is a downsizer contribution form which needs to be completed and submitted at the time of making the contribution.

8. Note the following eligibility requirements:

   (1) the contract for the sale of your home must be signed or exchanged on or after 1 July 2018;

   (2) you or your spouse must have owned the home for 10 years or more;

   (3) the home must not be a caravan, houseboat or other mobile home (the policy purpose for these exceptions is unclear); and

   (4) the home must be exempt under the main residence capital gains tax exemption (i.e. you must not use it for business or income producing purposes).

9. New section 292-102(5) of the Income Tax Assessment Act 1997 provides that if your spouse dies, and their share of your home is held by an executor, then at that time the deceased is still considered to hold an ownership interest in the home. Therefore, this allows the downsizer contribution to be made if a home is sold after the death of one member of a couple.

10. Interestingly, there is no requirement that you actually downsize your home. Instead you merely have to sell it. It seems you are free to contribute the sale proceeds to

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superannuation and then buy a similar size, perhaps even a grander home, for your retirement and you will still be eligible for the downsizer contribution.

11. Because everyone's tax and superannuation circumstances are individual, please consult your accountant or financial advisor prior to making a downsizer contribution.

Estate planning opportunity

12. The prospect of a downsizer contribution will be another consideration in the estate planning matrix and may, for some, be a valuable opportunity to contribute extra monies into super at a time when it is becoming increasingly difficult to contribute to superannuation.

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Limits on family provision discretion – daughter of billionaire Michael Wright has her family provision award substantially reduced

1. In the well-publicised case of *Mead –v- Lemon* [2015] WASC 71 (**original decision**), Master Sanderson of the Supreme Court of Western Australia awarded $25M to Olivia Mead in her family provision application.

2. Ms Mead is the daughter of the late Michael Wright. She has 2 older sisters. She was born out of a later and, apparently at the time, undisclosed relationship. It was not disputed that his total estate was in excess of $1B. The late Mr Wright had left the bulk of his estate to his 2 elder daughters and left $3M to Ms Mead.

3. In family provision matters the Court must determine what is proper and adequate provision by a testator for their spouse or child or other eligible applicant.[2] In doing so the Court has significant discretion, which is necessary because what is proper and adequate is not legislated or codified. Further, the limitless possible permutations of circumstances of applicants and testators requires the Court have flexibility to account for the matters before them.

4. In the original decision Ms Mead made a claim for further provision out of her father's estate on the basis that the $3M provided to her via a trust was not adequate. In her application, Ms Mead included a list of items she contended she needed to maintain her lifestyle, which was highly publicised in the media, and included luxury items such as a crystal studded piano worth more than $1M. The sensationalist media value of the story was quite high.

5. The claim was made under the West Australian legislation, the *Family Provision Act 1972* (WA), but the principles are substantially similar to those considered in family provision applications under the *Succession Act 1981* (Qld). The case is therefore highly instructive for QLD lawyers.

6. Succession law practitioners were generally surprised by the size of the $25M award in the original decision. It was the largest award in a family provision matter in Australian history. However, despite the enormous estate, the Court does not have a general discretion in a family provision matter to completely rewrite the testator's will or to hand out unrestricted awards.

7. The result of the Appeal of the decision was that the West Australian Court of Appeal wound back the original order and instead ordered that Ms Mead receive $6.1M.

8. The Court of Appeal found that Master Sanderson had erred by making an order which was greater than what was *proper and adequate provision for the maintenance, support and education or advancement in life of the plaintiff*[3]. The Court said that section 6 of the Act only allows the Court to make an order of provision limited to the amount necessary to be *adequate* provision. Master Sanderson had acknowledged in his judgment that the award was probably more than adequate. The Court has no power to make an order which is more than adequate.

[2] In Queensland only spouses, children including stepchildren, and dependants are eligible to make a family provision claim.
[3] At paragraph 268 per Mitchell and Beech JJA.

