Newsletter of the Law

REABURN SOLICITORS

Autumn 2020

WILLS ARE NOT SET IN STONE

Mark and Kristy recently attended a seminar in relation to recent developments regarding Wills.

One of the important issues which was raised was the importance of clients updating their Wills to reflect their current circumstances.

The "golden rules" with Wills are:

1. A Will speaks from death and has no effect until the Testator has passed away;

2. The Will can only deal with the assets of the Testator that exist at the time of death.

Some years ago we were involved in a matter where a client gave the house to one son and the cash to the other son. This was based on the client's view that the amount of cash she had was equivalent to the value of the property. Many years after the Will was signed the client sold her house without changing her Will. She was placed in a nursing home and passed away whilst a resident at the nursing home. The effect of this is that the house was "adeemed", in other words, because it did not exist it cannot pass to the son. The Will provided that the cash and "all other assets" were to pass to the other son.

The net result of the Testator not updating the Will was that, on a strict reading of the Will, the son who was to get the house actually gets nothing and the son that was to get the cash and "all other assets" was then entitled to not only the cash assets but the balance of the Refundable Accommodation Deposit paid by the nursing home. After some initial angst we were able to resolve the matter although the son who was to receive the house did not get the 50% of the Estate which the Testator had hoped.

As a general rule, none of us can accurately predict how and when we will pass away. It is, however, critical to ensure that the last Will is not only a true reflection of your wishes but, more importantly, the question needs to be asked is whether it is possible "in the real world" for the terms of the Will to be carried out. Unlike Accountants, it is not necessary to see us on an annual basis to review your Will. It is ultimately the responsibility of the person signing the Will (the Testator) to ensure that the Will properly reflects their wishes.

If this is an issue for you, we encourage you to contact us and arrange an appointment to discuss the terms of your Will.

What we do...

Are you aware of the various areas of law in which we practise?

We concentrate on the following areas:

- **Wills and Estates**
- **Family Law**
- **Property Transactions**
- **Business Law**
- **Commercial Law**

If you have any queries in relation to any of these areas of law, please call us on 5586 2222 for an appointment.

West Burleigh Professional Centre
39 Tallebudgera Creek Road
West Burleigh QLD 4219
Telephone: 07 5586 2222
Facsimile: 07 5586 2233
Email: info@reaburn.com.au
www.reaburn.com.au

Postal Address:
PO Box 215, West Burleigh QLD 4219

YOU PAY PEANUTS YOU GET MONKEYS

In our last newsletter we wrote an article regarding the cost of conveyancing and "You Pay Peanuts You Get Monkeys".

In his capacity as Executor of an Estate, Mark recently listed a property for sale. Shortly after listing we received 3 separate letters from law offices and conveyancing firms (affiliated with law offices) saying things such as:

- A simple straight forward approach to achieve settlement quickly and efficiently;
- Protection of your interests;
- Agreed competitive professional fees;
- A 10% discount on your next property conveyancing transaction;
- We don't charge extra for time spent discussing your matter;
- Some firms offer less service but charge less fees.

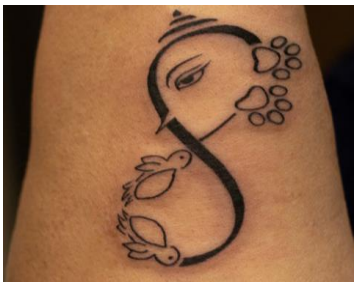
Having practised on the Gold Coast for over 30 years, Mark would be well known to any established legal firm. It is clear that the letters are generated electronically. We assume that the solicitors engage a professional firm to "trawl" for property listings and the correspondence is generated automatically.

No doubt many of our clients who have listed properties for sale receive similar correspondence.

We are proud to say that the majority of our work comes from existing clients or referrals. We do not engage in "hustle" with real estate agents, nor do we tout for work by sending out what we think is tacky correspondence.

WHOSE SKIN IS IT ANYWAY?

Tattoos are more popular than ever, with individual tattoo artists gaining critical acclaim for complex works. This is giving rise to legal issues similar to those found in the conventional art world, such as claims to protect intellectual property rights.



Tattoos can live on after death. The practice of preserving tattooed skin has existed since the Neolithic period. In May 2019, the BBS reported on the National Association for the Preservation of Skin Art ("NAPSA") in Cleveland, Ohio. Since 2015, NAPSA has offered a service allowing individuals to gift their tattoos to family members after death. In 2018, NAPSA began advertising its services in England.

With more individuals wanting to leave tattoos as preserved pieces of art to loved ones, we consider the implications under English and Welsh succession law. Does turning tattoos into preserved objects mean they can be treated for inheritance purposes like conventional artwork?

