

# NEWSLETTER

FEBRUARY 2014

## Estate Litigation Newsletter

### Welcome to our February Estate Litigation newsletter

This quarter we have included news on:

- a recent decision of the Supreme Court of Queensland (*Re Yu* [2013] QSC 322), which held that a will typed into an iPhone was legally valid
- formal versus informal wills, in light of *Fischer v Howe* [2013] NSWSC 462
- 'protecting children from themselves': special provisions that may be included in wills to safeguard your estate from beneficiaries and outside influences
- the circumstances in which you can seek to extend the time for making a claim on a will.

Please do not hesitate to contact us if you would like more information on any topic, whether covered in this newsletter or not. We hope you find the newsletter informative and useful.

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## iWill?

In November 2013, the Supreme Court of Queensland in *Re Yu* [2013] QSC 322 held that a will typed into an iPhone was legally valid. The will was found in the deceased's 'Notes' application after the man committed suicide.

### The Queensland decision

In 2011, a young international student living in Australia committed suicide. Shortly before he did so, he recorded his will on his iPhone. He did not sign it himself or have it witnessed. His brother, the executor of the will, could not implement the deceased's wishes without approval from the court.

All Supreme Courts in Australia have jurisdiction to grant probate even where the formal requirements of a will are not complied with. The requirements for a valid will include:

- understanding what the nature and effect of a will is;
- making the will in writing; and
- signing and dating the will in front of two witnesses who are present at the same time.<sup>1</sup>

The Supreme Court of Queensland held that, despite the formalities not being observed, the deceased had demonstrated a clear intention before his death that the will be legal and operative.

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<sup>1</sup> *Succession Act 2006* (NSW) s 6; *Succession Act 1981* (QLD) ss 9-10; *Wills Act 1968* (ACT) s 9; *Wills Act 2000* (NT) s 8; *Wills Act 1936* (SA) s 8; *Wills Act 2008* (TAS) s 8; *Wills Act 1970* (WA) s 8; *Wills Act 1997* (Vic) s 7.

## Comment

Even though the iPhone will was held to be valid, the case turns on a very unique set of facts that strongly indicated the deceased intended the document to form his will. In particular, the court was persuaded by the fact that the document was created shortly after the creation of other documents containing final farewell notes.

Other important features of the document included that it:

- commenced with the words 'This is the last Will and Testament...';
- formally identified the deceased and referred to his address twice;
- concluded with the name of the deceased where a person's signature might have been; and
- was dated.

Despite the decision, a testator should avoid recording a will on a smart device. In different circumstances, a court may be unable to uphold the will. The problems that may arise include:

- the formalities are not adhered to;
- there is no way of knowing who actually recorded the will;
- there is no way of knowing whether that person intended it to be their will; and
- the security on a smart device is not adequate to protect or replace such sensitive documents.

Do-it-yourself wills and wills that can be created via iTunes Store Applications are not adequate and legal standing cannot be assured with their use. Using such devices can create uncertainty,

for which the beneficiaries of wills may pay the ultimate price in trying to enforce them.

Your will must be legal and operative in order for you to have a say about how your estate is distributed. Ensure that your intentions are expressed clearly by drafting your will ahead of time and preferably with the help of a solicitor. It is important to store the will in a safe place known to your executor.

## Formal versus informal wills

An informal will does not carry the same weight as its formal counterpart. The Supreme Court of New South Wales in *Fischer v Howe* [2013] NSWSC 462 considered the necessity of an informal will.

### The duty of care owed

The plaintiff, Mr Fischer, was the son of the deceased. He claimed damages from the defendant solicitor for failing to make an informal will that expressed his mother's (the deceased's) instructions to revise her old will. Mr Fischer was to receive 50 per cent of the estate under his mother's new will, which was a substantial increase from his original share of 25 per cent.

The solicitor attended the deceased's home to take instructions for a new will. The solicitor informed the deceased before leaving that he would not be able to prepare her will until after Easter. The following day, the deceased was diagnosed with pneumonia and subsequently died shortly after.

The court held that the defendant solicitor owed a duty of care to give legal effect to the deceased's testamentary intentions by



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drawing up some kind of legal document listing her wishes. Where a solicitor is unable to do this, they must engross an informal will for their client to ensure their wishes are carried out in the event of their death.

