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# Let's chat

Estate planning - The less than known stuff – August 2023

With:

Darius Hii – Tax and estate planning lawyer; Chartered Tax Advisor; and Director at Chat Legal

*Information provided is general in nature; precise application depends on specific circumstances*





# Mutual Wills and capacity

- *Reed v Smith* [2022] QSC 173
- Wills were made in 2001 by Gordon and Dawn
- Gordon had an updated Will prepared in 2016
- The 2016 Will reduced the gifts to the plaintiffs
- The plaintiffs contended that the 2001 Wills were 'mutual wills' (being wills where the Willmaker promises 'not to revoke their own Will without the knowledge [or] consent of the other')
- On the balance of the evidence, no mutual Wills in existence (Court considered reliability of witnesses)
- Separate discussion on whether Dawn had capacity at a certain point in time



# Mutual Wills and capacity

- Takeaways:
  - Mutual Wills exist
  - Requires specific drafting to ensure they can be upheld (in the case, Court noted the lack of wording of the intention to create the mutual Will arrangement)
  - Generally, not recommended due to the inflexibility in the event one party is unable to consent to changing the Will
  - Has uses in 'blended family' scenarios
  - Query whether 'life interests' or 'protective trusts' may be of benefit or use

# Gift of property to person for caring for cats



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- *HIBBIT v ZIADE* [2022] NSWSC 904
- Deceased died on 6 January 2020 leaving no close relatives but living with two cats (Bonnie and Clyde)
- Will dated 20 September 2019 with various (17) bequests of \$225,000 to friends and charities
- Ambiguity regarding clause 21(b): ...'*to hold my residence at.... to [recipient] or the survivor of them in return for carrying for my two cats*'
- Two interpretations:
  - Gift effective immediately and failure to look after cats would not affect entitlement to gift
  - Gift deferred and conditional to only take effect once the two cats die and the recipients had cared for the cats during their lifetime

# Gift of property to person for caring for cats



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- Evidence included various affidavits of conversations and communications
- Court considered the consequences if the gift was deferred and the ambiguity that would be caused:
  - Uncertainty where the property would go if gift only made after two cats die (what happens if the recipients do not care for the cats)
  - Uncertain if worded to mean gift is made as the recipients were caring for the cats prior to the deceased's death or for their agreement to care for the cats
  - Practical difficulties with a lengthy deferral of vesting, disputes regarding the care provided to the cats (and the standard to apply) and issues where the recipients are unable to care for the cats through no fault of their own
- Court applied rule in favour of an earlier rather than a later vesting
- Court did also consider the evidence including the solicitor's recollection that the deceased would 'have to trust' the recipient to care for the cats

# Gift of property to person for caring for cats



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- Takeaways:
  - Beware issues with making unusual conditional gifts
  - Note issues can arise where rules are included the Will due to ambiguity and lack of foresight
  - Use of simple and standard wordings preferred
  - In other specific gift circumstances, deferral of a gift raises other issues such as:
    - What happens to the income generated from the specific gift?
    - Can the income be gifted before the property is gifted?
  - Detailed file notes can be considered noting costly process applying to the Court

# Will form named executor but no beneficiary



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- *In the Estate of Mr Trevor William McMahon (deceased)* [2022] QSC 236
- Deceased prepared the Will himself by filling in a Will form noting issues with the following two clauses:

## "4. Special Gifts

I make the following special gifts (legacies, bequests and devises):

*Two houses 1. 142 Woodend Rd, Woodend Qld 4305*

*House 2. 144 Woodend Rd, Woodend Qld 4305 of which \$13,132.67 is still owing to Bendigo Bank. Rent is paying off the remainder. Any moneys in my bank to cover funeral costs + any expenses – rates – insurances etc*

*1. Toyota – Coaster Campervan + 1. Toyota Corolla*

*1. Twin Cab – Nissan Ute"*

## "5. Residuary / Residue of my Estate

I direct my Executor(s) to pay all my debts and then I give the residue of my estate to SAME.

*I want cremation – cheapest possible. No funeral.*

*1. Ford Tractor-Slasher*

*1. Toyota Forklift & 12 tin boat on trailer"*



# Will form named executor but no beneficiary



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- Clear deceased forgot to name beneficiary of his assets and 'residuary estate'
- Proposed to rectify the clauses by:
  - Deleting words in clause 4 and replacing them with the words "*Left blank intentionally*"
  - Deleting words in clause 5 and replacing them with the proposed beneficiary's name
- Court noted power they have to rectify a Will which requires the Court to consider a deceased's intention
- Court sought to decipher intention, going to the extent of considering the definition of the word 'SAME' (as inserted into clause 5)

# Will form named executor but no beneficiary



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- Court could not confirm intention so determined estate to be distributed under intestacy rules
- The executor noted that the executor would likely seek greater provision from the estate and as such the Court replaced the executor as a result of the potential conflict of interest

