

## Death In Paradise

One thing which has come to concern me very much is how we all make provision for our ultimate demise. I once went to an estate planning conference where one of the practitioners expert in the field read out a series of advertisements from local suburban newspapers by local solicitors and pointed out their ineffectiveness. "They are trying to sell death" he said "Who is interested in that". They should be trying to sell and encourage provision for "life".

I suspect a lot of the problems associated with organising Wills and estate planning relate to the problem we all have in communicating the issues involved to the community. This is compounded by the fact that it is not really an issue that any of us want to talk about very much – we would really all rather prefer that it went away – and if we do think about it – we think we will deal with it on another day.

This "other day" is usually at some indeterminate time in the future which simply results in us not dealing with the problem at all. Unfortunately it is a problem which will not go away and will be dealt with – either in our lifetimes – or by those left behind afterwards.

Accordingly I thought it might help if I went through some of the experiences that I have had, as all lawyers do, in handling estates to give you some sort of insight into the problem and how it manifests itself.

One story happened in the early 1980's and although to some extent it has been cured by some recent amendments to the Succession Act, who needs an application to the Supreme Court with all the possibilities that other problems may occur or it may go wrong, together with the expense to rectify something that should have been fixed in the first place.

### **BILL'S STORY**

"Bill was a good bloke - shame about his family!"

#### ***The Family***

Bill was a particularly nice bloke. I met him through the local Club where he was the President. He had a pleasant-smiling face with blue eyes, a deep wheezing laugh and a bit of a beer tummy. He could have been anywhere between 45 and 55 although he did have a surprisingly young wife and a very pretty 8 year old daughter, Melody. He was kind and friendly to everyone at the Club and nothing was ever too much trouble for him. He liked a beer and a smoke - and even though he had a heart problem everyone would shout him at the bar - and he would often have one more "just to be sociable".

He had his own business with a partner and worked very hard at building up the Cairns branch of a national franchise. Things had been pretty tough for the last three to four years but he anticipated good times ahead. Like a lot of people he moved up from down South - and although he didn't say anything - I had the feeling that times had not been so good down there.

Apart from his health problems he was a good father, well respected in the community and an all round good bloke.

We were all very saddened when suddenly an asthma attack had him hospitalised for a couple of weeks. After about two weeks we all began to realise that it might have been a bit more serious than we thought. Still Bill was Bill - he'd be right. We sent flowers and quite a few of us wandered into say "g'day" to him. I meant to go as I was very fond of him but unfortunately I had a large court case out of town, so I had planned to go the following weekend.

### ***The Will***

Unfortunately the following weekend didn't come for Bill. A heart attack brought on by a bad asthma attack or vice a versa meant he died during the week.

The first I knew about the very sad news was the arrival of his young wife in my office clutching a bit of handwritten paper on which Bill had tried to write his Will.

He and the hospital wardsmen had done their best. You could tell from the way it was written that he really wasn't very well at the time - but unfortunately it wasn't good enough<sup>1</sup>. Why he didn't call me or get Gwen to call me I'll never know. I would have come straight away. Anyway, whilst it clearly showed what Bill wanted to do it wasn't good enough to meet the formal requirements and the effect of it was he died without a Will (or Intestate). He had only one witness.

### ***Rules of Intestacy***

I assured Gwen that it shouldn't be too bad. A wife and one child meant that the estate would be split equally between the wife and child according to the "rules of intestacy"<sup>2</sup>.

Gwen would be entitled to half - and the balance would be held in Trust for 10 years until her 8 year old daughter came of age<sup>3</sup>.

"That's a bit awkward" she said. "There's not a lot of money, and I really do need all of it now to help me get re-established so that I can properly look after Melody in the future. I know it's what Bill wanted."

I knew that from Bill's Will-making efforts but unfortunately I had to advise her that she could only have half the money. The rest would have to be held in Trust for Melody, although the income from the capital could be applied for Melody's advancement in terms of paying for school fees, uniforms, education expenses and the like<sup>4</sup>.

