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Q&S QUINN & SCATTINI Lawyers

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Ambiguous Gifts in a Will

Wills & Estates Team

A clause in a homemade will can appear crystal clear to the person writing the will, yet it can be very ambiguous to another person reading it after the will-maker has died.

The proliferation of homemade wills has caused a substantial increase in the number of applications to the Supreme Court of Queensland to construe (interpret) unclear will clauses.

Many people think making a homemade will saves money, but the reality is often quite the contrary.

Frequently the words used by the will-maker are not clear and it is necessary to ask the court to interpret the will.

It may be thought that an application to the court about the meaning of a will clause is an unnecessary expense. But it puts a different perspective on it if you put yourself in the shoes of the executor who could be personally liable if the estate is not properly distributed in accordance with the will.

A gift in a will that has not been properly drafted may have two or more meanings. The differing meanings may in turn lead to different outcomes for two or more potential beneficiaries.

An example of a will clause that made perfect sense to the will-maker, but not to his executors or the court, can be found in the High Court of Australia case of Ritchie v Magree (1964) 114 CLR 173.

In that case the will-maker left a will that stated:

"I also direct that my wife Mildred Maria Wilson is to have full use of my property situated at 81 Harris Street, Harris Park and that upon her death the property 81 Harris Street, Harris Park is to become the property of my daughter, Helen Kathleen Wilson."

This part of the gift seemed clear enough – it meant that Mildred was to reside in 81 Harris Street, Harris Park for her lifetime and after her death it became the property of Helen.

But the following three sentences in the clause caused the executors to apply to the court for interpretation:

"The remainder of my real and personal possessions is to become the property of my wife Mildred Maria Wilson. I also direct that my wife Mildred Maria Wilson is at liberty to dispose of any portion of my estate if she thinks it is advisable with the exception of course the property known as 81 Harris Street, Harris Park. I also direct that upon the death of my wife Mildred Maria Wilson all of that portion of my possessions remaining is to become the property of my daughter Helen Kathleen Wilson."

What do you think the clause means?

You may think that the clause is clear enough. You may think that this clause means that the will-maker's estate (apart

from the property at 81 Harris Street, Harris Park) was to be held by the trustees for Mildred to use for her lifetime, but then, on her death, it was to be given to Helen.

If you thought that, then you would apparently be wrong.

In fact, only one of the three judges who decided this case considered that that was the correct interpretation of the will. The remaining two judges considered the clause was too ambiguous for them to be able to ascertain exactly what the will-maker meant. They found that Mildred could live in the Harris Street property for her life and upon her death the property would go to Helen. But, as for the residue of the will-maker's estate, it was given outright to Mildred.

You may think that the decision in this case is really of no consequence to Helen because her mother Mildred naturally would have left a will leaving everything to her daughter, Helen. Unfortunately, this was not the case. It appears that Mildred made a will that gave her estate to someone other than Helen. Mildred probably believed that Helen would inherit all of her father's estate under his will. What a devastating outcome for Helen.

The court will use its best endeavours to interpret a will to give effect to the will-maker's intentions, but as you can see it is not always easy to ascertain what the will-maker means.

There are many rules of interpretation that a court will use to assist it in discerning the will-maker's intention as expressed in the will. Unless you have studied these rules, it is very easy to make a mistake.

Don't do your own will.

Get an expert to do it for you. You will save your estate a great deal of money by avoiding costly court applications and you will ensure that what you actually want to happen with your estate is put into effect.

If, however, you find yourself in the unenviable position of being the executor of a will that contains ambiguous terms, see us as soon as you can. Executors are entitled to legal advice to assist them in the execution of their duties, and the legal fees for that advice will almost always be paid from the estate.

As an executor, don't leave it to chance that everyone will agree on the way you choose to distribute the estate.

See the experts at Quinn & Scattini and take home the peace of mind that comes from receiving the correct advice.

