

Macrossan & Amiet Solicitors

news update

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Special Wills and Estates Issue

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Contesting a Will - Family Provision Applications

By *Francesco Maconi*

When a person makes a Will they often believe it will go unchallenged and that their assets will be left to whomever they choose. This is partly but not completely true. A person drafting a Will must keep in mind that in some circumstances - where, for example, the testator excludes a spouse from their Will, or leaves everything to one child instead of dividing their belongings amongst all children, or decides to leave everything to charity - the Court can intervene on behalf of the excluded person.

Family members who have been excluded from a Will can bring what is known as a Family Provision Application for their proper maintenance and support out of the estate of the deceased person. Family Provision Applications are the most common "challenges" to a Will.

Bringing an Application

Part 4 of the *Succession Act 1981* (Qld) ("the Act") provides that where a person dies and



Francesco Maconi

adequate provision is not made for the deceased's spouse, child or dependant from the estate, the Court may, in its discretion, order that such a provision be made on the application of that person. Under Part 4 of the Act spouses (including de facto spouses), the deceased's children (including step-children) and the deceased's "dependants" are all entitled to bring an Application to the Court.

The term "dependant", which is used in the Act, is defined quite broadly. It includes a person who is "wholly or substantially maintained or supported by the deceased person" and who is also

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General Perspective

Estates

By John Formosa

What Do I Own?

We quite often experience a situation when taking instructions from clients in the preparation of their Wills that they do not clearly understand their business structures. As a result of this it is sometimes difficult to take proper instructions from clients in the preparation of their Wills without consultation with their accountant.

Many businesses are owner/operated by husband and wife teams and although they started off as simple partnerships, have over the years changed their business structure to a company or trust. Of course with a trust they can either be personal trustees themselves or a corporate trustee.

The situation becomes even more complicated when a husband and wife in preparing their Wills have some children or a child involved in the business and some not involved in the business. It is therefore very important not only to ascertain the correct ownership of assets, but also, in some situations, one business can have different ownership of various assets. For example, a couple may have purchased their own premises to operate their business from which is owned by their own superannuation fund and leased to their business entity. They may have some equipment which was originally owned by them in their old partnership, some equipment owned in their new entity whether it be a company or trust, and/or a combination of both.

The other issue with identification of ownership is in relation to land and more importantly jointly owned land as to whether it is owned as joint tenants or tenants in common.

The general rule is that land is owned as joint tenants, if one of the joint tenants dies then the deceased's interest in the property automatically goes to the surviving joint tenant outside the deceased's estate. The exception to this rule is if the tenant classed as partnership land and the joint tenancy rule does not then always apply. For this reason it is sometimes necessary for solicitors when preparing Wills to conduct title searches of the properties.

Mutual Will and Mutual Will Agreement

When a couple are making their Will and they have children from previous relationships to consider, there is always a major concern that after the death of one of them, the survivor may remarry and/or change his or her Will after their partner has died. The concern is that the deceased's children may then "miss out on their inheritance" and traditionally what some couples would do would be not to leave anything to each other outright but have it in some form of trust to protect their respective children.

If when couples enter into second relationships or marriages, they are able to maintain "separate asset pools" as well as sometimes having a "joint asset pool" then the ability to leave part of their estate directly to their children as opposed to their spouses children can easily be obtained. This however is not always the case and the younger they are at the time of making their Wills the more concern they have for each other in relation to securing their spouse's position going forward.

One way of achieving some form of equality is for the couple to make a mutual Will and enter into



John Formosa

a mutual Will agreement. The downside of the mutual Will agreement is that once one of the parties dies the surviving party is not able to change his or her Will. What can be achieved however, is where the husband and wife can leave everything to each other and then set out in the second part of their Will how their estate is to be distributed once both are deceased.

How to Deal with the Family Farm

Having a large rural client base my experience shows the most common dilemma for any parents in making their Wills when they own a family farm or a family grazing property, is to try to ensure that the farm remains in the family after the parent's death.

Invariably there are some children involved in the farming operation and some who are not. Also, the normal situation for any farming or grazing family is although they may have some off-farm assets, whether it be superannuation, a beach house, shares or cash or other assets, these off-farm assets never have anywhere near the same value as the farming assets.