---

<sup>1</sup> Section 9 - The Succession Act (Qld) 1981. See also Judgement of MacPherson J N Re: Henderson No. 231 of 1985 (unreported, Queensland Supreme Court).

<sup>2</sup> Second Schedule Part 1 Item 2 - Succession Act (Qld) 1981.

<sup>3</sup> Section 5 - Age of Majority Act 1984.

<sup>4</sup> Sections 62 - 63 Trusts Act 1973 - 1979 (Qld).



The \$100,000 estate was already beginning to look a little bit smaller. Poor old Gwen was down to \$50,000 which was not a lot in terms of the requirements of a young family and the debts which Bill had left.

### ***Joint Tenancy***

Gwen was cheered up by the fact that their house was held as joint tenants and she took by right of survivorship automatically without it having to be given to her in a Will. Accordingly at least she owned her own home and the Building Society had made sure that Bill had a life policy sufficient to cover the mortgage owing on the house. At least that's what we all thought.

### ***Duty of Disclosure in Insurance***

Unfortunately Bill hadn't been entirely frank with the insurance company at the time that he filled in his proposal for insurance. He probably just thought he'd gloss over things, or was worried that the Building Society wouldn't give him the loan if he didn't get his insurance.

In any event the result of it was that he hadn't disclosed his medical condition and the policy was void<sup>5</sup>. An insured has all the knowledge of his/her affairs and the insurance company must accept what is said at face value. In exchange for this you owe an absolute duty of good faith to the Insurance Company.

Things were looking reasonably grim by this stage as their small \$130,000 house had a \$80,000 Building Society mortgage.

However Gwen could use her \$50,000 to pay off the balance and felt if she went back to her old job as a Secretary she would be able to meet the mortgage payments on the \$30,000 still outstanding.

Of course it would have been much nicer if she could have used the \$100,000 in cash and savings to pay out the mortgage.

She and Melody could have lived in an unencumbered house with \$20,000 put away for a rainy day. But, she was determined to make the best of it - and frankly had no choice.

### ***Dissolution of Partnership***

Anyway, there was still Bill's interest in his partnership with his good friend Frank which held the national franchise for the business that they had been building up together. "Frank never worked as hard as Bill" Gwen confided "but never mind Bill always knew the business would be worth a lot of money in the next year or so and would provide quite adequately for our old age". He only made a living out of it while he was working there but Gwen planned to continue in business with Frank and that would give her a job and pay for the groceries.

---

<sup>5</sup> Section 13 - Insurance Contracts Act (Commonwealth) 1984. "The Duty of the Utmost Good Faith".



Unfortunately Bill had been as casual with his business affairs as he had been with his Will. There was no formal partnership agreement with Frank.

This meant that the partnership was automatically dissolved on death.

So Gwen didn't step into Bill's shoes to take over the partnership as she had hoped. We had a long discussion with Frank. Unfortunately, Gwen and Frank never really hit it off. However Gwen thought that she would make the best of it and make an extra effort and try and get on with Frank for the good of the business. Frank had other ideas. "Look, Gwen, I really do not want you in the business" he told her.

I had the sad duty of advising Gwen that because there was no partnership Deed between Bill and Frank which provided for the continuation of the business in the event of either party's death we fell back on the statute law. That provided for the dissolution of the partnership immediately upon the death of a partner<sup>6</sup>. Accordingly the business was dissolved and Gwen had no right to go back there in Bill's place. Nor did she have a job, nor did she have any income.

### ***Value of business - Buy out formula - Keyman Insurance***

Gwen thought she would be paid out for Bill's share on the dissolution of the partnership. That was certainly true. Unfortunately whilst the business had lots of promise and potential that had not as yet been realised. It had only really been making enough to pay Bill and Frank a wage, had no clients who were contractually obliged to it, had cheap rented premises, a leased truck, and its main asset was the franchise.