When Family Matters and Estate Planning Collide – Just One Example

Family & De Facto Law Team

One of the things we ask clients at the first meeting is whether they have a current Enduring Power of Attorney (**EPA**). We talk about the change that might need to be made to that document, or that one should be put into place, and then we proceed to deal with the family law issue.

At the other end of the matter, we find it is also a good time to review the estate planning documentation that a client has in place because now they may have divorced, undertaken a property settlement and/or secured orders regarding the care of children.

A Case Example

Recently, we had a situation where we had these discussions with a client. The client had reviewed his will but decided that he did not need an EPA.

Sadly the client is now the subject of an application to QCAT for Guardianship and Trustee Orders because he had a massive stroke that took from him his capacity to make decisions for his own welfare. He is a man in his early 50's.

When we talk with clients about these things, it is not to bring home the fact that we are all mortal. Rather it is to ensure that you have appointed someone you trust, and who knows you, to make decisions about your welfare in the event that you are alive but do not have capacity.

An EPA is a terribly important document that means you have control over who makes decisions. Taking it a step further, the Advance Health Directive goes into much more detail about what decisions are to be made and even whether a life support system is to be turned off.

It saddens us to see family members come back to ask for help when this relatively simply planning tool could be employed. It is cost effective and saves your 'estate' not only a lot of money but also a lot of heartache and trauma.

What compounded this situation was that the parties were not divorced. This meant that our client's former wife remained his next of kin for medical treatment purposes.

The family feud that has now started may not ever resolve because situations like this see siblings against siblings, parents against children, new spouses involved and so much more.

The time and energy involved in dealing with these situations, as well as the financial cost, is significant.

If you do nothing else today, please review your existing EPA if you have one and if you don't, please do something about putting one into place.

Basic Concepts for Community Management Schemes

Business & Property Team

With the recent surge in apartment building and the increasing the demand for mature-age lifestyle communities, more and more land in Queensland is being held and managed by community management schemes.

This article provides a brief overview of the parts that make up a basic community management scheme and how they work together for the benefit of Lot Owners.

Why Have a Community Management Scheme?

Some parts of a development are intended to be for the benefit of all lot owners. These can either be desirable features such as shared swimming pools or recreational areas or are parts that are critical in order for lot owners to fully enjoy the lot they own such as basement level car parks, lifts and the very structure of the building containing the lot.

It would be unrealistic (and unreliable) to expect any one lot owner to be able to save up, pay for and maintain these share facilities. A community management scheme is an effective way for all the lot owners in a scheme to pool their resources and manage the maintenance and operation of the shared land, buildings, plant and equipment for everyone's mutual benefit.

What Is a Community Management Scheme

Very generally speaking, a community management scheme is a system where a 'body corporate' holds and manages 'common property' for the use and benefits of the lot owners. In return for this, each lot owners agree to:

- pay 'levies' or 'special levies' to the body corporate to cover the body corporate's costs; and
- obey the 'by-laws' of the scheme to ensure that all lot owners can enjoy the common property and not have their use, enjoyment and rights over their lot negatively affected.

Body Corporate – A body corporate is the organisation that runs, maintains and (if necessary) upgrades or repairs the common property. A body corporate also calculates, approves of and collects the levies and special levies, sets the by-laws for the scheme. A committee of lot owners make day-to-day decisions for the body corporate and general meetings (where all lot owners are entitled to vote) are held to make certain important decisions.

Common Property – The common property of a community management scheme is the shared land, buildings, plant and equipment the body corporate owns and manages for the use of some or all of the lot owners.

Exclusive Use Areas – A community management scheme could be set up so that only certain lot owners can use specific parts of the common property. This is desirable when a lot owner needs to have the exclusive use of part of the common property without interference from other lot owners. The primary example would be car parking spaces that are reserved for the exclusive use of a specific lot owner. A lot owners is usually responsible for the cleaning and maintenance of the exclusive use area that it has been given.