I always say to any mother and father in this situation is if they wish to leave their whole estate equally between their farming and non-farming children, then in my opinion, the only way this can

General Perspective

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occur is for the farming operation to be sold along with all their other assets and then divide the cash asset pool by the number of children. This however, in my experience, is not a result that the parents would be happy with. They can achieve fairness, but not equality.

I always start the process with them in trying to identify their farm and non-farm assets and the value of these assets. I also try to explain that if they wish the farming child or children to carry on the farming enterprise, then one way of attempting to achieve fairness between the farming and non-farming children is for the farming children to inherit the farming enterprise on the condition that they pay the non-farming children a set amount of money or a percentage of the value of the farming enterprise. My “catchphrase” is always that equally as important as setting the amount or the percentage is the period of time the farming the children are given to find the money or pay the sum of money to their siblings.

Another very important issue when preparing Wills for farming families is to identify what encompasses the farming enterprise. For example, in a sugar cane farming business, it is not uncommon to have the following variables:

- a. Land owned by Dad and Mum together or just Dad, and sometimes common ownership with some of the children.
- b. Old plant and equipment which is owned by one or more old partnerships.
- c. The crop, plant and equipment and the bank accounts to be



- d. Partnerships with neighbours in harvesting, planting and other equipment.
- e. Any farmers who have owned their cane farms for a long period of time would have been issued with Sugar Terminal Shares, which generally parents wish to leave to the farming, as opposed to the non-farming, children.
- f. Most farmers who supply their cane to Mackay Sugar would have also in recent times be issued with shares in that company when it demutualised from a co-operative to a limited company.
- g. For those farmers who are in the Plain Creek area, clearly this is not any issue, but farmers who are in the Proserpine Sugar Mill area, although they do not have issued shares, are still members of the Co-Operative and they must consider how they deal with their membership and possibly shares in that entity if that entity ever follows

the same path that Mackay Sugar has followed.

- h. Water entitlements are another issue to be considered. In the Mackay area irrigators who are either on the Teemurra or Kinchant irrigation schemes have now been issued with separate titles to their water entitlement which separates the water entitlement from the land and a simple clause in a Will leaving the farming property does not necessarily achieve vesting of the water entitlement to the farming child.
- i. Once again Proserpine is a little different in that the irrigators on the three (3) various irrigation schemes from the Peter Faust Dam are yet to receive titles separate from their land for their water entitlements. However, a draft operation plan for the whole Proserpine Irrigation Scheme has been pending for quite a number of years and must be finalised one day.

As in preparing Wills for any couples who have a family business, it is important for this exercise to be carried out in conjunction with their accountant.

Profile

My Uncle Marc

By Andrew Telford

My great uncle Marc O'Donnell was the quintessential country farming gentleman. Marcus O'Donnell and his wife Kathleen lived on a farm near Bloomsbury and had seven children. Uncle Marc never swore, had a strong Catholic faith, loved his wife and children and all of his family. Marc was hard-working and because he was very careful with his money he accumulated a considerable amount of wealth, mostly comprising his farm at Bloomsbury, other outside property investments and a significant share portfolio. Money was never spent on luxury items such as a car or a house. Nevertheless, Marc was a very generous and kind man who had a wonderful sense of humour.

My father John Telford will tell you that the most fun that he ever had in his life was when as a young man he went and worked with Uncle Marc. Many practical jokes were played out in the cane fields. In later years, Uncle Marc and my father spoke by telephone on a regular basis to discuss the goings-on of the sugar industry and life in general. As a child I can remember being excited at the prospect of going to Uncle Marc's place because he and his family were just so much fun to be around. A defining moment in my childhood, which I often recall to this day, was one of these occasions when the family all had a sing-a-long around the piano. I remember Uncle Marc singing the song "Take Me Home Again Kathleen" to my Auntie Kath. I remember how surprised I was at how well he sang and also by the obvious love that Uncle Marc had for my aunt. This love became

even more apparent when Kathleen was diagnosed with Parkinson's Disease. No matter how incapacitated my aunt became, my uncle refused to place her in a Nursing Home and he spent ten years of his life, with the help of full-time carers and his family, caring for Kathleen until she passed away in May 2006.