The accountants advised that on winding up the business the value was really next to nothing.

I took over the negotiations from Gwen to try and get as much as I could for her from Frank on the dissolved business. It wasn't like the usual situation where two business partners go their separate ways. Bill was dead and all his goodwill and contacts and connections died with him. I did the best I could but \$5,000 was all Frank was offering. I urged him to double it bearing in mind the business potential. "Potential is potential - not hard cash now" said Frank. "Look, Bill was a good bloke but I've got my own family to think about".

Unfortunately Gwen had to make do with the \$5,000 nominal payment that I was able to get out of Frank. At least it was better than the theoretical nothing the Accountant said the business was worth. Things are only worth what people will pay for them - and no one wanted a half interest in a franchise with Frank. A price formula in the Partnership together with Keyman Insurance would have saved a lot of heartache. To be fair to Frank it would be a little hard to expect him to pay for "dead" goodwill.

### ***More about the Rules of Intestacy***

---

<sup>6</sup> Section 12 - Partnership Act 1984.

I would like to tell you this story had a happy ending but there was more bad news in store. Bill had married as a young man some 25 years previously and divorced approximately 24 years prior to his death. There had been one child of that union. Bill had tried his best to see her and be involved with her but his former wife was pretty bitter about things and would not allow him access and in the end Bill had given up.<sup>7</sup>

He had rebuilt his life with a new wife and a young daughter and come to Cairns ten years prior to his death.

As a matter of courtesy Gwen had dropped his former wife a note to let her know Bill had died.

It all proved rather unfortunate. A letter arrived from Bill's first child by his first marriage asking whether he had left a Will and pointing out that if he had not "under the Rules of Intestacy" she was entitled to a third of the estate.<sup>8</sup> As a 24 year old she was entitled to the money straight away and did not have to wait ten years until she attained her majority like Melody did (3). Suddenly Gwen's \$50,000 became \$33,500. Melody's money dropped from \$50,000 to \$33,500 as well.

Gwen was faced with a \$50,000 mortgage - not a \$30,000 mortgage if she wanted to keep the house.

On a secretary's wage with the rising interest rates then prevalent it was really more than she could manage. Bill's house and the garden he had so carefully tended had to be sold. Gwen and Melody had to move into a two bedroom unit in a large apartment block. The pets had to go and so did Melody's treehouse together with all the friends she'd made in the nice neighbourhood in which they had previously lived.

So no happy ending.

There was, in the sense that Gwen didn't let any of this get her down, and Melody has grown into a well mannered cheerful teenager who is the spitting image of her father.

As Gwen said "At least I'm not out on the street. He was such a good bloke but why did he have to go and leave things like this!"

This short but true story has taken you on a journey through The Succession Act; The Trusts Act; The Family Law Act; The Age of Majority Act; The Insurance Contracts Act and the Partnership Act. We live in a legal world.

If there is a moral to this story it is that being a good bloke is not enough.

This is not a legal text book but since Bill's story happened there has been an amendment to the Succession Act 1981<sup>9</sup>

---

<sup>7</sup> Section 63 E + 63 F - Family Law Act 1985.

<sup>8</sup> Second Schedule Part 1 Item 2 - Succession Act (Qld) 1981.

<sup>9</sup> Succession Act (Qld) 1981 as amended S31.



Without going into it in enormous detail the effect of this has been that Bill's testamentary instrument would have been capable of being recognised and Bill's testamentary intention given effect to. Whilst this amendment would have allowed some of Bill's problems to be cured – the insurance difficulty would still be there. Moreover an application to the Supreme Court is not an inexpensive exercise and might well have been opposed by those with a vested interest in doing so. It is then left to the discretion of the judge.

How much better for the problem to be avoided in the first place by proper arrangements being made so that what you want to happen does happen.