**DON'T GO THERE GIRLFRIEND!**
**HOW TO KEEP AN ESTATE OUT OF COURT**

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Australians are living longer. There's more time for new relationships and second families, more time to build up assets (and more time to create complicated asset structures), and unfortunately more time to live with chronic illnesses and need care, and more time to live with dementia. A will leaving the house to the wife and children may no longer cut it. And leaving a child your favourite cuff-links may no longer cut it.

Probate and family provision litigation is often emotional and personal - many of the parties are grieving and unstable. This paper will highlight legal issues, but also other issues that may cause unreasonable angst and anger and that may be the catalyst for commencing legal proceedings.

**Testator's Assets**

The solicitor can take an active role in minimizing the risk of estate litigation by asking the testator for as many details as possible about the testator's assets – drill down to determine if the property is residential or commercial, are the shares blue chip or speculative mining, how much of the accommodation bond is refundable.

The solicitor may not be able to rely on the testator's instructions for a complete inventory of the testator's property, and may consider doing an ASIC name search and Land Titles name search. A testator may not appreciate what "joint tenancy" means, and may not appreciate that it falls outside the estate.

If the testator does not own the property referred to in the will the property is adeemed and the gift fails. However, if the testator does not own the property directly *but the testator owns the shares of a company and the company owns the property*, the disappointed legatee may bring a construction or rectification suit and claim that it includes the shares in the company.[1]

If the testator' attorney disposed of the testator's property pursuant to an enduring power of attorney, then in NSW the disappointed beneficiary may claim that they are entitled to the surplus money arising from the sale.[2]

If the property is subject to a mortgage, the testator should carefully consider whether the mortgage should be discharged or whether the legatee should take the gift with the burden of the mortgage.[3] If the legatee takes the property with the burden of the mortgage, will the financier be willing to refinance the mortgage in the legatee's name?[4]

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In *Ireland v Retallack* [2011] NSWSC 846, the will expressly required the executor to pierce the corporate veil to transfer farming property to particular beneficiaries, but there are comments in the case that have been relied on by family provision plaintiffs who foreshadow that they may bring a construction suit.

2 section 22 *Power of Attorney Act 2003* (NSW)

3 the default position is the person takes the gift subject to the burden of the mortgage - *Locke King's Act*; *section 145 Conveyancing Act 1919, NSW*

4 In *Clifford v Mayr* [2010] NSWCA 6. the testator left the house to his children. However, the children were minors and the bank was not willing to refinance the mortgage. The bank would lend to the testator's widow, but she was not entitled to the house and not willing to pay the mortgage on a house that she did not own. The NSW

The superannuation death benefit may be the largest asset in the estate, or indeed the whole estate. Or it may fall outside the estate. Similar issues may arise with life insurance. A testator may have a binding death benefit nomination but many death benefit nominations are not in fact binding – a nomination is only binding if the nomination is less than 3 years old and signed by two adult witnesses.[5] If there is a non-binding nomination, or the trust deed does not allow for binding nominations (e.g. CSS and PSS), the trustees may elect to pay to the nominee, may pay the estate, or may pay children or a spouse who is not even nominated. The trustee still retains a discretion to pay whoever they want. If there is a non-binding nomination, a person has 28 days to ask for the trustee's decision to be reviewed internally, and if still not satisfied after the internal review the person has 28 days to appeal to the Superannuation Complaints Tribunal. [6] The Superannuation Complaints Tribunal uses different criteria than a family provision claim – the SCT prefers applicants who were financially dependant on the testator, "who would have continued to benefit from the member's income if the member had not died".[7]

The assets of a discretionary trust will not form part of the estate. A "statement of wishes" to the trustee of a discretionary trust may give a testator comfort but it is not binding on the trustee.[8]

The NSW family provision legislation allows the court to claw "notional estate" back into the testator's estate.[9] Notional estate may include superannuation death benefits,[10] property held as joint tenants[11] including real estate and joint bank accounts, and assets owned by a trustee of a discretionary trust.[12]

ACT testators should not assume they are invulnerable even if the *Family Provision Act* 1969, ACT does not include notional estate provisions. First, the testator may move before the testator dies. Second, the ACT legislation may change before the testator dies. Third, the

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Court of Appeal ultimately ordered that the house be transferred to the widow with a charge in favour of the children.

