

LB CO WILLS AND ESTATES SEMINAR

Thursday 18 November 2010

Keynote Address by Hon Mr Justice Peter W Young AO

Judge of Appeal Supreme Court of NSW

(Formerly Chief Judge in Equity and Probate List Judge)

It is a privilege to have been asked to give the keynote address this morning.

I come from a legal family with five successive generations in the law. My father was for many years the probate and estate planning partner at then one of Sydney's bigger law firms. Dinner time conversations were often around my father's latest victory over the death duty assessors in the Stamp Duties Office. He was proud that no will drawn by him was ever the subject of court proceedings to construe it, except for one where his intentions were upheld.

The solicitors and indeed barristers have different problems today. Death duty as such with all its complications for drafters of wills has largely gone. Ever since 1952 when cesser duty bit on estates, wills as such became simpler. This meant fewer will construction suits in the equity Court. However, the complications for estate planners merely shifted into companies and trusts and off shore manoeuvres.

It is 47 years since I last worked in a solicitors' office. Although at the bar and in the court, I was heavily involved in matters concerning wills and estates, it is obvious that in those 47 years there has been considerable change. Let me outline some of them to you and then spend a little time reviewing cases which illustrate the modern position.

I have already mentioned the formal abolition of death and estate duties. Even though Capital Gains tax has entered the field, this abolition has altered the way in which estate planners and probate lawyers prepare wills.

Philosophically, the major changes have been first the shift from the validity of wills depending solely on matters of strict compliance with formal requirements to a system that, within limits, will focus on fulfilling the testator's intention and secondly, the inroads into freedom of testation by expanded rights under the Family Provision legislation.

I will give examples shortly. However, let me first finish the list

Thirdly, the fact that medical science has kept people living longer and healthier has meant that we have needed to review our approach to wills made by the elderly. This is also affected by the fact that nowadays people often have many diverse shareholdings and may not remember everything they own.

Fourthly, we now allow people under disability to have wills made for them in certain situations.

Fifthly, social attitudes to couples living together outside matrimony and begetting children who once would be classed as illegitimate has meant that we have had to adjust our procedures.

Sixthly, as the world has gotten smaller, but the British Empire has shrunk, we have had to change our attitude to recognition of foreign wills and probates and the law as to reseals of probate.

Seventhly, the regrettable fact that law schools have ceased to focus on the thorough teaching of the law of succession, private international law and family law and even the technical rules affecting interests in land, has meant that some testator's intentions are being defeated by the ignorance of the will drafter.

Lastly, the law of negligence has moved so that, in some cases, disappointed beneficiaries can sue the solicitor whose negligent preparation of the will has meant they did not receive what the testator intended.

There may be other changes, but the eight I have listed are the principal ones. I will now give examples of each, usually from recent cases. There will probably not be time after that to remind drafters of wills of what usually has to be repeated at seminars like this such as when drafting a will, don't forget the residue clause, don't use the word "survive" without specifying who it is that must be survived and remember the difference between saying "To Amanda when she attains 25" and "To Amanda provided she attains 25"

The first of my propositions is that we have moved from strict formalism to a greater focus on fulfilling the intention of the testator. As really had to be the case, most of this change has come about by statutory amendment. When I refer to sections of an Act without naming the legislation, you can assume that I am referring to the Succession Act 2006 with amendments as it is currently in force.

Section 8 (replacing the former s 18A) allows that court to admit to probate informal documents provided the court is satisfied that the deceased intended that the document was to operate as his or her will.

All sorts of scraps of papers have, on occasions, been admitted to probate under this section or its predecessor. Time does not permit a thorough exposition of the ambit of the section. The section can be used to have a copy of a lost will admitted to probate in certain cases if the presumption of revocation because the original will cannot be found.

However, memos of instructions for a solicitor to prepare a will are usually not within the section as the deceased did not intent that document to have testamentary effect. However suicide notes which include a phrase such as, "I want my mother to have all my property" may well qualify even though one might query the sanity of the deceased when he or she wrote the note. My decision in *Ryan v Kazakos (2001) 159 FLR 452* is an interesting discussion of this type of case.