# Will form named executor but no beneficiary



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- Takeaways:
  - Risks of a D.I.Y. Will
  - Reading any 'how to complete' guides if you do D.I.Y.
  - Will packs or online websites may seem convenient, until a mistake is identified (often only after death)
  - A lawyer preparing a Will may often retain evidence of intentions in the event of a dispute later on (and would presumably ensure the Will is drafted correctly)

# Too many cooks (executors) spoil the broth



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- *Refalo v Gatt (No 2)* [2021] NSWSC 1677
- Will appoints seven children as executors and equal beneficiaries
- In the event some of the children wanted to sell a property and others did not want to sell, then a clause 5(b) set out the procedure to be followed:
  - *(1) The Executors who wish to keep the asset are to contract to buy the asset with such Contract to contain the usual settlement time and terms and conditions within twelve (12) months of a written request by the other Executors at a price being determined as per subclause (2);*
  - *(2)*
    - *A. the price will be the value determined by two independent valuers (one to be appointed by the purchasing executor and trustee; the other by my remaining executors) for the purpose of the sale; or*
    - *B. if those valuers cannot agree, the value determined by an umpire who is a third independent valuer to be appointed in writing by the first two valuers*

# Too many cooks (executors) spoil the broth



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- Dispute about whether to sell and not as well as the price
- After seven rounds of negotiation, the time limit was set to expire
- Court guidance was sought regarding the process applicable and the valuation to follow
- Simply enough, based on case law to determine a fair result, the mid-point value was adopted

# Too many cooks (executors) spoil the broth



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- Takeaways:
  - Consider a reasonable number of executors (Queensland caps at 4)
  - Advantages of 1 v 2 v 3 and consider the circumstances
  - Note that unless otherwise stipulated in the Will, the executor ultimately determines whether assets are sold with proceeds split; or assets are transferred 'in specie'
  - Consider who is appropriate to make such a decision

# Will challenges (aka family provision applications)



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- *Hartley v Hartley* [2023] QCA 80; [2022] QDC 217; [2022] QCA 96
- Case involved a Will challenge from an estranged son
- The deceased's estate was approximately \$1.2m in value and was split between three of the deceased's family
- Deceased left no provision to son and outlined her reasons in a statutory declaration which included the following:
  - Deceased felt she gave enough to the son during her lifetime;
  - The son was addicted to 'ice'
  - The son had recently been in prison for his crimes which included breaking and entering, drug possession and assault;
  - The deceased had a restraining order against the son
  - The son broke into the deceased's home and stole from her
  - The son didn't help the deceased during her illness
- The son challenged the Will

# Will challenges (aka family provision applications)



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- There were a few technical issues regarding the making of orders which resulted in various judgements
- Importantly though:
  - Initially, the Court determined that the son was eligible for some provision of the estate in the value of \$150,000
  - The decision was appealed and at appeal, the Court noted that the initial decision had to be reconsidered as the contents of a statutory declaration made by the deceased should be regarded as proof of the truth of the contents of the statutory declaration
  - On reconsidered, the initial Court still held that provision should have been made to the son (noting the Court placed more weight on the fact that the son needed the help given his position and the fact that the Court believed the deceased's belief in the statutory declaration was flawed based on other evidence (e.g. the circumstances of the restraining order))
  - On a second appeal, the son was unsuccessful on claiming costs



# Will challenges (aka family provision applications)



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- Takeaways:
  - Certain persons can challenge a Will for 'more provision'
  - The key question is whether that person should have/ have more provision made to them (in the case, the Court considered the son was left 'without adequate provision for his proper maintenance and support')
  - There are various factors that the Court will consider including the relationship, the value of the estate, how the wealth was built and the financial positions of persons who may have an interest in the estate
  - If wanting to document a deceased's intention, a statutory declaration is the only real written evidence worth any weight but care must be taken to ensure the contents of the declaration are true as if contrary evidence arises the weight of such statutory declaration may be reduced
  - Ultimately, no one can prevent a Will challenge and no one knows which way it may go



# No Will, foreign beneficiaries

- Deceased left his wife and minor daughter
- Passed away with a Will made before his marriage to his wife
- Determined that his Will was revoked after his marriage (as a result of certain legislation)
- Deceased deemed to have passed away 'intestate'
- Intestacy rules state that his estate is to be split:
  - First \$150,000 to the deceased's wife
  - $\frac{1}{2}$  to his wife and  $\frac{1}{2}$  to his minor daughter
- Wife and minor daughter reside overseas
- Deceased left 2 properties in Australia