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9. This decision re-enforces the principle that when considering family provision applications, the Court is not rewriting the will in any way it sees fit with unbridled discretion. The Court's powers are limited to what the law provides as the moral obligation of the testator. The Court quoted earlier cases where it had been recognised that the Court's power was limited to making adequate provision for proper maintenance and support "but no more".

10. The Court said, at paragraph 269,

"*That is to say, a testator's freedom of testamentary disposition is to be interfered with only as far as may be necessary to make adequate provision for the applicant's proper maintenance etc. The Court must have regard to the will of the testator and interfere only to the minimum extent necessary to make such adequate provision*".

11. Not only did the Court reduce the size of the award for Ms Mead, it also returned the structure of the award to that which was set out under the will i.e. Ms Mead was to receive her inheritance only upon reaching the age of 30 and not before. The Court reasoned that this was the assessment of the testator as to how the trust would "facilitate the achievement of the objective of ensuring the respondent's financial security for the remainder of her life"[4]. The Court was satisfied that having her inheritance held on trust by an independent trustee for her until she reached 30, would assist in providing long term financial security for her.

12. Part of the reasoning for this decision was that no evidence was put before the Court as to how Ms Mead had spent $3M already transferred to her. This amount of $3M was to be accounted for when the $6.1M was to be transferred to a trustee for her benefit.

Conclusions

13. The following conclusions can be drawn from the outcome of the appeal:

(1) Whilst there is still significant discretion in how family provision applications are dealt with, particularly for smaller estates or difficult cases, the Court's discretion is not unlimited. There is some science (or at least economics) as to how awards are made. The Court is not able to award more than what is considered adequate.

(2) The Court will, when it considers appropriate, respect a testator's decision that a child's inheritance be held on trust for them until a particular age, including in this circumstance, the age of 30. This recognises that the advantage independent trustees bring to the long term financial security of the inheritance can outweigh the child's right to immediate and unrestricted enjoyment of the inheritance, where the testator so chooses.

(3) Whilst it is dangerous to ever attempt to draw conclusions from the actual amount awarded, it is noteworthy that the Court considered in this case that adequate provision in the circumstances of a young applicant and, for practical purposes, an unlimited estate, was a capital sum sufficient to purchase a "reasonably substantial house in the Perth metropolitan area" and an annuity of $100,000 per annum for life indexed to wage inflation.

[4] At paragraph 256

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(4) In order to determine what that capital sum was, the Court looked to actuarial tables put into evidence by the parties. This looks less like the exercise of discretion and more like a curial financial assessment of need.

Controversy

14. We doubt the controversy over this case will be silenced by the appeal decision. Ms Mead will receive a substantial sum and, if she so chooses, will not need to work again in her life. Many would consider that she has won life's lottery in having this opportunity.

15. The flipside of course is to consider it from the position of Ms Mead's siblings. Her 2 siblings received approximately half a billion dollars compared to Ms Mead's $6.1M. Is that an inequity which ought to be addressed by law?

16. Had Ms Mead and the late Mr Wright been domiciled in France or Germany or another jurisdiction where there is forced heirship, the law would have mandated a fixed proportion of the estate must be provided to her as a child of the testator.

17. That system is seen as ‘fair’ in those societies but not Australia.

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The place for informal wills in an estate plan

1. An informal will is a document which apparently sets out a person's testamentary intentions but which has not been signed in accordance with the legal requirements of a will set out in the *Succession Act 2006*[5] (**Act**).

2. Section 6 of the Act provides that, for a will to be valid and binding, it must:

   (a) be in writing and signed by the testator or by some other person in the presence of and at the direction of the testator, and

   (b) the signature is made or acknowledged by the testator in the presence of 2 or more witnesses present at the same time, and

   (c) at least 2 of those witnesses attest and sign the will in the presence of the testator (but not necessarily in the presence of each other).

3. The will-maker must sign the document, intending it to be his or her will.[6]

Court recognition of informal wills

4. A will or other document which sets out the testamentary intentions of a person but does not meet the above requirements is known as an informal will. Section 8 of the Act allows a Court to order that an informal will is formally recognised as the deceased's will, notwithstanding it does not meet the requirements of the Act.