5 regulation 6.17A *Superannuation Industry (Supervision) Regulations* 1994 (Cth)

6 death benefit complaints http://www.sct.gov.au/pages/make-a-complaint/death-benefits-complaints; time limits - http://www.sct.gov.au/pages/make-a-complaint/time-limits

7 "Death Benefits" SCT Brochure - http://www.sct.gov.au/dreamcms/app/webroot/uploads/documents/SCT-Death-Brochure-2012.pdf

8 *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405

9 Part 3.3 Succession Act 2006, NSW ("**NSW Succession Act")**

10 section 76(2)(e) NSW Succession Act

11 section 76(2)(b) NSW Succession Act

12 In *Kavalee v Burbidge* (1998) 43 NSWLR 422, the NSW Court of Appeal designated a Liechtenstein stiftung (similar to a discretionary trust) as notional estate because the trustee was *required* to act in accordance with the testator's instructions. In *Flinn v. Fearne* [1999] NSWSC 1041, Master McLaughlin did not designate a discretionary trust as notional estate where the testator was the settlor and appointed the trustees because the trustees were independent and had fiduciary duties to the beneficiaries. However, there is a suggestion that a discretionary trust may be notional estate if the testator *was* the trustee.

NSW courts may have jurisdiction to deal with an ACT estate. The NSW court has jurisdiction if the testator is domiciled in NSW, has immovable property such as real estate in NSW, or movable property such as shares.[13] Importantly, the NSW court may have jurisdiction even if the only assets in NSW *are themselves notional estate*.[14] The testator may not be aware that the testator's superannuation fund is located in NSW.[15] The testator may have used NSW accountants to create the family discretionary trust with a NSW incorporated corporate trustee and registered office/principal place of business at the NSW accountant's address.

**Taking Instructions**

A number of recent cases on undue influence,[16] knowledge and approval, and testamentary capacity have shone a glaring spotlight on the process of taking instructions.

The solicitor should ask the testator questions to confirm that the testator is orientated as to time and space[17] and should also expressly ask the testator if they have ever had memory issues or been treated for dementia. This is not fatal[18] but it will influence the way that the solicitor takes instructions and the questions the solicitor should ask.

The solicitor should ask the testator to expressly identify persons who may have a claim on the testator's bounty, and tease out why the testator has decided to make the gifts that they have.
The test of testamentary capacity may still be *Banks v Goodfellow*[19] - the testator understands that he or she is making a will, understands the extent of their property and can comprehend and appreciate the competing claims. However, the application of the test is more nuanced - a testator usually understands that they are making a will,[20] and the court may accept that the testator had capacity even if the testator only has a general idea of their assets and may not

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13 *Taylor v Farrugia* [2009] NSWSC 801; *Hitchcock v Pratt* [2010] NSWSC 1508

14 *Hitchcock v Pratt* [2010] NSWSC 1508

15 The location of a trust is determined by the trust deed, or otherwise according to the *Hague Convention* on *the Law Applicable to* Trusts *and on their Recognition* (part of Australian law under the *Trusts (Hague Convention) Act 1991*. This may include where the trustee is located and the principal place of business of the trust - *Vidyagauri Hiralal v Nitin Hiralal* [2013] NSWSC 984

16 Undue influence had not been successfully claimed since *Callaghan v Myers [*1880] 1 NSWLR 351. However, two recent cases re-ignited the claim - *Petrovski v Nasev; Estate of Janakievska* [2011] NSWSC 1275 and *Dickman v Holley; Estate of Simpson* [2013] NSWSC 18. It is likely the increasing age of testators and the vulnerability and physical dependance of testators on carers and relatives will lead to an increasing number of claims.