# No Will, foreign beneficiaries

- If keeping the property, issues arise as below.
- How do you split the properties between wife and daughter
- The daughter is under-age so is unable to hold legal title – determined that the administrator of the estate would have to hold such property as trustee on trust for the daughter until she turns 18
- Queries as to treatment of income for wife and whether daughter is entitled to the income of the property immediately
- FIRB and stamp duty/land tax surcharge issues for foreign persons (wife was not an Australian citizen or PR holder)
- **Important to have an up to date Will**
- **Important to consider if Will needs to be made 'in contemplation of marriage'**



# Specific gift to grandchildren

- Deceased had a specific gift of a property to the executor to hold on trust for 'the children of a child' until the youngest attains the age of 25
- Will was a 4 page Will
- Will contained only a handful of trustee powers but included a power for a trustee to enter into a trust deed to document the terms of a trust
- Executor was provided with a trust deed that:
  - Had a discretionary beneficiary class
  - Had a different person named as a beneficiary
  - Included other roles not noted in the Will
  - Still referred to a Settlor



# Specific gift to grandchildren

- Concerns whether signing trust deed would result in adverse tax and stamp duty implications – resettlement as you would be varying the terms of the original trust deed (which includes changing the beneficiary)
- **Considered the Will established a ‘bare trust’ arrangement where the executor holds a property on trust for the three minor grandchildren until the youngest turns 25**
- Queries as to how income may be dealt with but certain trust legislation provisions enable some use of the income for a beneficiary’s education, advancement and maintenance until the end of the trust
- Could have been more flexible and useful if a standard testamentary trust was drafted in the Will? *Intention of deceased was to provide for daughter and the daughter’s children in a tax effective manner*



# Lawyers embedding themselves

- Have seen various Wills where:
  - Lawyer appoints themselves as the sole executor
  - Lawyer appoints themselves as the sole trustee and appointor of a testamentary trust
  - Lawyer appoints themselves as a co-trustee and co-appointor of a testamentary trust
  - Clause included appointing the lawyers as the 'lawyer for the administration of the Will'
- Clients have been surprised when mentioned to them
- Is this appropriate, especially where the flow-on effects are unknown for the client?
  - Executors are considered the legal personal representative of the deceased and may have the ability to exercise shareholder rights (i.e. appoint directors of a company)
  - Executors may be automatically made the successor Appointor of discretionary trusts

# Lack of consideration when using testamentary trusts



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- Will states everything of a deceased is distributed into a testamentary trust:
  - Does this mean all the personal items must be itemised in the testamentary trust?
  - What happens if key beneficiaries pass away?
  - How broad is the beneficiary class – particularly in light of recent trust cases – i.e. should the beneficiary class be strictly lineal descendants initially?
  - Is there flexibility to opt out of a testamentary trust?
- Will testamentary trust terms are either too basic or too complex?
- Cascading testamentary trusts – one testamentary trust splitting into multiple testamentary trusts on the death of certain persons – potential stamp duty issues



# Not having backups

- Need to have longevity for the Will
- Consider backups for executor and guardian roles
- Consider backups to assets if core group of persons all deceased (if a couple - split between families and whether equal or in different proportions)
- Consider how personal property dealt with (in conjunction with memo)





# Not clearly identifying charities

- Important to use the correct name
- Often need to search to find the 'ABN' and if the charity requires certain wording to be included in the Will
- That is, whether gift is made for 'general purposes' or a particular research or other purpose
- Have seen many gifts that lack certainty and where uncertainty exists, the executor will need to go to Court to obtain clarity

# Need to review entity documentation



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- Things picked up on general review of trusts and companies over the past year:
  - Trust: 'Foreign person' (which includes a person considered a foreign person under any other legislation) excluded from being Trustee, Principal, Beneficiary, Attorney etc. Issue is that Willmaker's only surviving family lives overseas
  - Trust: Individual trustee recommended by lawyer/accountant but deed excludes trustee from being a beneficiary (seen it 3 times in 2023)
  - Company: Articles of associates requires at least two directors and company has been operating with one

# Understanding jointly held assets



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- Willmaker owns house as joint tenants with divorced partner still
- Willmaker did not have formal property settlement or the time/funds to buy out divorced partner
- Risk if Willmaker passes away that partner receives property in its entirety



# Other points of consideration

- Superannuation and self-managed superannuation funds:
  - To nominate or note
- Life insurance:
  - To pay to spouse or to estate
- Memo of directions
- Business assets/'partnerships' and 'joint ventures'
- Overseas assets and beneficiaries



# The important considerations

- Person/s you trust to manage your assets
  - After death – via executor and/or trustee roles
  - While living – via financial and personal (and health) attorney
- Combination of persons useful?
  - 1 or 2 or 3
  - Making decisions jointly
- Independent advisors suggested?
- Where language is an issue – consider whether teams of persons operational
- Backups where appropriate
- Same or different people looking after children?