5. Section 8 requires that the Court be satisfied that deceased person intended the document to be their will. The Court is able to consider any evidence it thinks fit in relation to informing the Court of the deceased's intentions in relation to the document.

6. In doing so the Court looks to the intention of the will-maker in priority over the technical aspects of the document's execution to determine if the document ought to be recognised as the will-maker's final will. The Act does not require that an informal will be written on paper.

7. In the case of *Alan Yazbek v Ghosn Yazbek & Anor* [2012] NSWSC 594, an unprinted Microsoft Word document was admitted to probate by the Supreme Court of New South Wales because the Court was satisfied that notwithstanding it was not witnessed, the deceased intended it to be his last will.

8. In the case of *Re: Yu* [2013] QSC 322, a document typed on an iPhone but never printed or signed was found to be a valid (informal) will by the Queensland Supreme Court.

9. In a similar way, the Supreme Court of Queensland recently found that a draft text message on a deceased man's mobile phone, which was found near his body, was

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[5] And in other States in accordance with their own Succession Acts.
[6] Note that section 6 provides other requirements which are not discussed here.

intended by him to be his final testamentary document and thus was granted recognition as his will.[7]

10. These judgments indicate that the Court has well and truly dispensed with the requirement that a will be on paper and signed or witnessed. Documents which do not meet any of these requirements may still, in the appropriate circumstances, be found to be the last will of a deceased.

11. As an estate planning practitioner, I would hope that testators do not make a habit of making informal wills. It requires an application to the Court at some cost and delay and significant uncertainty prior to an informal will being recognised and receiving a grant of probate. Testators are still in a far superior position in relation to certainty and costs by visiting a lawyer to have their will done in the traditional way.

12. However, the potential for informal wills must be considered by estate planning practitioners in at least one scenario and that is when the lawyer is attending on a client without any potential witnesses being present. Prior to the rise of informal wills, there was no way for the lawyer to have the client sign their will at that meeting. Then if the client died before the lawyer returned to them with an extra person as a witness or before the client could attend their office, there was a high chance that the client's testamentary intentions could never be put into effect. However, it is clear that there would be a range of methods available for the lawyer to attempt to secure a valid (informal) will. This could include:

    (1) video recording or audio recording the deceased's intentions at that meeting;

    (2) writing the deceased's simple intentions by hand and arranging for the deceased to sign it and have the lawyer as the sole witness;

    (3) typing up the document on a laptop or other electronic device without it being printed or signed in any manner; and

    (4) there are probably other ways it could be achieved.

13. If a client is acutely ill, there is possibly now a responsibility upon the lawyer to make that informal will by whatever means necessary whilst at the bedside of the client. This obligation has always existed when it was possible for the lawyer to handwrite a will and have a nurse or doctor or other third party witness it, but the obligation now extends to even where there are no possible witnesses because of the potential of an informal will application.

Caution

14. However, informal wills are not always appropriate and their limitations must be recognised.

15. Many clients have complex estate plans which require the lawyer to consider trust deeds, financials, constitutions of companies and other relevant company, trust or estate documents prior to the lawyer being able to give informed advice to the client as to the effect of their wishes and how to achieve their testamentary intentions in their will. When a lawyer tries to prepare a will without having the time to consider

[7] *Re Nicol*: *Nicol v Nicol* [2017] QSC 220.

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those documents and to obtain the advice of other professionals such as accountants or financial advisors, any attempt to create a will at short notice may have unintended consequences for the client and could leave the client's beneficiaries worse off compared to if the will-maker had had no will at all.

16. Therefore, informal wills are unlikely to be appropriate where a person has a complex estate plan.

17. Informal wills ought to be limited to urgent wills in exigent circumstances. In all circumstances that it is possible, a formal will which accords with the requirements of section 6, should be prepared.

Cameron Cowley

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Our Estate Planning Team

Cameron Cowley

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Greg Moin

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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.

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