HARGRAVE CHAMBERS CONFERENCE

16 & 17 MARCH 2016

TRAPS FOR A LEGAL PRACTITIONER IN DRAFTING A WILL
FROM A SUCCESSION CLAIM PERSPECTIVE
BEWARE THE DISAPPOINTED BENEFICIARY

It is accepted in the law that when a practitioner accepts instructions to a draft a Will, they inherit a duty in contract and tort to ensure that the testator's intentions become a reality.

This duty in turn can provide or found an action by a disappointed beneficiary claiming that they had missed out due to the lawyers' failure to carry out the testators instructions.

This cause of action was demonstrated in *Hill v Van Erp* (1997) 188 CLR 159 where a beneficiary missed out on an inheritance because the solicitor permitted the intended beneficiaries spouse to witness the Will thus voiding the provision of the legacy to her husband.

This duty to potential beneficiaries is not surprising however the recent decision of the Tasmanian Full Court in *Calvert v Badenancy* [2015] TASFC 8 surprisingly extended the duty somewhat further. In *Calvert* a solicitor was found negligent for not identifying the potential family provision claimants against the Estate when drafting the Will and for failing to advise the testator on how the potential claims could be defeated or minimised.

In Calvert the Testator's estate consisted largely of two farming properties that he owned as tenants in common in equal shares with his former partner's son (his stepson), to whom he wished to leave his entire estate. The testator engaged the Defendant law firm to make his Will after he was diagnosed with a terminal illness in 2009.

The Testator had previously made two other wills in 1984 with the same law firm. The first of those Wills left a small bequest of $10,000 to the Testator's estranged daughter. The second Will made in 1984 contained no disposition to the daughter.

While taking instructions for the 2009 Will, the solicitor (being a solicitor from the same firm that had prepared the previous 1984 wills) did not ask the Testator

whether he had any children or make any enquiry about any potential family provision claims. The evidence adduced at trial revealed that, notwithstanding the fact that the testator expressed an intention to leave his entire estate to a non-family member (albeit the son of his long-time partner whom he considered a son), the solicitor did not enquire about any other family member of the Testator who could potentially have a moral claim on the estate, he simply drafted the Will as instructed.

The Testator died later the same year and probate of the Will was granted in early 2010. The Testator's estranged daughter successfully brought a family provision claim against his estate and was awarded $200,000 plus interest and costs of $175,000 from a total estate of approximately $600,000.

The disappointed beneficiary sued both the solicitor that drew the Will and his law firm. The plaintiff's case was that the solicitor was negligent in failing to enquire about the Testator's family situation and whether there was any risk of a family provision claim. He further argued that had the solicitor made such enquiries, he would have learned about the existence of the estranged daughter. Given that daughter was a potential claimant, the solicitor should have advised the Testator of the possibility of making an inter vivos transfers of his interests in the properties or changing the manner of holding the properties so that they passed to the intended beneficiary by right of survivorship. As the solicitor failed to provide such advice, the Testator lost the opportunity to organise his affairs so as to frustrate any family provision claim. The plaintiff was unsuccessful in the first instance but succeeded on appeal on this basis.

Comment

On 26 October 2015 the High Court granted special leave to appeal Calvert and it is anticipated that it will be heard in early 2016. A possible reason to reverse the decision is that the duty found in *Calvert* was not within the scope of the retainer.

It has been brought to my attention that NSW is the only Australian state where the Succession Act prohibits contracting out of notional estate which can be brought into account if disposed of within 3 years of the testator's death. A practitioner would have to gamble that the Testator would survive for 3 years against the considerable costs and stamp duty in changing ownership or the nature or form of ownership of assets. It may be that *Calvert* will have less impact on NSW practitioner than others. Having said that, it would be prudent for

the NSW Practitioner to alert the Testator to the possibilities and give the Testator the option, particularly as the Court has discretion as to whether it will call in a notional estate.

In *Howe v Fischer* [2014] NSWCA 216 the Court of Appeal decided the solicitors duty was described as *"... a duty to take reasonable steps, to achieve by the exercise of reasonable care and skill of the ordinary skilled solicitor, two things; first the fulfilment of the client's objectives of making a formal Will according to the agreed time frame and, second the avoidance of any reasonable frustration of that objective*".

Lesson

1. A practitioner when drafting a Will **must** not only take all reasonable steps to identify potential beneficiaries, by seeking all former Wills and instructions of the testator, but be able to prove this in some way.
2. Once potential claimants are identified, then the testator should be given options to minimise the risk. These would include obtaining a statement, statutory declaration, or affidavit setting out the reasons the testator has not made provision or additional provision for the potential claimant evidencing the matters asserted, such as estrangement, conduct, provision during lifetime etc.
3. If it is possible to transfer assets or change the basis on which assets are held i.e. tenants in common to joint tenancy or place assets in a Trust then instructions should be taken as to whatever this is required. Again this will only be beneficial if it can be proved as the testator won't be around to assist.
4. Have a detailed will instructions sheet, and does a title search on any real property to ensure the property is held in the entity that the testator instructs.
5. Confirm terms of retainer in writing.
6. Confirm advice and instructions in writing.
7. Advise clients of terms of the Succession act and classes of possible claimants.