# ‘Clause warfare’ better than not enough



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- More interpretation provisions better than less – results in less ambiguity
- A specific section of succession law states that gifts to a deceased's child automatically passes to a child of that child in certain circumstances – questions may arise about making gifts to a sibling and then their children – so clarity should be included in the Will
- Clarifying meaning of child does or does not include step children
- If there are multiple recipients, then gifts to multiple persons are made to such of them who survives and equally (unless otherwise stated)
- If various gifts made but one of the gifts fails, then that gift should be apportioned between the other gifts in the same proportions



# 'Clause warfare' better than not enough

- Broad powers for executor to administer Will including various sale, purchase, investment, lending (including lending interest free to guardians or beneficiaries) and maintenance powers
  - May include broad income determination powers
  - Consider taking out insurance
  - Carrying on partnership
  - Ability to develop and vote in relation to shares
  - Ability to partition
  - Ability to execute power of attorney to appoint nominees
  - Clarity that early distribution of residue possible



# Detailed clauses

- *I understand that government legislation may give an automatic gift over to the children of any issue who do not survive me. I have, where I believe appropriate, made directions in this regard in this Will. I direct that any automatic gift over provisions in government legislation do not apply.*
- *In this Will, any gift which depends on the beneficiary surviving me by a specified period or attaining a specified age is contingent and does not vest in the beneficiary unless and until he or she has survived the specified period or attained the specified age and income produced by the gift between my death and vest of the gift accumulates to the gift.*





# Detailed clauses

- *If a recipient of a specific item or a monetary legacy is under 18 years at the date of my death then I direct that my Personal Representative has power to give the subject of the bequest to a parent or a guardian of the recipient, unless otherwise specified. I declare that the receipt by that parent or guardian will be a full discharge to my Personal Representative.*
- *I have been advised of the ability to contract to make a Will a certain way and then not to change it or to do anything to diminish the value of the promise. I direct that I have not agreed with anyone to make my Will a certain way.*



# Detailed clauses

- *I acknowledge that any entitlement that I may have as a member of a superannuation fund, or any amount payable under any policy of insurance taken out as part of my membership and/or entitlement of that superannuation fund (superannuation benefit), does not automatically form part of my estate and that I may make a valid binding death benefit nomination in respect of my superannuation benefits. If I do not have a valid binding death benefit nomination, then I acknowledge that my Personal Representative may liaise with the trustee of such superannuation fund holding my superannuation benefits to determine how to distribute my superannuation benefits.*
- *If my Personal Representative:*
  - *receives any superannuation benefit; and*
  - *such amount is to be distributed under this Will,*  
*then:*
    - *to the extent that my Personal Representative has a discretion to distribute such amounts to recipients under my Will;*
    - *my Personal Representative may limit the recipients of such amounts to persons who satisfy the definition of 'death benefits dependant' under section 302-195 Income Tax Assessment Act 1997 (Cth).*



# Detailed clauses

- *If I co-own any assets as joint tenants with any other person, I confirm that I understand such assets are to pass to the surviving joint tenants.*
- *In relation to any gift of shares made under this Will, if applicable then, I direct that any gift of shares by this Will is to be gifted on the basis that each recipient is to receive a discrete whole number of shares in their sole name (or if the recipient is two or more people and they cannot receive a discrete whole number of shares for any reason, then as joint tenants).*
- (not enough space on a slide) Detailed clause dealing with a gift of real property including how amounts owed over the property are dealt with and whether furniture in the property goes with the property. Other considerations including how costs of registration paid and if the property was mid-sale at the date of death of the deceased.



# Detailed clauses

- *In relation to any gift to a charitable organisation made under this Will, if applicable then, I declare that:*
  - *any distribution is for the general purposes of the organisation;*
  - *I have a general charitable intent. By that I mean if at any time the organisation is for any reason unable to accept a gift, then my Personal Representative, with the direction of the Supreme Court, is empowered to pay the gift to another charitable organisation which in the opinion of my Personal Representative has as near as practicable the same or similar purposes and methods; and*
  - *the receipt of the financial controller, treasurer or proper officer for the time being of that organisation is a sufficient discharge to my Personal Representative.*



# Limited time offer

## Terms and conditions

- Will and Enduring Power of Attorney prices in following website:  
<https://chatlegal.com.au/estate-prices.html> discounted to:
  - \$650 (GST inclusive) – Single
  - \$850 (GST inclusive) – Couple
- All inclusions the same **except** that the meetings will be online only
- Complimentary services available in-person
- Valid if initial estate planning meeting booked between 18 September and 29 September (after-hours availability offered)
- Fee to review trust/companies/self-managed superannuation funds remains the same
- If interested, please let me know before **15 September 2023** so that we can provide you with a fixed price letter (after having a brief chat to understand your circumstances)

# Contact details

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