Diminishing squeamishness

The problem starts with the issue of ownership. Does a person with a tattoo own anything to give? As the England and Wales Court of Appeal held in *Yearworth v North Bristol NHS Trust* (2010 British decision), the common law has always adopted the same principle: a living human body is incapable of being owned. Hence, a person cannot dispose of their own body through their Will. Common Law Courts have, however, become steadily less squeamish about the notion that body parts might be capable of being property.

A new well established exception was where work had been carried out on a body part post death. In *Doodeward v Spence* (1908 British decision), the High Court of Australia decided that a preserved human specimen kept by a doctor was property capable of being sold by his Executors on his death. Griffiths CJ explained that the "lawful exercise of work or skill" on a body or part of a body meant it had "acquired some attributes differentiating it from a mere corpse".

That reasoning led to the conviction of the Defendant in *R v Kelly* for stealing body parts from the Royal College of Surgeons of England's anatomical specimens department. Rose LJ observed that "the common law does not stand still" and "on some future occasion" the Courts may hold "that human body parts are capable of being property", where they have "a use or significance beyond their mere existence".

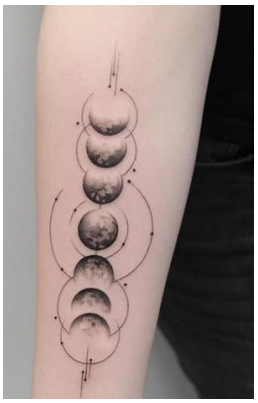
In the past decade, common law has gone further. In *Yearworth*, the England and Wales Court of Appeal held that 6 sperm donors were the legal owners of their frozen sperm for the purposes of a damages claim by them against North Bristol NHS Trust, which had destroyed the samples. Lord Judge LCJ said developments in medical science "require a re-analysis of the common law's treatment of and approach to the issue of ownership of parts or products of a living human body".

That reasoning was taken a stage further in *Roblin v Public Trustee for the Australian Capital Territory*. The Australian Court upheld a Testator's gift in his Will of his frozen sperm held in a fertility clinic. The mere fact that the subject of the gift was formerly part of the Testator's body did not prevent it from being property capable of being bequeathed.

The distinguishing feature of all these decisions is that the body part became property only after being removed or separated from the body. If a tattoo is only removed and preserved post-death, how can a Testator dispose of it by Will? At the point of death, the Testator would have no property in the tattoo.

The PRs' position

An answer might lie in considering how personal representatives ("PRs") might approach a direction in a Will to preserve and gift a tattoo. Subject to the Court's power to determine responsibility for disposing of bodies, PRs are charged with determining how and where a body should be disposed of and making arrangements.



The Deceased's wishes about how their body should be disposed of are not binding, but also not irrelevant. In the English case of *Re JS (Disposal of Body)* (2015 British decision), the Applicant Child, diagnosed with terminal cancer, wanted to be cryogenically frozen after death. Her Mother was willing to carry out the procedure, but her Father objected.

Jackson J called the Child's wishes "relevant, perhaps highly so". He made a pre-death appointment of the Mother as PR under s. 116 of the *Senior Courts Act 1981*. Although Jackson J could not order the Mother as PR to dispose of the body in a particular way, he made injunctions restraining the Father from obstructing the Mother from arranging for the Applicant's body to be cryogenically frozen.

Re JS sets a precedent for the Court facilitating "unusual" methods for disposing of bodies. NAPSA removes and preserves customers' tattoos in the mortuary, shortly after death and before the body is buried or cremated. Following *Re JS*, while a PR may not be obliged to carry out a tattoo preservation procedure, the Court might, if there was a dispute, make orders facilitating such a procedure, particularly where the Deceased had made a direction to that effect in their Will.

A bequest by the back door?

If PRs carried out a tattoo preservation procedure, what is the status of the preserved tattoo? Following *Yearworth*, it is hard not to conclude that it is property. If that is right, who owns it?

On the present state of the authorities, the answer might be the PRs as instigators of the preservation procedure. However, Testators can authorise their PRs to incur greater than ordinary funeral expenses. In this event, the costs of a tattoo preservation procedure might be regarded as part of those expenses.

If PRs carried out a procedure at the expense of the Estate, in accordance with a direction in the Will, why should the preserved tattoo not be an Estate asset? It is not necessarily unorthodox. If "A" during his life buys goods from "B", but delivery of those goods takes place after A's death, the goods are treated as assets of the Estate, even though A had no property in them when he died. Why then, if A contracts with an organisation like NAPSA to remove his tattoo after death, should that tattoo not also be an asset of the Estate?