SUCCESSION ACT CLAIMS
MULTIPLE FAMILIES

In my experience, the claims of children of first marriages, as against, the second partner and step-children or children of the 2nd relationship give rise to a high percentage of provision claims and pose difficult moral questions for the judge and parties alike. It is not unusual for these cases to generate a fair amount of animosity.

Sometimes the animosity is generated by the prospect of assets of the first relationship not being passed down the bloodline of the first relationship but the loveline.

The increasing number of these cases and all Succession Act claims are in part caused by the extraordinary increase in the value of the family home meaning there is now a decent, or indecent, amount to fight over.

It is not uncommon for second relationship couples to attempt to head off the potential trouble at the pass, by making arrangements or directions as to how their respective estates should be distributed. These arrangements have met with mild or limited success in the past, however it would appear that the Courts are now more inclined to uphold such arrangements then they perhaps were in the past.

Three cases illustrate this point and I am grateful for Darryl Browne drawing these to my attention in his article in the February 2016 of the Law Society Journal.

Case 1 – *Bates v Cooke* [2015] NSWCA 278

In this case the applicant Bradley Bates ("Bradley") claimed a notional estate order from the estate of his mother June Cooke ("June"). June had been married to Robert Cooke ("Robert") for 25 years. June had 2 children from her first marriage. June and Robert had one child of their marriage and Robert had 2 daughters from a former marriage.

June and Robert made mutual (mirror) Wills in 2006 leaving their estates to each other and then to the applicant and 4 siblings of their relationships equally. June died first and her estate passed to Robert under her Will. Bradley decided to contest his mothers Will and was motivated in part by the fear that Robert was free to change his Will and leave Bradley ineligible to contest Robert's Will.

Assets

June's estate was notional $1,050,000 in a Self Managed Super Fund and joint tenancies in 2 properties.

Robert owned the matrimonial home valued at $1.3 million.

Bradley aged 43, earned $70,000 pa owned 2 lots of land worth $216,000 and had combined superannuation of $170,000.

Bradley's claim

Bradley initially claimed one fifth of June's estate but altered his claim a sum to boost his superfund to a suitable level for his retirement.

Result

Bradley failed at first instance and then on appeal. He lost because the Court of Appeal found he did not claim he had an immediate need that enlivened an obligation for June to make provision for him, and he failed to show a solid foundation for the claim to build up his superannuation in his evidence.

Comment

The Court of Appeal held that:

- The trial judge (Kunc J) was in error in disentitling Bradley on the basis that his needs were generated by well intentioned but improvident investment decisions.
- It was open to the primary Judge (Kunc J) to accept the respondent (Stepfather's) evidence that there was not a real risk that he would change his Will to reduce Bradley's entitlement to his estate.
- It would have reached the same decision as the primary judge.

Note: There is absolutely nothing Bradley can do if Robert changes his Will unless he can successfully argue a constructive trust based on Robert’s evidence.

Case 2 – *Lowe v Lowe (No 2)* [2015] NSWSC 1626

The summary of this case as quoted in the judgement of Kunc J is succinct and so I repeat it in total:

Summary

1. *Australians are living longer, healthier lives. Consequently, second (or subsequent) marriages later in life are an increasing demographic reality. Often the couple will have children from their previous marriages. While those children may be happy for their respective parents in their new relationship, there is often a concern among those children that when their natural parent dies, the assets of their previous relationship should be applied only for the children of that previous relationship. This case raises that issue in the factual circumstance that the plaintiff and her second husband, the late Francis Alfred Lowe ("Mr Lowe") agreed to, and did in fact, keep their own assets and financial affairs separate.*

2. *Mr Lowe died on 9 April 2014 at the age of 79. The plaintiff is Diana Mae Lowe. She is 82 years old and is Mr Lowe's widow as the result of a second marriage for both of them. They were in a relationship for eight years, the last four of which were as a married couple. Without disrespect, I shall refer to the plaintiff and several others who feature in this judgment by their given names.*

3. *In addition to Diana, Mr Lowe was survived by his three adopted and now adult children, Murray, Cameron and Jodie. They are the defendants (to whom I shall refer collectively as such) and the only other eligible beneficiaries.*

4. *The deceased's estate (the "Estate") had a sworn value of $3,338,508.42.*

5. *The deceased left a will made on 14 August 2012 (the "Will"). Probate was granted to the defendants on 11 August 2014. Apart from some furniture and personal effects, all that Diana received under the Will (other than a limited right to reside in and purchase the matrimonial home) was a Mercedes-Benz car, to which the parties gave an agreed value of $45,000.*

6. *By amended summons filed on 29 September 2014, Diana applies for provision out of the Estate under s 59 of the* Succession Act 2006 *(NSW)*

(the "Act"). Mr A. Lakeman of Counsel appeared for Diana. Mr G. Underwood of Counsel appeared for the defendants.