I remember as a young sole practitioner in Proserpine the pride that I felt when my Uncle Marc came to see me for the first time in the early 1990's. It meant a lot to me for someone such as Marc, whom I respected so much, to come to me for legal advice. At this stage, my relationship with my uncle changed from that of a child looking up to his respected uncle to a more grown-up type friendship. My uncle never spoke ill of any person but events occurred within his family which caused tension and ultimately led to my uncle's decision to remove two of his children as beneficiaries in his Will. For me this was heartbreaking on both a personal and professional level. The fact that this could occur in such a caring, loving family made up of good people illustrates the fact that a family dispute can occur within the best of families.

Uncle Marc died in May 2007 without having resolved the estrangement that occurred with two of his children. The almost inevitable court case followed. The Succession Act allows a



Marc O'Donnell

deceased person's spouse, child or dependent to make application to the Supreme Court for adequate provision to be made from the Estate of the deceased person.

The Court will consider many factors. This includes the size of the estate, the financial circumstances of the person making the application, the conduct of the applicant towards the deceased and whether the applicant has in some way contributed or helped the deceased person establish or maintain their estate.

These situations are very difficult because the executors who then have the task of upholding the terms of the Will have an obligation to defend any application that has been made. As in this case, this can place a great strain on the family members who are left with the task of being the executors of the deceased's estate.

My Uncle Marc

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The Supreme Court in Brisbane handed down its decision in relation to my Uncle's estate earlier this year. The court case took a toll on all concerned. One claim was settled prior to the hearing and the remaining child was awarded a lump sum payment together with some costs. The judge believed that a payment should be made because the value of the estate was significant. Effectively a distribution could be made without unduly affecting the distribution of the estate to the remaining beneficiaries.

There is no simple solution for many of these situations. I do believe that having observed many different disputes, one of

the most significant and common contributing factors is a lack of communication. I cannot emphasise enough the need for parents to discuss with their children what is going to happen when they die. It is important for you to discuss matters with your accountant and your solicitor. In my Uncle Marc's case, he died suddenly from a heart attack before he could properly arrange his affairs to achieve the outcome that he wanted.

We do not live forever and as such, we need to plan for our death. If you have a family situation that could result in an argument within your family after your death then please do not procrastinate, as we all do. Start

planning now to ensure that you minimise the risk of your death being the catalyst for further division within your family and for your hard-earned money to be eaten up in legal fees.

I have written this article firstly to acknowledge and recognise my Uncle Marc for the kind, humble and loving man that he was. Secondly, I have written this article to illustrate that even the best of families can have breakdowns in relationships which can result in complex, expensive and emotionally draining litigation. See your accountant and solicitor but most of all, if possible, talk to your family.

Did you know?

You have a Will, but have you ever reviewed it?

If you are unmarried then marry, your Will will be revoked by the marriage unless the Will is expressed to be made in contemplation of that marriage. Consult a solicitor about your Will if you decide to marry.

Divorce may affect your Will. The matter is complex and the law is not uniform throughout Australia. In Queensland a Will leaving a benefit to a spouse is revoked after divorce to the extent of the benefit given to the former spouse but otherwise remains in force. Clearly in these circumstances if you are contemplating divorce or have been divorced since making your Will you should consult a solicitor.

Review the copy of your Will every two or three years or whenever a

major event occurs in your family, your assets or the taxation laws (to make sure the Will is still what you want). In particular consult a solicitor:-

- a. if you change your name, or anybody named in the Will changes theirs;
- b. if an executor dies or becomes unwilling to act as executor or becomes unsuitable due to age, ill health or any other reason;
- c. if a beneficiary (someone who has been left something in the Will) dies;
- d. if you have specifically left any property which you subsequently sell or give away or put in trust or into a partnership or which changes its character. This applies

particularly to specifically bequeathed shares in a company which restructures its share capital;

- e. if you marry or divorce; or if you have children (including adopted or fostered children);
- f. if you enter or end a de facto relationship.

If you wish to change your Will or revoke it or make a new Will without informing your husband or wife you may do so, but you should consult a solicitor.