Apart from informal wills, the court may rectify a will. The provisions of s 27 empower t court to rectify a will if the will does not carry out the testator's instruction

s or tit contain a clerical error. It should be noted that this is narrower than s 29A of the previous legislation, but that matter does not concern me this morning.

The most common case is where a “not’ has slipped in unnoticed into a will, such as “ I give a million dollars to my wife Penelope provided she does not survive me by more than one month.”

Before the Act contained provision for rectification, the only methods of curing a mistake was, if the problem was with a gift to a spouse or child, to make a Family Provision Act application. Outside that area, apart from a voluntary rearrangement by the legal beneficiaries, or a suit against the drafter of the will for negligence, there was no way of adjusting matters.

Passing to the second matter on the list the increased inroad of Family Provision legislation on freedom of testation.

When this legislation was introduced in NSW in 1916 as the Testator’s Maintenance and Guardianship of infants Act the legislation was designed to protect widows and minor children who had been cut off with a shilling. (See Professor Rosalind Croucher’s note on this is (2009) 83 ALJ 617 that one cut off one’s dependants with a shilling to make it plain that the testator had considered the dependant –and then rejected her rather than being thought to be a senile person who had forgotten who his dependants were).

However, as time has gone by, more and more people have become eligible to claim on a testator or even a person who dies intestate. We are even now getting cases brought by homosexual lovers or adult children who themselves are relatively wealthy, in the later case, merely because their father has not distributed his estate equally between the children. Some of these cases even succeed or are settled. This fact has eroded freedom of testation and has meant that some wealthy people seek advice from estate planners to put their assets out of reach of claimants. This is difficult, especially as the legislation allows the court to make awards out of notional property, that is certain property which the testator has parted with by gift or transfer to a trust or holds as joint tenant, see ss 75-77..

The third matter I listed was the fact that people are living longer and healthier lives with a greater range of property interests.

The leading case of *Banks v Goodfellow* (1870) LR 5 QB.549 has guided courts for over a century as to whether a testator had sufficient capacity to make a valid will.

The classic passage is at p 565 that

“It is essential to the exercise of such a power [ie of testation] that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect”

However, these days, it is not necessarily so that a person who cannot remember exactly what property he has is too infirm to make a will: he or she may just be one of the wealthy whose holdings are so wide that it is impossible to remember every investment.

Another problem in this area was highlighted by the recent decision of Briggs J in the English Chancery Division in *Re Key* [2010] 1 WLR 2020. In that case, the testator and his wife had been married for 65 years. The wife died suddenly in November 2006. The testator was then 89 and infirm and had been dependant on his wife for domestic care.

A week after the wife's death, at the request of one of his daughters, a solicitor called at the testator's home and took instructions for a will. The testator had two sons and two daughters. His previous will, made in 2001, had left a life estate to his wife and the bulk of the remainder to his two sons who had run the family farm with him. The 2006 will gave the whole estate to the two daughters in equal shares.

The sons challenged the 2006 will on the grounds of lack of testamentary capacity.

Briggs J pronounced against the 2006 will and granted probate of the 2001 will. His Lordship held that, in modern days, bereavement was a matter which could give rise to a mental disorder to deprive a person of rational decision making. On the whole

of the evidence in the present case, the testator was devastated by the death of his wife and was unable during the week following to exercise the decision making powers required of a capable testator.

The judge added for advice to the profession that when a solicitor is instructed to prepare a will for an aged person or one who has been seriously ill, he or she should arrange for a medical practitioner first to satisfy himself or herself as to the testator's capacity and understanding and to make a note of the examination and findings.

My fourth point was that we now allow wills to be made for people who have no testamentary capacity. This occurs in two main areas, minors and mentally incapable people. Minors' wills are dealt with in s 16, under which the court may authorise a minor to make a will. Under ss 18 and following the court may authorise a will for an incapable person.

Recently a 16 year old received a large verdict. He had been living with foster parents for many years and was attached to them. He told the court that, he wanted to make a will so that if anything happened to him, the funds would go to his foster mother and father rather than his biological parents. The boy appeared to the court to be a mature person and the court considered that what he intended to do was fair and reasonable and granted him authority.

