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LEGAL SERVICES

Making a will is technical.

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The first wills legislation commenced in 1540. Ever since then, courts have developed rules to guide the preparation of wills. Because the law places an emphasis on certainty, and certainty is produced by consistency, courts today still apply rules developed hundreds of years ago. There are lots of them, and they are not necessarily completely logical in today's society. So will making today is technical and not instinctive. It requires awareness of long-standing legal principles and rules of construction, together with a keen eye for detail.

Gift-over clauses

A 2017 decision from the South Australia Full Court emphasises the point. A will made thirteen specific gifts. It then left the rest of the estate to children of the deceased's brothers and sisters of the testator's parents as survived him. It stated that if a beneficiary didn't survive, but left children who did, the children would take. Despite the wording, that gift over provision, as it is called, was found to only apply to brother and sisters who survived the testator (rather than children who survived the testator of predeceased brothers and sisters).

Be precise: What is "Flat 14"?

Rosie Arnot lived in London but she owned two strata lots, 20 and 37, in an apartment building in Elizabeth Bay, Sydney. Lot 37 was a car parking space but could be sold or disposed of separately to her unit, which was lot 20. It had a separate value of $70,000.00. By her will Rosie gave all her share and interest in "Flat 20" to her niece and nephew.

She then gave the rest of her estate to various members of her family, her friends and

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charities. After her death the issue arose as to the meaning of the gift of “Flat 20”. Did it mean lot 20? Did it mean lots 20 and 37 (ie the car parking space)? Or was it ineffective as not describing any property owned by the deceased at her death? Of course, the niece and nephew and all the residual beneficiaries, were interested in this issue as it determined the amount each would receive from Arnot’s estate. In deciding the meaning of “Flat 20”, the court looked to Arnot’s intention. It appeared that she had always treated ownership of the car parking space as ancillary to ownership of the unit. The court said that “Flat 20” did not have a technical meaning. So the court held that the will gave both lots 20 and 37 to the niece and nephew.

SMSF trust deeds: take care

Superannuation funds, especially self-managed superannuation funds, are another problem. Essentially, too little attention is often given to the details that need to be carefully observed. There is a lot of money is superannuation funds, so court contests abound on whether the details have been properly satisfied. Another South Australian Full Court decision involved the court deciding whether a member of a SMSF had given a death benefit nomination to the trustee of the fund. Unfortunately, this elementary and routine requirement is easily missed. That can produce ‘elder financial abuse’ opportunities unless the decision making within the fund is carefully planned. Another issue is properly understanding the meaning of the superannuation trust deed. This is important as there is increasing litigation about member’s and beneficiary’s entitlements. A superannuation trust deed can’t be simply scanned – it needs to be carefully read. One part can’t be picked out and read – the whole document and circumstances need to be considered.

Dispute about Remains

Pono Aperahama was 17 when he died from self-inflicted head injuries. Both his parents were New Zealanders of Maori decent, but Pono was born in Sydney and lived in Australia all his life. His mother wanted Pono to be buried in New Zealand in accordance with Maori cultural law. His father wanted his son cremated after a traditional Maori service in Penrith, and the ashes divided between the mother and him. He maintained that burial in New Zealand would practically prevent visitation rights for him and Pono’s seven siblings. The mother took proceedings in the Supreme Court of New South Wales to be allowed to instigate her wishes. There was disputed evidence before the court about Maori practices regarding burial. There was evidence about Pono’s connection to Maori customs, which was minor. The court favoured the father’s proposal for various reasons, chiefly because it was preferable for the majority of Pono’s close relatives and avoided the possibility of further dispute in New Zealand.