17 Some lawyers require older testators to provide a recent ACAT assessment or a doctor's letter dated the same day as the appointment confirming that the testator has no issues. Indeed, some lawyers conduct elements of the MMSE during the appointment, including asking the testator to draw a clock face showing a particular time

18 in *D'Apice v Gutkovich; Estate of Abraham* (No 2) [2010] NSWSC 1333, White J held that the testator had capacity even though she had been diagnosed with moderately severe dementia and the Guardianship Tribunal had made a financial management order because the testator could not manage her affairs

19 B*anks v Goodfellow* (1870) LR 5 QB 549

20 *Dickman* at [160] per White J "such knowledge is rarely lost unless the testator has extremely severe disorder of the mind."

require the testator to know their assets in detail.[21] The main focus of many of the cases is whether the testator can properly identify and evaluate the competing claims – where the testator has a delusion about one of the children,[22] or cannot withstand emotional pressure because of extreme age, physical weaknesses and emotional lability so is not able to evaluate the strength of competing claims. [23]

The solicitor should obtain instructions directly from the testator, and other persons should not be present. The solicitor should ask open-ended questions, seeking "detailed responses, not merely nodding approval."[24]

Detailed contemporaneous file notes are crucial. Indeed, a solicitor may ask a clerk/paralegal to also attend the appointment just to take notes. The notes should record who was present at the appointment including confirming that the solicitor saw the testator alone, without the principal beneficiary. The notes may also record the solicitor's observations of the testator's demeanour. In *D'Apice v Gutkovich*, White J noted the solicitor's detailed notes of his questions and the testator's answers, and reproduced some of the text in his judgment. In contrast, in *Petrovski*, Hallen J was critical of the solicitor's limited notes.

The solicitor's notes may also be useful in resolving rectification[25] and construction[26] issues. Indeed, in NSW, Hallen J held that the NSW statutory test of rectification which refers to "testator's instructions"[27] effectively requires the solicitor to give evidence or the solicitor's notes to be in evidence.

The notes in and of themselves may not be able to able to be relied on an as informal will[28] – an informal will requires that the testator intend the document without more to operate as a will.[29] However, the solicitor may give the testator the option of signing the document to be the will in case the testator dies or loses capacity before a full typed will is executed. Indeed, a solicitor may be negligent for failing to give the testator the opportunity to make an informal will. [30]

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21 The test was formulated in the 1880's when a testator's assets were relatively simple whereas today's testator may have extensive and complex assets, and may have handed management of them to a broker or planner – see *Kerr v Badran; Estate of Badran* [2004] NSWSC 735 per Windeyer at para 49; *D'Apice*

22 *Virginie-Pitel v Campbell; Campbell v Virginie-Pitel* [2010] NSWSC 1440

23 *Dickman* at [160] per White J

24 *Petrovski* at [306] per Hallen J

25 section 12A Wills Act 1968, ACT

26 section 12B Wills Act 1968, ACT

27 section 27 Succession Act 2006, NSW

28 section 11A Wills Act 1968, ACT

29 *The Estate of Masters (deceased); Hill v Plummer* (1994) 33 NSWLR 446; *Hatsatouris v Hatsatouris* [2001] NSWCA 408

30 *Fischer v Howe* [2013] NSWSC 462 – The solicitor was negligent even though the testator was not at risk of imminent death, by reason of her age, lack of mobility, need for care and infirmity, and susceptible to a not insignificant risk of losing testamentary capacity in the period of about a fortnight between the initial conference and the proposed conference.

If the testator speaks English as a second language, the solicitor should record that the testator appeared to understand the process. If there is a risk that the testator does not fully understand, know and approve the contents of the will, the will should be translated and this should be noted on the face of the will.[31]

The solicitor and the client should carefully check spelling and pronouns in the will. It is surprising how many plaintiffs seize on a mis-spelling of a grandchild's name as *compelling irrefutable proof* that the testator did not know and approve the will, and is the catalyst for the plaintiff's claim. At the very least, mis-spelling a grandchild's name, mis-describing the sex of a grandchild or mis-spelling the testator's street address raises a suspicion that the testator didn't give the instructions. The testator's son may know his own children's names but may not know his sister's children's full names….

The solicitor should also be conscious of the process *around* taking instructions. For example, the evidence may show that the principal beneficiary selected the solicitor (or indeed the solicitor may be the beneficiary's solicitor), organized the appointment (helpfully confirmed by the law firm's file notes confirming telephone calls with the principal beneficiary rather than the testator), drove the testator to the appointment, and provided follow-up details and instructions to solicitor [32]

**Administration**

The executor should confirm how the testator's power of attorney was used. This may be delicate if the executor or one of the executors was also the testator's attorney. First, if the testator's attorney sold the testator's property pursuant to an enduring power of attorney, a beneficiary may be entitled to the surplus.[33] Second, the executor has an obligation to call in and collect the deceased's assets and this includes pursuing an attorney who has misappropriated the deceased's funds.[34]

The executor should carefully consider whether advances made by the testator were gifts or loans, and if they were loans whether the loans are time-barred.[35]

**Family Provision**

A person may still challenge the estate, even if the testator's capacity is robust, the will is clear, and the estate is fairly administered.