Do not add to or delete from the Will after execution. Consult a solicitor if you want to change or revoke your Will because even the simplest changes must be correctly done or they may have disastrous results.

Make an Informed Decision

Executors

By Damian Carroll

If you attend a Solicitor to make a Will, one of the first questions you will be asked is “*Who will you appoint as your Executor or Executors?*”

An executor is the person appointed by a Will to administer your estate. The executor has a serious obligation to carry out your wishes as expressed in your Will and more than one executor can be appointed in a will.

An executor should be an adult. Appointing a minor as an executor creates specific difficulties and is not wise. It is also not appropriate to appoint a person as your executor if that person suffers from a disability which prevents him or her from administering the estate.

Appointing a person as an executor places serious obligations upon that person to comply with the requirements of the law in the administration of your estate. A failure by the executor to carry out their duty may see them personally liable.

The executor actually stands in your place and disposes of property as directed by you.

If more than one executor is to be appointed, then it is essential that those executors are not hostile to one another. Hostility between executors can result in difficulties in the administration of the estate. Unless there is cooperation between executors, decisions which otherwise would be simple become arduous. Sons and daughters who don't speak to one another are not good choices as executors.

In the simple estate, it is preferable that the executor has been a part of the deceased's life. We are all aware of people who flow in and out of our lives from time to time; important today not so important tomorrow. But there are those who are always there. The “always there” person will be the preferable executor. You can be confident that person will be making the decisions that you would have made if you were there to make them.

More complex estates may require professional expertise in the role of executor. In this situation there can be both the “always there” person and the professional so that the executors have a mix of



Damian Carroll

the personal and the professional combined in the management of the estate.

It is the executor who approaches the Court and seeks confirmation that the document presented is your last Will. When that confirmation is given by the Court (which is known as Probate) the executor receives the authority to deal with your assets in accordance with your Will as if you were there dealing with them yourself.

An inexperienced Lawyer will simply accept who you say is to be your executor without asking any questions about their capacity or expertise. The experienced Estate Lawyer will assist you to appoint the appropriate executor for you and your estate.

Our August chuckle: *A lawyer named Strange*

A lawyer named Strange died, and his friend asked the tombstone maker to inscribe on his tombstone, “Here lies Strange, an honest man, and a lawyer.”

The inscriber insisted that such an inscription would be confusing, for passersby would tend to think that three men were buried under the stone. However he suggested an alternative:

He would inscribe, “Here lies a man who was both honest and a lawyer.” That way, whenever anyone walked by the tombstone and read it, they would be certain to remark: “*That's Strange!*”

Contesting a Will - Family Provision Applications

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a parent of the deceased, parent of the deceased's child, or a child under the age of 18 years. When we take this into account, the class of people who can make a Family Provision Application not only includes husbands, wives, children and step-children of the deceased, but can extend to the parents and former spouses of the deceased as well.

An Application for family provision can either be commenced in the District Court or the Supreme Court, depending on the size of the estate. The monetary limit for claims heard in the District Court is \$250,000. If the estate is larger than this, the Application must be brought in the Supreme Court.

The Legal Test

The Court determines Family Provision Applications by applying a two-stage test, outlined under section 41 of the Act. The first requires the applicant to show that adequate provision has not been made out of the estate for his or her proper maintenance and support. The second requires the Court to consider whether any order should be made, and if so, what amount should be awarded to the applicant. The Court will consider various factors to determine this second issue, which may include:-

1. The size of the estate;
2. How the distribution was effected under the Will;
3. The applicant's financial position;
4. The relationship between the applicant and the deceased;
5. The needs and claims of the applicant;



6. The character or conduct of the applicant.

In relation to this last point, a Court can refuse to make an order, or reduce an amount under the order, if the applicant's character is disentitling in the Court's opinion. Remember: orders for family provision are based on the Court's discretion, so the applicant's prior conduct will be relevant.

Recent Rulings

Today the Court has taken a more interventionist approach into estate matters. Compared to the past, judges seem more inclined to make an order for an applicant's provision and maintenance out of the estate, although these orders may vary. For example in the case of *Currie v Gault* the deceased's step son, Andrew Currie, made an Application for a provision out of Mrs. Currie's \$3 Million Estate. Andrew had been left out of the Mrs. Currie's Will entirely. The Court described Andrew Currie as living in a comfortable position, earning around \$1,100 per week as a security officer. His combined earnings with his partner totalled around \$2,000 gross per week.

