

Episode 12: Summary

Episode Name: Beyond the Will - Practical Considerations in Estate Planning

Guest(s): Simon Bennett

What area(s) of law does this episode consider?

Simon speaks to us, not only, about the need to have a will, but the importance of taking a holistic approach to estate planning. This includes incapacity planning, succession planning, superannuation planning, as well as of course, estate planning.

Why is this topic relevant?

The probate list in the Supreme Court of NSW is without a doubt, one of the busiest lists. 2019 saw the lodgement of 27,438 applications for a grant of probate. While the large majority of these applications were uncontested, 310 were listed as contentious matters. When you think about it, that is 310 families who, after the difficult loss of a family member, had the unpleasant task of litigating a contentious probate matter.¹

Given the number of probate applications lodged each year, and the expectation that those numbers will increase, it is important to understand, at least to some degree, the basics around estate and succession planning. This will assist those of us, who are not specialised in this area, to identify when a client is in need of specialised advice and referral to an estate planning specialist.

What legislation is considered in this episode?

This area of law is one in which a number of different pieces of legislation intertwine:

- *Succession Act 2006* (NSW)
 - In New South Wales, wills and the manner in which wills are administered are governed by the Succession Act.
 - Probate must be granted before the will of a deceased person can be administered by an executor.
 - In the absence of a will, property is distributed to the deceased's family according to a formula set out in Chapter 4 of the Act.
 - A Family Provision Order under Chapter 3 of the Act is one way in which a will can be contested.
 - Section 60 of the Succession Act outlines some of the matters considered by the Court when deciding whether or not to grant a Family Provision Order. Some of these include:
 - the relationship between the applicant and deceased, including the nature and duration of the relationship;

¹ Supreme Court of New South Wales Statistics (revised at 5 June 2020) <
[http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/2019%20statistical%20data%20\(revised%205%20June%202020\).pdf](http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/2019%20statistical%20data%20(revised%205%20June%202020).pdf)>

- the financial resources and needs, both present and future of the applicant;
 - the age of the applicant; and
 - the conduct of the applicant before and after the death of the deceased person.
- Section 95 of the Succession Act states that a person eligible to make a Family Provision claim may release his or her right to do so, subject to the approval of the Court. As Simon explains, this can be very difficult to do, and is naturally quite rare. In deciding whether to make the approval, the Court will consider:
 - whether it is to the advantage, financial or otherwise, of the person making the release;
 - whether it is prudent to make the release;
 - that the terms of the release are fair and reasonable; and lastly
 - that the person making the release sought independent advice and gave due consideration to that advice.
- *Superannuation Industry (Supervision) Act 1993 (Cth) (SISA)*
 - Superannuation does not form part of your estate, so it is important to understand and advise clients as to how super is dealt with upon death.
 - Section 59(1A) of SISA provides that a member of a superannuation fund can give notice to that fund, requiring the fund to provide benefits in respect of the member to the person mentioned in the notice, being:
 - a legal personal representative; or
 - a dependant or dependants.
 - Where a client may wish to provide their super benefits upon death to someone different, this should be specified in their will.
- *Guardianship Act 1987 (NSW)*
 - This Act covers matters of guardianship. It provides when an appointment of a guardian has effect (s 6A); who is eligible for appointment as a guardian (s 6B); the functions of enduring guardians (s 6E); the revocation of guardians by their appointers (6H) and importantly, under section 14 of the Act, the Guardianship Division in NCAT has the power to make a guardianship order where an application has been made.
- *Powers of Attorney Act 2003 (NSW)*
 - Any guesses on what this Act covers? You got it! This Act covers everything from prescribed to enduring powers of attorney, termination and review of powers of attorney.

What are some examples considered in this episode?

Simon gives us a number of examples of clients he has come across, and their experiences in this area. Here are just a few examples:

- The lawyer's role is more than an "order-taker"; Simon talks about two daughters that approached him regarding their father's will. Nothing had been left to their mother, and they wanted to understand why that was the case. When Simon approached the solicitors who had drafted the will, their response was that the father simply came in and said he wanted to leave everything to his kids. The lawyer didn't ask whether the father had a wife. This is an important question to ask for so many reasons, including because a spouse is considered 'a natural object of testamentary recognition' entitled to make a claim on the estate.
- When discussing the importance, and purpose, of a memorandum of wishes, Simon gives the example of a family business and a trading trust. He speaks of a family business, involving the parents and some but not all of their children, which is worth say, \$2m. Over time, the parents step back from the business, and its value increases to say \$12m. When the parents pass away, the child children who contributed to the growth of the business feel that they are entitled to that money, while the parents want to treat all of the children equally. Further, there are a number of tax considerations that come with deciding whether to transfer the property inter vivos or gift them under a will. A memorandum of wishes in cases of businesses can provide something of an instruction manual on how the business should be run.

What are the main points?

- Estate planning is more than just making a will. Incapacity planning, succession planning, superannuation planning and estate planning are all equally as important and should be considered at the time of making a will.
- The role of a lawyer is not to be an order-taker. This is true for all areas of law, and the drastic effects of doing so can be seen in the example Simon gave, particularly in estate planning. Ask questions, do your research and provide well-rounded advice and options to the client.

What are the practical takeaways?

- Public superannuation fund boards may determine where money and assets go when someone passes away, particularly where this has not been addressed by way of a binding death benefit form, or provision in a will. It is important to flag this with the client and help them to come up with a solution that fits the circumstances of their particular family situation. Addressing these issues in advance of death can assist and take the pressure off loved ones who are left to administer the estate.
- Things change; this is true for people individually and their families, and it should be especially true when making a will and its adjacent documents. A client's current wishes may not be their wishes 5 or 10 years down the track. Remind your client of this and discuss meeting

every few years to see if any changes or amendments are needed. As Simon aptly said, clients feel as though they are paying for the document, but the value is in the advice.

- Expectation can often be starkly different to reality. Simon reminds us that Family Provisions Act claims are considered a needs-based jurisdiction. One party may feel particularly entitled to a part of an estate, perhaps on the basis of dedication or contribution to the life or wellbeing of deceased, but it will likely come down to the needs of beneficiaries and claimants.