If PRs did hold the preserved tattoo for the Estate, how should they dispose of it? If the Will directs how it should be disposed of, an attractive answer is to say: in accordance with that direction. This would leave the unusual situation where a Will might contain a direction to carry out a tattoo preservation procedure, which is not binding, and a gift of the preserved tattoo, which is binding, if the PR chooses to carry out the procedure. This odd result suggests it would be more coherent simply to extend the common law to regard a tattoo as property capable of disposition by Will.

A duty to preserve?

The possibility of preserving tattoos raises another question. Could a PR, obliged to preserve and realise the Estate's assets, ever be liable for failing to commission a tattoo preservation procedure? A preserved tattoo might have considerable value that residuary Beneficiaries or creditors of insolvent Estates would have an interest in compelling the PRs to realise.

If the preserved tattoo does not become an asset until the preservation procedure is carried out, the answer is no. However, that is somewhat unsatisfactory, particularly if it were settled that the resulting tattoo was held for the Estate.

Conclusion

It is unclear whether NAPSA has yet carried out its procedures in England. Nevertheless, Common Law Courts may not be far away from having to grapple with the questions such procedures raise. Can I gift my tattoo? Who owns the preserved tattoo? For instance, is it possible to say that a tattoo is a work of art and can be disposed of in the same manner as any other personal item. The Australian Courts have not yet had to deal with the treatment of tattoos. It would seem inevitable that this will happen at some stage and the outcome will be, to say the least, interesting.

WILLS, JEWELLERY, MEMORABILIA AND HEIRLOOMS

Many clients, in particular Mothers, wish to give their jewellery to Daughters in their Wills. Whilst this is certainly an understandable and admirable intention, sometimes using generic terms can create terrible problems. By giving a general description, for instance "my personal effects" that can cause problems by itself. None of it is an issue if there is 1 Daughter but if there are a number of Daughters and the Will simply says "I give my jewellery to my Daughters", again that can cause problems. It is always advisable to give clear instructions in relation to jewellery and personal gifts and to name the Beneficiary of the gifts. Where jewellery is left in general terms equally and is to be divided between a group of people it may be advisable to suggest a "private family auction" with a specification as to which family member chooses first and second etc.

A 2015 New South Wales case *(Lowe v Lowe)* illustrates the difficulties of using the phrase 'personal effects' by pointing to different Court interpretations, to different contexts of Wills and to the particular circumstances of the Will maker. The Court found that the 'personal effects' included a $60,000.00 Mercedes Benz. It adopted the High Court's meaning of that phrase: "items specially and personally used by the Testator".

The growing interest in family history has increased the value (including the sentimental value) of family memorabilia, photographs and personal papers. It is only prudent to ensure that the Will gives a clear description of each gift and so diminishes the difficulties that may be faced by both Executors and Beneficiaries.

We often have clients giving us instructions on Wills saying "I just want a simple one". Having practised in the area for over 30 years Mark's view is that the "KISS WILLS (keep it simple stupid)" are fast becoming a thing of the past.

GIFTS, GRANNIES AND THE GAA

The demographic of the Australian population is changing – lifespans are increasing, and with this there is an increase in the proportion of the population called "aged".

Of those between 80 and 84 years old, 12% have some form of dementia. For those over 94, this figure is 40%.

These demographic features drive the ever-growing need for members of our ageing population to have a substituted decision maker to assist them in managing their affairs as their capacity declines.

This cohort holds significant wealth and the statistics demonstrate they are dangerously exposed to the unscrupulous, with estimates putting the annual cost of elder financial abuse in Queensland at a minimum of $1.8 billion.

Aligned with such figures, the Public Trustee of Queensland reports that Enduring Powers of Attorneys (EPAs) are the main source of reported financial abuse of older people. The Public Trustee is typically appointed as a financial administrator if a suitable alternative is not available. Relevantly, a significant distinction between the holder of an EPA and a financial administrator is that the person holding an EPA is not required to undergo any scrutiny prior to accepting appointment, whereas a prospective financial administrator is subject to a great deal of scrutiny and oversight by the Queensland Civil and Administration Tribunal (QCAT) as to their suitability and financial management skills.

A protective mechanism within the legislative scheme is to prevent conflict and gifting transactions without any authority, unless it is naturally and reasonably a gift that the adult might make. The typical examples are birthday and Christmas presents. The question, however, sometimes arises whether it is proper for an attorney/financial administrator to make large gifts on behalf of their principal when that was their custom.

This scenario was examined in the QCAT decision of (FK), delivered on 18 December 2018.