## The law in Victoria

The Supreme Court is given the power to legalise informal wills. It is established law in Victoria that solicitors owe a duty of care to intended beneficiaries to ensure the testator's wishes are carried out. This duty of care extends to:

- ensuring that a will is properly executed;
- not delaying preparation and presentation of the will;
- advising disabled testators that their solicitor may execute their will for them; and



- responding in a timely fashion to telephone calls from a testator relating to the instructions to draw up their will.

In some circumstances, it is appropriate for a solicitor to draw up an informal will and have it signed by the person on the spot. An informal will ensures that a person's testamentary intentions are protected in case the person is unable to make a formal will at a later date. If the person does make a formal will at a later date, the formal will supersedes the previous informal version.

## Protecting children from themselves

Special provisions may be included in wills that safeguard your estate from beneficiaries and outside influences. This is particularly useful if you are a parent dividing your estate among your children.

### What kind of special provisions?

As a parent, you can put restrictions on when your children receive their inheritance, such as when their other parent dies or when they attain a certain age. Alternatives are also available whereby a parent may choose where the child's estate share goes, should they predecease them. Special provisions can be put in a will dictating when the children are entitled to their inheritance.

Examples include:

- a son who was not entitled to his share of his mother's estate unless he divorced his wife; and
- children who were not entitled to their share of their father's estate unless they had Protestant wives (two of which had already married Roman Catholic women).

How effective are these special provisions in adequate asset

protection? This question was considered in *Jones v Krawczyk* [2011] NSWSC 139.

## Recent case law

In this case the deceased's daughter, Zofia, had been made the primary beneficiary, trustee and controller of several testamentary trusts subject to one condition: Zofia should divorce her husband.

Her mother's will stipulated that she could not be a trustee under the will and stay married to her current husband. Zofia was therefore denied the ability to control any of the trusts. Distributions could be made to her but no amount was guaranteed.

Zofia challenged the validity of the will in the Supreme Court of New South Wales, arguing that this particular provision was against public policy because it was antithetical to the principle of the preservation of marriage. The court held that the provision was valid and the judge:

- assumed that by including this special provision, the deceased was trying to protect her daughter from the influence and control of her husband; and
- found that it was clear the deceased did not consider the husband's influence and control to be in her daughter's best interests and that the will reflected this.

## Conclusion

The Supreme Court also raised concerns about special provisions that had been challenged and found to be invalid. Where such protections fail, the conditions in the will are void and the assets of the person making the will have no protection.

## Seek advice

This case demonstrates just how important proper estate planning is. Well-drafted provisions are necessary to ensure your wishes are carried out as you intend them to be.

## Are you out of time?

Have you been adequately provided for under the will of a person close to you? Has your time for making a claim on the will expired? If so, rest assured – the time for making a claim can be extended in certain circumstances.

## Who can make a claim?

People close to the deceased such as family members, friends, same sex partners, de facto partners, as well as other people who can show dependency on the deceased, may challenge a will if they believe they have been left out of the will or feel they have not been fairly provided for. This is a testator family maintenance claim.

## Extension

Strict time limits exist for making such a claim, being six months after grant of probate or letters of administration. If the time period lapses, an application may be brought to extend the time, but the court needs to be satisfied of various factors before doing so, including:

- the reason for the delay;
- the length of the delay;
- whether you are a person who should have been provided for under the will of the deceased;
- whether there is any hardship to beneficiaries if the extension of time is granted;
- whether any part of the estate has been distributed.

## Advice

It is critical that you seek advice if you think you may have a claim and the time period for bringing the claim has expired.

## Team Member Profile

### Rena Solomonidis, Senior Associate, Estate Planning & Probate and Commercial Litigation

Rena has acted for clients in large scale litigation and has experience with all stages of the litigation process. She advises clients across various industries on a range of commercial matters including contractual and property disputes, insolvency and consumer law matters. Rena was Co-chair of the Editorial Committee of the Law Institute of Victoria from 2012-2014.

Rena's experience includes litigating and advising on disputes involving grants of probate, testator family maintenance claims, administration orders and interpretation of wills. Her clients include individuals and public and private companies, and she has experience in managing the affairs of high net worth individuals.



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