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LEGAL SERVICES

DEATH: PROOF AND PRESUMPTION

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Death can present its own type of legal challenges. Take 3 examples from court decisions of the last 6 months.

Example 1: Peter Maynard

Peter Maynard went on a surfing holiday in Bali. He left his accommodation on 24 August 2014 to go surfing. Later that day a fragment of his surf board was recovered by a local dive master. It suggested a severe impact with a coral reef. Despite an extensive search, Maynard's body was never found. He had a wife and three children. They had a close relationship. No contact had been made with them or family or friends and his bank account had not been operated in the ensuing nine months.

The common law has long recognised that a person who has disappeared without explanation for at least seven years may be presumed dead: see example 2. However, it is not always necessary to wait seven years for a missing person to be held to be deceased, even where a body has not been found. From the evidence of his disappearance the Court reached the conclusion that Maynard was dead.

Example 2: Susan Thompson

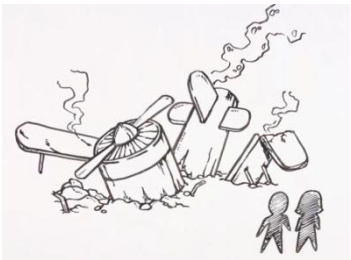
When Arthur Thompson died in 2006, his wife, Susan, had not been heard of, by those expected to hear from her if she was alive, since 1999. At law she was presumed to be dead. However, the law does not presume a date of death without specific evidence. So she wasn't presumed to be dead on the date in 2006 when Arthur died. In 2007, the Coroner declared Susan dead. However, that didn't assist because it didn't establish a date of death.

As Susan wasn't presumed dead before Arthur's death, she inherited his estate. In 2007 she was presumed dead, so her beneficiaries then inherited through her estate.

All of which is a big improvement on the position which faced Donald Miller. He had been pronounced dead in 1994 after he had been missing for eight years. However in 2005 Miller, who had moved from a Ohio to Florida in the US, returned to Ohio. He then wanted to reclaim his driver's license and social security card. A court stated that he was unable to do so because he'd been pronounced dead in 1994, that decree could only be set aside within three years of it being made, and that time had elapsed. This was so even though the judge stated that Miller was "sitting in the court room… in good health…"!

Example 3: Carol Dawson

John Dawson and his wife Carol died in a plane crash. Each died on the day of the crash but it could not be established which of them died first. There is legislation which provides



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that, in those circumstances, the younger is deemed to have survived the older. John Dawson was six months older than his wife. Accordingly Carol Dawson was deemed to be the last to die.

Other legislation provides that a beneficiary who dies within 30 days of a testator's death is treated as dying before the testator. This second legislation meant that Carol was to be treated as dieing before her husband. Potentially that legislation meant that John Dawson's Will had not disposed of his estate on death. He would have died intestate, and a different beneficiary would inherit the estate.

The court resolved the potentially different approaches produced by the legislations, and determined that for the purposes of the Will, Carol Dawson, although younger, was to be treated as having predeceased her husband so he didn't die intestate. However, you know the moral! This is another example of the need to carefully prepare Wills.

More problem gifts: Don't make a gift to a building

Paul Bates was worth over two and a half million dollars ($2,500.00) at his death. He had never married. He had no children. He was a devout Catholic and regularly attended services at the Redemptorist Monastery in Mayfield, Newcastle. In his last Will, made in 2002, he left about two million three hundred thousand dollars ($2,300,000.00) to the Redemptorist Monastery. Now the Monastery is a building, and a gift to a building is ineffective. So, who inherited the $2.3million gift?

At the date of his Will a community of the Catholic Church (named "The Fathers of the Congregation of the Most Holy Redeemer") met at the Monastery building. However, before his death that community sold the building, and at Bates' death conducted its activities at a different building. The Supreme Court decided that the Will didn't mean what it said – a gift to a building – but meant a gift to the community of the Catholic Church even though it was not connected with the building at Bates' death.

This is another example of the considerable cost that can be incurred if great care is not taken in the preparation of a will.

Another judicial warning: The harm caused by well-meaning but unqualified people

A recent case before the Supreme Court concerned the meaning of three documents. There was a properly prepared will which had some handwritten alternations. A typed document which specified gifts to be made on death which was also altered by hand, and a completely hand written document. The Court was asked to make some sense of these three documents. In the course of doing so, the Court said this:

"The deceased either was offered, or sought, the assistance of an entirely unqualified person to prepare these three documents. That person would no doubt protest that she was trying to help a friend. She was no help at all. A claim of good intentions is no defense. The fact is that unqualified people who intermeddle in the preparation of documents that have legal operation cause great harm. The defense for such officiousness is often one of trying to save the willmaker money. That is sterile. This deceased could have had several wills professionally prepared for a fraction of the cost that has been imposed on her estate by this application".

If you want to make arrangements which have legal effect on death and do not cause your beneficiaries considerable cost, delay and concern, don't do anything which records your wishes for the gifting of assets on death other than through a will prepared by a legal practitioner who knows and understands the law and has experience in preparing wills.