7. *The defendants accepted that Diana was entitled to some additional provision. The amount of that provision was in dispute. The Court has determined that Diana is entitled to additional provision of $100,000. That amount is intended to ensure that her position is no better or worse than her circumstances at the time she began her relationship with Mr Lowe.*

The Will [Made the day before the marriage]

14. *Mr Lowe bequeathed $180,000 to Murray and forgave unspecified debts owed to him by Cameron and Jodie. There was no dispute that the general scheme of the Will (as had been Mr Lowe's practice in life) was to treat each of his children equally and the bequest and releases were intended to equalise, as between the siblings, the effect of advances that Mr Lowe had made during his lifetime to Cameron and Jodie that had not been matched by similar gifts to Murray.*

15. *$20,000 was bequeathed to each of his six grandchildren to be held on trust until they attained the age of 21 years.*

16. *Mr Lowe gave Diana a right of residence in his property at Terrey Hills (the "Matrimonial Home") for up to 18 months after his death with the option to purchase the Matrimonial Home when that period expired. Diana owns her own home at Terrey Hills ("Her House") where she had lived with her first husband. The Will provides that she could purchase the Matrimonial Home for the lower of the value of the Matrimonial Home and Her House with the Estate paying the transaction costs of the transfer.*

17. *The obvious effect and intention of this price provision was that, if she wished, Diana would always be able to buy the Matrimonial Home from her own resources on the assumption that she would sell Her House. If Her House was more valuable than the Matrimonial Home, she would retain the cash difference. If the situation was reversed, she would obtain a windfall gain. However, this consequence fortifies the Court in its conclusion that the primary purpose of this bequest was not to confer any financial benefit as such on Diana, but was intended to ensure that, if she wished to do so, she could continue to live in the Matrimonial Home without borrowing. It also meant that the value of the Matrimonial Home*

would in any event be realised (albeit perhaps at a discount if it was worth more than Her House) for the benefit of the defendants.

18. *At trial the parties agreed that the value of the two properties determined by kerbside valuations was roughly equal: $1.3 million for Her House and $1.4 million for the Matrimonial Home. Diana's right of residence in the Matrimonial Home expired on 14 October 2015 and she has decided to return to Her House (see further paragraph [39] below).*

19. *Mr Lowe's household furniture, furnishings and personal effects were bequeathed to Diana. This gift was the subject of the judgment of Brereton J in* Lowe v Lowe *[2015] NSWSC 48. His Honour decided that the gift included Mr Lowe's car but not his moneys on hand, in bank accounts or on term deposits nor his shares or notes in public companies. The parties agreed the car to be valued at $45,000 for the purpose of these proceedings and accepted that no value should be attributed to the furniture and personal effects.*

20. *Any Lowe family heirlooms, photographs and personal papers were left to the defendants to be divided between them as they saw fit. The residue of the Estate was left to them (or their surviving children) in equal shares.*

What provision ought to made from Diana – Her Financial position and needs.

63. *With the exception of one minor matter, Diana's financial circumstances once she returns to Her House and sells Mr Lowe's car were not in dispute.*

64. *Her House is valued at $1.3 million.*

65. *She has cash invested of $352,360.24 which will be supplemented by the car sale proceeds of $45,000 to become $397,360.24. The parties were content to assume interest on that sum would be earned at 3% p.a. producing annual income of $11,921.*

66. *She has her own car and other assets worth about $23,500 and no liabilities.*

67. *In relation to her expenses the only matter for debate was an allowance of $4,500 p.a. for tax. Mr Underwood argued that on his submission as to how Diana's affairs would be structured, no tax would be payable. Mr Lakeman's hypothetical arrangements gave a different result. On the*

material available to it, the Court cannot make a reliable conclusion one way or the other. Out of an abundance of caution the Court will assume tax will be payable, although the amount is further considered below (see paragraph [81] below).