Andrew Currie was successful in his Application and was awarded \$900,000 from the estate.

Contrast this decision with the case of *Manly -v- The Public Trustee of Queensland & Anor*. In that case Mrs. Manley, the deceased's wife, was left with a quarter of the estate, with the deceased's other three sons left with the remaining three-quarters. Mrs. Manly, who had no assets, little income and was dependant on her deceased husband for support, made an Application to the Court for a further provision out of the estate. She was unsuccessful in her claim, because the Court ruled that adequate provision had been made for her.

A final word

If you believe that the Will of the deceased does not make adequate provision for you, then you may be able to make a Family Provision Application for further maintenance and support out of the estate. In each case the outcome will vary according to the facts in question.

Does your son have a Will?

By Andrew Telford

Before I married and had children, my mother asked me “Andrew, I assume that you have a Will? I do not want you leaving a mess behind for me if you die!” My response to my mother was “Don’t be silly Mum. Of course I have a Will, I am a solicitor.”

Unfortunately I remember saying these words, when in fact I didn’t have a Will. It seemed to me to be unnecessary given that I was not married and had little or no money so I did not really worry about it. Looking back now, I cannot believe my attitude. I think it is one that is reflective of many aged in their mid-twenties or younger.

This anecdote is indicative of many family situations where a mother is trying to make sure that her young sons have their affairs in place so that if something does happen then the mother is not left with a bigger mess than should otherwise be the case.

As solicitors, we realise that our clients are sometimes complacent about arranging their affairs.

You have to be 18 to do a Will and / or an EPA. It might be convenient for students who are away at university and who need their mothers to look after banking, etc., in their absence. Having an EPA will allow you as a



Andrew Telford

parent to attend to your child’s affairs whilst they are at university or overseas.

In order to encourage people under twenty to arrange for a Will and an Enduring Power of Attorney (“EPA”) we are offering to prepare these documents for “under 20’s” for the next two (2) months for a reduced fee. Please contact us for more details.



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Real people, real smiles, real service!



Find us on the ground floor of the Macrossan & Amiet Building - 55 Gordon Street, Mackay.

The partners and staff of MACROSSAN & AMIET SOLICITORS are proud to be associated with Wide Bay Australia Ltd.

In fact, for those of you who don’t know, Wide Bay Australia has a full service Agency in Amiet House at 55 Gordon Street, Mackay.

Wide Bay Australia is your easy local alternative when it comes to finance & banking and our Agency Staff are fully equipped to assist you.

From Finance (home loans, investment loans, equity loans & lines-of-credit) to Personal and Business Banking (everyday accounts, savings accounts, term deposits, cash management accounts) and from Insurance (home & contents, landlords, car, boat, caravan & trailer, Life) to Travel Money & Foreign Exchange (Travellers Cheques, Cash Passport Debit Card, Telegraphic Transfers) - you’ll get personal attention and fast service!

In particular, if you are looking at buying a residential property and need to arrange finance - come and speak with Jenny without obligation. She will be pleased to assist you to make it happen!

In fact, come into the Gordon Street Agency and speak with Jenny about a loan before 30 April, 2010 and you will also go into the draw to WIN A \$2,000 HOME HARDWARE VOUCHER!



Jenny Moohin is our Loans Consultant based at Gordon Street Agency.

Jenny has been involved with lending for 8 years and has a Diploma in Financial Services from the Institute of Financial Services together with an FSRA Tier 2 Training Certificate. Prior to working as a Loans Consultant, Jenny had 15 years as an experienced legal secretary/conveyancer.

Jenny can assist with Wide Bay Australia’s range of home loans for owner-occupiers, investors, vacant residential land and acreage.



Nicole Klages is our Senior Customer Service Consultant.

Nicole has an FSRA Tier 2 Training Certificate from the Institute of Financial Services and has 4 years experience in Customer Service within the finance industry.

Nicole can assist with everyday and savings accounts, term deposits, insurance, credit cards, foreign exchange and the full range of Wide Bay Australia’s banking services.