FK involved an application under the *Guardianship and Administration Act 2000* (Qld) (GAA) by the then recently appointed financial administrator GJ and FK, who was 94 at the time an order was sought for the tribunal to approve financial gifts to numerous relatives of FK.

The extent of the proposed gifts was significant. They were worth a total of $112,000.00 and included "Christmas gifting to 23 family members and a family friend totalling $67,000.00" as well as "birthday gifts to 48 family members and 1 friend totalling $45,500.00".

The administrator, GJ was one of those family members to receive the gifts.

The decision traces the mechanics of the steps the administrator was required to undertake and the evidence necessary to satisfy the tribunal that the proposed gifts were ones that ought to be approved.

The decision addresses the provisions of the GAA relating to the powers exercised by the decision maker, and their responsibilities including the duty to avoid conflict transactions unless authorised.

These were succinctly summarised at paragraph [27]:

> *"The Administrator is required by principle 11 of the General Principle to act in a way that is appropriate to FK's circumstances. The Administrator is required to act with honesty and with reasonable diligence in relation to the adult's affairs. The Administrator is required to avoid conflicts of interest.*
>
> *"The Act in section 54 deals specifically with the situation of gifts. The section provides that unless the Tribunal orders otherwise, an Administrator for an adult may give away the adults property only if:*
>
> *(a) the gift is*
>
> *(i) a gift of the nature of the adult would make when the adult had capacity;*
>
> *(ii) a gift of the nature that the adult might reasonably be expected to make;*
>
> *(b) The gifts value is not more than what is reasonable having regard to the circumstances and, in particular, the adult's financial circumstances."*

The question for determination was whether financial gifts totalling $112,000.00 satisfied this criteria. Of notable relevance was that FK "is a person of considerable financial means who was in the practice of giving monetary gifts to children, grandchildren and others at Christmas, birthdays and other special occasions".

In approving the gifts, the decision pays particular attention to the evidence of FK's long-standing accountant of 15 years.

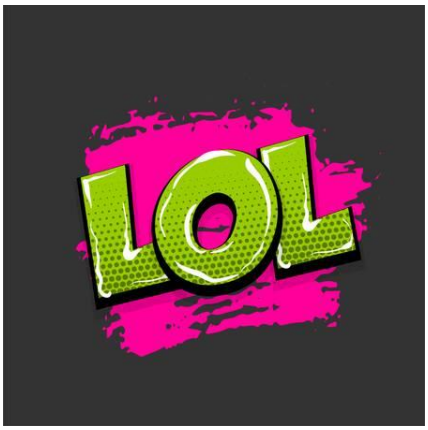
Noting that "[t]he circumstances of this matter are unique and unusual", the tribunal ultimately found "that the gift-giving program can be undertaken without unreasonably compromising FK's financial position. Her interests are being protected but her wishes are also being served." It should also be noted that the approval was confined to "the 2017-2018 period".

While an unusual decision, it demonstrates that not all financial exchanges between incapacitated adults and their family members are laced with menace, deprivation and dishonesty.

In addition, I refer you to the equally unusual matter *CMB, Re [2004]* QGAAT 20, when in a split decision, the majority tribunal approved the sale of the incapacitated adult's family home and distribution of the proceeds to her children. This represented 70% of her assets. The split nature of that decision is particularly instructive to practitioners in illustrating the differing approaches to interpreting legislation.

Having regard to these decisions and the level of oversight a financial administrator is subject to, it raises the question of whether the level of abuse in the case of EPAs could be reduced if a similar approach to suitability and reporting factors was applied before a person is appointed as an attorney. The cases are clear that these situations turn on their own facts and a prudent substituted decision maker will seek QCAT sanction before making gifts on behalf of the principal or entering into conflict transactions.

JUST FOR A LAUGH



There was an elderly couple who in their old age noticed that they were getting a lot more forgetful, so they decided to go to the doctor. The doctor told them that they should start writing things down so they don't forget. They went home and the old lady told her husband to get her a bowl of ice cream. "You might want to write it down," she said. The husband said, "No, I can remember that you want a bowl of ice cream." She then told her husband she wanted a bowl of ice cream with whipped cream. "Write it down," she told him, and again he said, "No, no, I can remember: you want a bowl of ice cream with whipped cream." Then the old lady said she wants a bowl of ice cream with whipped cream and a cherry on top. "Write it down," she told her husband and again he said, "No, I got it. You want a bowl of ice cream with whipped cream and a cherry on top." So he goes to get the ice cream and spends an unusually long time in the kitchen, over 30 minutes. He comes out to his wife and hands her a plate of eggs and bacon. The old wife stares at the plate for a moment, then looks at her husband and asks, "Where's the toast?"