68. *Making that assumption and otherwise accepting the figures put forward by Diana (which were not relevantly challenged by the defendants other than as to tax) means that her annual expenses would be $35,364. This results in an annual shortfall of $23,443 when measured against her interest income (see paragraph [65] above).*

69. *In addition, she told the Court that she would need to paint Her House (this has been done ($14,525)), attend to matters such as new carpets, floorboards, curtains and blinds etc ($30,000) and purchase new furniture and appliances ($29,000). It was also submitted on her behalf that she should receive an amount of $16,000 to cover the difference between her costs on the ordinary and the indemnity basis. This last amount is not one the Court considers it appropriate to take into account because it is an ordinary incident of litigation and is de minimis in terms of her overall financial position.*

70. *Bearing firmly in mind that the Court is applying the Act in its terms and without treating Powell J's observation in* Luciano *(see paragraph [62] above) as anything more than a helpful indication, the parties nevertheless found it convenient to frame their submissions by reference to his Honour's categories. The parties therefore accepted that because she had Her House, community standards would not have expected Mr Lowe to have made any provision for her accommodation. Attention was focussed on funds to keep her in the style to which she had become accustomed and the need for a buffer for vicissitudes. The Court will to some extent follow that approach, but more in the nature of a cross-check, because it is the language of the Act which the Court must apply.*

Decision and Reasoning

The Court made a finding that:

1. There was an arrangement or understanding that the deceased, his 2nd wife (Diana) would keep their assets and financial affairs separate and that they did so. As Diana conceded in her evidence.

2. There was no material or significant change in Diana's circumstances such as decline in wealth or financial (she still owned her own home worth $1.3 million and had $400,000.00 to call upon for contingencies) as well as the ability to downsize her home if extra funds were required.
3. The Judge should give significant weight to Diana's arrangement with the deceased.
4. Adequate provisions would be an amount that would restore Diana to the position she was in at the commencement of the relationship neither better nor worse off.
5. The court awarded an additional $100,000 on this basis, recognising that she required $73,000 for home renovations/repairs and had a shortfall of $7,300 pa between her income including part pension of $14,872.00 and expenses and a life expectancy of 10 years. The Court calculated the value of the annuity at $36,500.00.
6. However as Diana unfortunately rejected a Calderbank offer of $230,000 and an earlier offer, she was ordered to pay the defendant's costs on the ordinary basis up to 8 June 2015 and thereafter on a indemnity basis (*Lowe v Lowe* (No 3) [2015] NSWSC 1800).
7. It is interesting to note that the Court reached its conclusion to give Diana a modest amount despite the Estate being quite large ($3 million)

Case 3 – *Thompson v Thompson* [2015] VSC 706

This was a claim by Gwenneth Thompson ("Gwenneth") against the estate of her husband Jack Thompson ("Jack") claiming further provision under his Will.

Relevant facts

1. Jack had 2 adult children from his first marriage Laurel and the defendant.
2. Jack and Gwenneth lived together since 1979 and married on 8 December 1987.
3. They came into the relationship with assets which they pooled eventually buying an apartment in Collingwood as Tenants in Common in equal shares. Jack's one half interest in the Collingwood apartment was valued at $475,000.
4. Gwenneth received $40,000 from a policy on Jack's life.
5. The Estate had net cash assets of approximately $118,000.
6. Jack left Gwenneth a life interest in the Collingwood apartment, the car, a legacy of $15,000 and the home contents.

7. The residue of the Estate and remainder interest in the Collingwood apartment were to go to Jack's 2 children.

Gwenneth's claim

Gwenneth wanted the title of Jack's one half interest in the Collingwood apartment transferred to her absolutely.

Court's decision

The Court rejected Gwenneth's claim but extended the terms of the life interest to allow Gwenneth to sell Collingwood and purchase an alternate property or accommodation bond in lieu on the same terms ie. a Crisp Order.

Although Gwenneth's long standing relationship made her maintenance and support paramount, the competing claims of the children and the testators wishes were significant factors in the consideration of what further provision should be made for Gwenneth.

The parties demonstrated an intention to keep their financial affairs separate (ie. Collingwood apartment).

At paragraph 73 His Honour said:

> *"Is the present circumstances, where the estate is not large, where there are significant competing financial needs and where the deceased's' wishes were that his adult children would benefit from his estate after the death of the plaintiff, I consider that further provision for he plaintiff's maintenance and property support is provided by an extended portable life interest in the Collingwood apartment."*

At paragraph 74:

> "*An extended portable life interest has significant value to the plaintiff in both monetary terms and as security for her future accommodation needs. It provides for her wish that she remain living in the apartment and for the future should she find it desirable or necessary to move to alternative accommodation or supported accommodation. If the plaintiff does sell the Collingwood apartment, she will have a secure nest egg for her future contingencies from the additional income from the investment of the sale proceeds. An extended portable life interest also provides for the adult*

children and preserves the deceased's wishes that his interest in the Collingwood apartment passes to his adult children on the plaintiff's death".

Conclusion

In all 3 cases, the various Courts looked to the parties intentions, either expressed or by conduct, and gave these intentions significant weight in their respective decisions in mixed/multiple family situations. It is now possible to have some comfort but not complete certainty that in cases where parties keep their assets separate and show an intention to divide their estate with consideration of the family history, the Courts will attach significant weight to their intentions.