

Till death do us part

Client Scenario

THE INTRICACIES OF the legal system regularly confound all participants.

Unfortunately, even the simplest of situations can result in strange and totally unintended outcomes.

When wealth is involved, the difficulties are often magnified.

Many times in recent history, beneficiaries have been given tens and even hundreds of millions of dollars in gifts under an estate, but still seek to challenge the will on the basis of ‘inadequate provision’.

In one case, a husband, who lost his wife 15 years before his death, asked his son Andy and daughter Karen if either of them would consider caring for him.

Karen volunteered and devoted almost all of her spare time to doing so. In the last eight years of her father’s life, she lived in his house and was effectively his full time carer.

Pursuant to the last will, the father allocated what he understood to be virtually his entire wealth as follows:

- a his house and all its contents (approximate value \$300,000) to Karen
- b his cash (approximately \$18,000) to Andy
- c any other assets to be divided equally between Andy and Karen.

While sorting his possessions, after his death, Karen found a lotto ticket. On redeeming it, she discovered a first prize of \$12 million, unclaimed from some months earlier.

The question for the courts was, who should receive the payout?

Three arguments were raised:

- a Karen was entitled to the contents of the house; the lotto ticket formed part of those contents and therefore, she was solely entitled
- b the lotto ticket was, effectively, cash and therefore, Andy was solely entitled
- c the ticket was neither house contents, as normally understood, nor cash, and therefore, the winnings should be split equally between Karen and Andy.

It was generally accepted that, although the father and Andy had a strong, although not deep relationship, the father was forever indebted to Karen because of the sacrifices she had made, and therefore, at the very least, he would have expected her to receive half of the lotto winnings, if not entitled to all of them.

The court's decision?

The lotto ticket was akin to cash. Cash was to be distributed solely to the son, therefore 100% of the lotto proceeds went to Andy.

For anyone who owns assets of any description jointly with another person (whether it be a spouse, family member, friend or business associate), the law has what is, in theory, a very simple rule; in practice, it is anything but.

Jointly owned assets can be owned in one of two ways.

If an asset is owned by 'joint tenants', it is as if each owner actually owns 100% of the asset. For example, if two spouses own their family home as joint tenants and one spouse dies, the other spouse will have notionally been deemed to have already owned 100%. The provisions of the deceased spouse's will are therefore irrelevant.

In contrast, if the jointly owned asset is owned, in equal shares, as 'tenants in common', each spouse has legal rights only in relation to one half of the property. In that scenario, if one spouse was to pass away, the ownership of the remaining 50% depends on the provisions of the deceased spouse's estate plan. Often estate plans provide that

the remaining 50% does pass to the surviving spouse, but this need not necessarily be the case.

Some years ago, a young professional couple from Sydney, named Bruce and Lina, learned the hard way the distinction between joint tenants and tenants in common. Having lived together for 10 years, the couple decided to formalise their relationship and marry, before starting a family.

During their 10 years together, Bruce and Lina had accumulated a significant asset portfolio, including a unit in Sydney's Double Bay. Originally, they had lived in the unit, but in recent years, it had become their investment property.

They also owned a house at Wolli Creek, a blue chip share portfolio and two European cars. All of these assets were owned as joint tenants.

In their personal names, they had some, relatively nominal, superannuation entitlements as well as life insurance.

While they were not 'high net wealth' as usually defined, they certainly had accumulated an impressive array of assets and had been financially responsible at every opportunity. They had also ensured that comprehensive estate planning documentation had been put in place over six years before their marriage.

In lieu of wedding presents, Bruce and Lina requested 'mortgage management assistance' – in other words, cash gifts that would be used to reduce the home loan balance on the Wolli Creek property.

Thanks to the significant generosity of Lina's parents, a 6-figure amount was deposited in the couple's joint bank account as they left for the airport on the following Monday morning, en route to Kangaroo Island.

The flight from Sydney to Adelaide was uneventful.

The flight from Adelaide to the island was unsuccessful.

Of the 8 people on the 12-seater plane that Monday afternoon, 7 died instantaneously and the 8th, the pilot, survived, although he would never walk again. He was never able to explain why doctors discovered excessive amounts of the active ingredient of marijuana in

his blood system during routine checks not long after he was recovered from the wreckage.

After some weeks working through the emotional issues that arise from burying a child, Lina's parents, as executors of their late daughter and son-in-law's wills, began the practical process of administering the estate.

One of their first discoveries was that, despite what was set out in them, the wills were in fact irrelevant, including the parents' own appointment as executors of the estates.

Each spouse had appointed the other as the executor and sole beneficiary of the estate, and had stipulated that if they failed to survive each other, Lina's parents would be the executors and the estate would be divided equally between the two sets of families. What they did not provide for was what would happen if the couple were to marry, which, of course, they had.

Regardless of who is nominated as a beneficiary, a will is generally automatically revoked by marriage, unless the will expressly provides otherwise. The wills here had no reference to marriage and were therefore, revoked on the Saturday of the wedding.

By the time of the light plane crash on the Monday afternoon, the newly wedded couple effectively had no estate plan.

Where there is no estate planning documentation in place, the government determines how wealth is to be distributed and the key issue, in relation to jointly owned assets, is whether they are owned as joint tenants or tenants in common.

For Bruce and Lina, virtually their entire asset portfolio was owned as joint tenants.

Where a couple have assets owned as joint tenants die in the same incident, the law has a 'tiebreaker' rule that deems the younger of the couple to have in fact survived the accident by 24 hours.

This notional additional day of life provides the pathway for determining who is entitled to all of the jointly owned assets.

In other words, the last joint tenant to die will own 100% of all assets and, therefore, that estate plan regulates the distribution of all wealth.

In this case, Bruce was some 9 months younger than Lina, so the Double Bay unit, share portfolio, Wollie Creek property and two motor vehicles were, for the purposes of the estate administration, solely his. The cash at bank was also solely his, including the significant 6-figure deposit that had been sourced largely from Lina's parents just a couple of days before the plane crash.

As Bruce died without a valid will, the government rules (namely the intestacy provisions) applied and, under these rules, all his wealth passed to his parents.

The relationship between the two sets of parents had always been at best uncomfortable. As the exact legal position in relation to the assets began to unravel, the relationship became positively hostile, as Bruce's parents refused to share any of the wealth with Lina's parents, and would not return the cash gift that they had made, nor the cash gifts from the wedding guests.

The complete disillusionment of Lina's parents and wider family was heightened further when their proposal that the majority of the wealth be donated to a foundation to support parents or families who lose children at a young age was rejected.

As it turned out, the rejection was partly driven by the fact that Bruce's parents, who had been estranged for some years before the accident, were embarking on what became an extremely drawn out and costly divorce settlement.

So, rather than using the combined wealth of their son and daughter-in-law to provide for other families in the time of need, a significant proportion of the wealth went to cover legal fees.