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31 *Scarpuzza v Scarpuzza* [2011] WASC 65; *Coppola v Nobile* [2012] SASC 129

32 *Petrovski* at [298] per Hallen J

33 section 22 *Power of Attorney Act 2003,* NSW

34 In *Bird v Bird* [2013] NSWCA 262, the testator's wife sold the testator's house when he went into a nursing home and deposited the money into her bank account. Nearly 15 years later, one of the testator's beneficiaries sued the executors of the testator's estate in devastavit for breaching their duties by not attempting to recoup the sale proceeds from the testator's wife. The NSW Court of Appeal held that the executors are under a positive duty to call in and collect the assets of the deceased and the executors were required to indemnify the testator's estate for any loss.

35 section 11, *Limitation Act 1985, ACT*

In NSW, a testator may ask eligible persons to release their rights to apply for a family provision order.[36] An eligible person may agree so that they do not jeopardise their relationship with the testator, and consequently do not jeopardise their inheritance. However, the court must approve the release and the court may decline to approve it.[37] Further, the testator needs to disclose their assets so that the court may assess the release. A testator may not want persons close to the testator to know the extent of the testator's assets.

Other than securing a release, it is not possible to stop family provision claims.

It may be useful for the testator to have a family conference to discuss the testator's will with their spouse, children and step-children/spouse's children. The catalyst for many claims is the shock and not understanding the testator's decision - a family conference gives the testator an opportunity to explain the testator's reasons, and gives potential applicants time to process and accept the testator's decision. In addition, a family conference ensures that there is no "Dad always said he would leave me the top block" allegations that Dad can no longer challenge.

However, the testator may not be in contact with potential applicants. These claims are often the most distressing to the executors – the applicant was not around when the testator was alive, when the testator needed care, and only re-appear to claim against the estate. A testator should arm the executors with information to at least strengthen the executor's bargaining position and discourage the claim.

An ex-partner may make a claim.[38] However, the courts will take into account the policy of family law to promote the finality of settlements of property disputes and that parties should be able to go their own separate ways.[39] The testator should provide the executor with copies of any property settlement or deeds of settlement, and child support agreements.

A child, even an estranged child, may make a claim. The court considers that estrangement is relevant, and may reduce what the court would otherwise order, but may not warrant exclusion from a parent's will.[40] The court will take into account the reason for the estrangement, especially if there was overt hostility.[41] The court may be more forgiving of the applicant's estrangement if there was sexual abuse,[42] the testator provided little financial or emotional support after divorce,[43] the testator was hostile,[44] or an "extremely difficult

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36 section 95, *Succession Act 2006,* NSW

37 *Neil v Jacovou* [2011] NSWSC 87

38 section 7, Family Provision Act 1969, ACT

39 *Glynne v Public Trustee* [2011] NSWSC 535

40 *Andrew v Andrew* [2012] NSWCA 308 at [53]

41 *ibid*

42 *Williamson v Williamson* [2011] NSWSC 228

43 *Palmer v Dolman* [2005] NSWSC 361

44 *Keep v Bourke* [2012] NSWCA 64

person" and a "hard, frugal, uncompromising woman".[45] The court may be less forgiving if the applicant is callous and hostile,[46] brought shame on the family,[47] and was a torment for the testator.[48] The testator may have letters, emails and text messages from the estranged child. The testator should be encouraged to keep copies of the testator's correspondence to the estranged child to make clear that the testator attempted to reach out and reconcile. The executor may also seek to obtain police reports and copies of AVO, and hospital and nursing home notes if there were any incidents / nasty telephone calls.

45 *Polistena v Mitton* [2011] NSWSC 931

46 *Ford v Simes* [2009] NSWCA 351

47 *Hastings v Hastings* [2008] NSWSC 1310

48 *Madden Smith v Madden* [2012] NSWSC 146