



## Contested Estates

By Tony Crilly

### *How the finer points can trip you up*

Recently I gave a lecture for Lexis Nexis to a group of lawyers who specialise in succession law. It was revealing, to say the least, to observe the disparity of opinions about many of the finer points of the law in relation to the administration of Estates and disputed entitlements.

These issues ranged from undue influence in Testamentary Trusts and Transfers during the lifetime of the willmaker, through to dealing with Superannuation Death Benefits in a Self-Managed Superannuation Fund. The impact of binding financial agreements under the Family Law Act on contested Estates, and structuring Estates to meet the needs of advanced care for individuals, was also considered.

The speakers were excellent and the information exchanged was a timely reminder about the rapidly developing area of the law.

### *1. Undue influence*

Undue influence, in Testamentary Transfers and Transfers that are made during a person's lifetime, is of increasing significance. As our population ages and their capacity diminishes, the likelihood of influence being exerted over the mind of a willmaker becomes more prevalent. It is common to see a late change of heart by a willmaker based upon a significant level of contact or influence exercised by a family member over the willmaker during their latter years or a period of illness. To that extent, Transfers can often be made for no consideration or under market value on the basis that there is a stronger relationship between the willmaker and that person at the time.

Often we see that there is a contradictory testamentary intention expressed in an earlier will and that the effectiveness of that document is undermined completely by the property transfer.

By means of that Transfer prior to death, the potential benefit of those entitled under the will can be lost.

There are, of course, provisions in the Powers of Attorney Act in Queensland and in other states whereby a Power of Attorney who makes a Transfer for personal gain is personally liable and must compensate the Estate. There are strict statutory time limits for disaffected parties to make Applications to the Court to rectify such a Transfer. In addition, under the general law, a Court may consider the circumstances of a Transfer and determine whether in fact the actions of the recipient were unconscionable. This might mean exerting pressure upon a person when they are suffering ill-health, dementia, medication regime and promises that the recipient may have made to the willmaker. It is important for professionals to keep alert to situations where clients may be overtly influenced or pressured by a relative into effecting a Transfer for an undervalue, or changing a will to exclude others late in the piece.

### *2. Super and death benefits*

It is a curious situation that lawyers cannot seem to agree upon the requirements of the SIS Legislation about the lapsing of a Binding Nomination for Super Death Benefits. Clearly, in the case of a Self-Managed Superannuation Fund, the first port of call is to closely scrutinise the terms of the Trust Deed to determine if there are special rules that relate to a Binding Nomination, or if there is a general reference to the legislation. If it is clear that a Binding Nomination can be made and that it appears it will not lapse after three years, then it is more likely that that nomination will continue to be effective, regardless of the passage of time. There is a line of thought that practitioners should write a more detailed set of instructions in the Binding Nomination which effectively becomes a testamentary act.

As to what the Trust Deed should say, a recent case of *Donovan vs. Donovan* [2009 QSC 26] is an important case when considering those terms. It is critical to assess who can be, or is, a member at the time and who will be the controlling individuals on the death of a member. That includes control of trustee companies by way of directorship and shareholding. In the end, great care must be taken to ensure that the Binding Nomination, which is a private document, will be effected by the relevant parties and some thought should be given to an independent person to act as a substitute Trustee.

Essential characteristics of a non-lapsing Death Benefit is that the nomination forms part of the rules of the fund or are approved by the Trustee, the agreement must be made whilst alive for the payment of Death Benefits, it excludes the operation of Superannuation Industry Supervision Act and Regulations and is expressly stated to not lapse.

Future amendments to the rules of the fund and the control of the Trustee are critical factors. A member's legal personal representative (Executor /Administrator), or a member's "dependents", are the only people who can receive the benefit.

Where there is a direction for payment of income streams, this can occur by payment to a spouse, a child under 18 years, or

a child over 18 but who is financially dependent on the deceased. However, the capital must vest in each child when they reach twenty-five years of age.

It is critical for clients to obtain independent financial advice about the tax consequences and the impact of locking in the payment of benefits rather than the ability to access lump sums.

### **3. Impact of BFAs on Family Provision Applications**

Close examination must be made of any agreement entered into by the parties to a marriage in respect of their entitlements under the Estate of the spouse.

The case law demonstrates that the Courts are more likely than not to enforce the terms of an agreement, particularly where the relationship is short, it is a second marriage and there are other competing claims by the children of the deceased (see *Barns vs. Barns* [2003 HCA 9]) where the Court carefully considered the effect of the deed and whether it stripped the Estate of the assets to deny the rights of those claiming further provision. The Court will consider the needs of the Applicant and other interested parties, the size of the Estate, service or support given to the deceased by the Applicant and encouragement to rely on an understanding there would be an inheritance to a beneficiary.

With the new provisions in the Family Law Act, a Binding Financial Agreement, which technically satisfies the tests in that jurisdiction, will be binding on the Estate of the deceased. It is important to note that the parties cannot contract out of the rights that beneficiaries have by statute, but the Court will consider a deed between parties that might not technically comply within the confines of the nature and extent of the relationship (see *Hills vs. Chalk & Ors* [2008 QCA 159] and *Manly vs. The Public Trustee of Qld* [2007 QCS 388]).

### **4. Recent developments**

Clients must consider carefully the impact of recent case law where Claims on a deceased Estate, based upon a statutory right, have been considered in the context of the overall personal and financial relationship.

The leading case is *Vigolo vs. Boston* [2005 HCA 11] in which an adult son signed a Deed of Agreement with the parents to separate their property and financial interests from the rest of the family. That adult son, who was independently wealthy, made a claim for further provision from the Estate when he was left out of the will. Ultimately, he was not successful and had to pay the costs of the Application. One of the overriding factors considered by the Court was the fact that the son had voluntarily entered into a Deed of Agreement with the deceased about the property interests.

*Vigolo* is an important case because the reality of modern family life is that many people have a joint enterprise or investment, particularly in property, as a family group. When those interests diverge and parties voluntarily sign a deed to separate those interests, that has to be taken into account in any contest over the Estate.

In the case of *Underwood vs. Underwood* [2008 QSC 159], two nephews were successful in defending their interest in a family business valued at approximately \$1.5m and in competition with a de facto of a number of years. Contributions by parties to the growth in the business assets are clearly recognised by the Courts, subject to the circumstances.

In *Hills vs. Chalk* [2008 QCA 159] a husband of eight years signed a Deed of Agreement, but later made a claim on the Estate. The Court considered carefully the circumstances and the interests of the children, dismissed the Appeal and set aside the further provision that was ordered to be made for the husband.

In *Frey vs. Frey* [2009 QSC 43] there was an issue about extending the time limit for filing a claim on an Estate and further provision for an adult son who had been made certain promises and provided for in a prior will. The wife did not succeed in further provision, but the son obtained the transfer of a property and water licence to benefit from the Estate.

In a recent case of *Lamond vs. The Public Trustee* [2009 QSC 247] an adult son, who was deaf and estranged from the testator, achieved further provision from the net Estate of \$2.6m by effectively obtaining one quarter of the residue. The costs of that Application were enormous and a significant factor in diminishing the total residue of the Estate.

Given the developments, clients must be advised on a case-by-case basis, taking into account the formal arrangements made with family members and the extent of their relationship.