Levies – A levy is the amount that each lot owner contributes towards the operation of the body corporate and the running and maintenance of common property. This includes payments to an 'administration fund' to cover operational costs, payment into a 'sinking fund' to cover the cost of maintenance, repairs and upkeep and payment towards the insurance premiums for the common property and the body corporate.

Special Levies – A special levies is an amount that each lot owner contributed to cover the extraordinary or unforeseen expenses that a body corporate may incur.

These costs could arise as a result of disaster, unanticipated need of repair, having to defend or mount legal claims or substantial upgrades to the common property.

There are strict controls about how the body corporate can decide to charge a special levy and special levies cannot be raised without a general meeting of the lot owners.

Because special levies can often result in lot owners paying significantly higher amounts of money to the body corporate, lot owners that have not been keeping themselves up-to-date with the outcome of the general meetings or new buyers that have not searched the body corporate can be caught unprepared when special levy notices are issued.

By-Laws – By-laws are the rules of the community management scheme that are intended to ensure that the scheme runs smoothly without any lot owners doing something that could have a negative impact on the common property or the use, enjoyment or value of other lots in the scheme. Many community schemes have by-laws that attempt go further than this (with dubious levels of effectiveness).

Conclusion

Community management schemes can be set up in almost an endless variety of ways depending on the shared and competing interests of developers and the individual lot owners.

Understanding the basic concepts discussed in this article is critical to being able to navigate a system that, fundamentally, is designed to ensure that the rights, use and enjoyment of all lot owners are respected.

Will the VLAD Act be repealed?

Criminal Law Team

In recent times the Queensland parliament has taken a strict stance and vowed to crack down on organised crime. This approached was essentially triggered after public outrage regarding the infamous Broadbeach bikie brawl that occurred on 27 September 2013.

That incident saw 18 members of the then Bandidos pleading guilty to charges including riot, affray, public nuisance and assault and obstruct police. All persons charged either received wholly suspended jail sentences, fines and in one case a good behaviour bond.

The governments approach to deal with the types of incidents described above was to introduce the *Vicious Lawless Association Disestablishment Act 2013* ("**the VLAD Act**"). Since that time there has been much talk regarding the utility of this legislation and whether it truly serves the purpose it intended.

In recent weeks the Parliament implemented a further bill, the Serious and Organised Crime Legislation Amendment Bill, which is designed to replace the original VLAD legislation. Whilst it could be said that the bill is a positive step forward as it will ensure that the VLAD Act (which has been described as unfair, unconstitutional and overly onerous), is repealed, there are still some concerning features evident in the bill that could impinge on the general public's civil liberties.

Specifically:

- Police may apply to have a premises declared as a restricted premises if they reasonably suspect disorderly activity. If this declaration is made the police may then undertake unlimited searches without a search warrant for a period of two years. During these searches they may seize any personal property and have that forfeited to the state.
- Consorting could also become a potential offence. The bill provides that it will be a misdemeanour (i.e. an indictable offence) for a person to consort with two recognised offenders after having been given an official warning by police with respect to each of those individuals. This would make it illegal to associate with anyone who has a criminal history containing an offence which has a maximum penalty of five years. The offence carries a maximum penalty of three years imprisonment or 300 penalty units, or both.
- To facilitate the issuing of the official warning for the offence, a police officer will have the power to stop and detain a person and to require them to provide their name, date of birth and address and in some circumstances their identifying particulars. This can undoubtedly be viewed as

breaching a person's right to personal liberty, rights to privacy and their common law right to silence.

The need to protect the community whilst not impinging upon the general public's right's seems to continue to be an ongoing difficulty and issue for the parliament.

At Quinn and Scattini Lawyers we are extremely passionate about protecting all individual's freedom and liberty. If you or someone you know requires expert legal advice or assistance with any criminal law matter, our criminal lawyers are more than willing and able to provide an unbeatable service.

Unlike some other firms - who focus on only one area of law - Q&S can offer expert solutions for all legal areas.

Access our expert lawyers for your next legal issue.

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