As to incapable persons, there was a recent case where a woman was badly injured by her spouse and she received criminal compensation from the government scheme as a result. She was in a perpetual coma and did not have capacity to make a will. If she died intestate, the spouse would receive the proceeds of the criminal compensation paid in respect of his own criminal conduct. Evidence was given by her solicitor that she had only one close friend, a woman in China and she was grateful for the women's refuge in which she had been living. The Court ordered that a will be made for her leaving half of the estate to the friend and the other half to the women's refuge. The case is *Re Kelso* [2010] NSWSC 357: noted 84 ALJ 678 (Kelso was the woman's solicitor who was the applicant for the order).

Fifthly, changes in social attitudes have meant that de facto spouses and ex nuptial children must be borne in mind when making a will and, indeed, on intestacy will take a share of the estate. Indeed, the Succession Act seems to acknowledge that a person may have a number of spouses, de jure and de facto. An odd consequence is that when the Public Trustee is asked to administer the intestate estate of a male person, he cannot ever be sure that there are no children who would be entitled to a share of the intestate's estate.

Recently, another problem emerged. The testator had been living with a person of the same sex. He made his will leaving her property to that person. They then went through a civil partnership ceremony which, apparently, in English law has the same effect as a marriage. The testator then died. The will was revoked because of the entering into the civil partnership under the English equivalent to our section 12. The court held that the will was not shown to have been made 'in contemplation of marriage'. [*Court v Despallieres* [2010] 2 All ER 451. This particular case has, at least for the present no relevance to NSW, but I gave it as a further illustration as to how probate law is affected by changing social attitudes.

Sixthly, when I was an articled clerk, if a testator died domiciled in Queensland with assets in NSW, probate would be obtained in Queensland and then the grant would have to be resealed in NSW as the law would not recognise the Queensland grant. Nowadays s 107 of the 1898 Act authorising reseals is still in place and theoretically the former law still applies. However, with the abolition of State death duties and a more Australia wide commercial approach by share registries, my perception is that, in practice, there are not as many reseals as formerly.

Again, in former times, one had to be very careful when making a will for people who were domiciled outside NSW. The will had to be made in accordance with the law of the domicile. So that, if the testator was domiciled in Arizona, there had to be three witnesses to the will.

This problem has now been solved by ss 47 & 48 which usually mean that the will will be valid here if executed here in our form. What happens in Arizona, however, needs to be borne in mind.

Seventhly, the fact that the full law as to property and succession is no longer taught by the majority of law schools has the effect that solicitors drawing wills and a fortiori their so called paralegals are completely unaware of rules such as those from Locke King's Act now s 145 of the Conveyancing Act, 1919 which makes a general rule as to how charges existing on the testator's property are to be borne by the beneficiaries unless the will otherwise provides.

Finally, there have been cases where the drafter of a will has been successfully sued by a disappointed beneficiary where the loss was caused by the negligence of the drafter in carrying out the testator's instructions. There have also been cases where the will was prepared in such a way that the estate paid the maximum in inheritance taxes which could have been avoided had the drafter taken care. This circumstance gives a further impetus to drafters to take care in everyone's interest to do a professional job.

The greatest risk is where a client is attached to a partner of the firm who has won all her business litigation for her. She has confidence in that solicitor and asks that solicitor to draft her will. The solicitor over confident in his or her ability will do it using text books much to the delight of the probate bar. The wise solicitor will either refer the matter to a partner skilled in that area or have such a person be the backroom boy or girl who does the real work.

However, even experienced solicitors can get caught. The most stark case is that of a solicitor who could see that his client was too burnt to be able to hold a pen and thus to sign the will, but forgot that s 6 permits another person to sign for the testator in the testator's presence. The intended beneficiary obtained damages against the solicitor, *Summerville v Walsh BC 9800342 CA*.

Finally, how much do you charge for drawing a will? I think most modern firms charge their ordinary hourly rate. However, some entrepreneurial firms do standard wills free or for a nominal fee on the basis that every will in their strongroom means a healthy fee in due course.

