

Proprietary estoppel and the burial licence

‘The best way to keep one’s word is not to give it.’¹

The decision of *Yu & Anor v Chief Executive, Dept of Justice & AttorneyGeneral* [2016] QCA 54 potently demonstrated the impact death has on a family in the context of making funeral arrangements.

Increasingly, families are making plans in advance in the expectation that it will reduce the trauma experienced on the loss of a loved one. To that end, the matter of *Vosnakis v Arfaras* [2015] NSWSC 625, *Vosnakis v Arfaras* [2016] NSWCA 65 (*Vosnakis*) shows that even when plans are made in advance, the law associated with a right of burial is complex and often involves resort to common law and equitable remedies for resolution.

Vosnakis involved the propounding of contract law and proprietary estoppel principles, where the parties disputed the right to hold a certain burial licence. The reading of *Vosnakis* is assisted by some background to the law of burial rights.

There is no ownership in a dead body – “The right to possession of a dead body exists only for the purpose of its proper disposal.”² If a person has named an executor in his or her will and that person is ready, willing and able to arrange for the burial of the deceased’s body, the person named as executor has the right to do so.³ The personal representative is either an executor appointed in a valid and binding will,⁴ or an administrator appointed by the Supreme Court.

A right of burial is a mere licence to inter a deceased’s remains in a particular plot. It is irrevocable once the remains have been interred in that licensed plot.⁵ Accordingly, once the remains have been interred in the plot the holder of the right of burial has no further rights.

It is not a proprietary right in land.⁶ It is a contractual right granted by the cemetery body to the holder of the right, for the holder to nominate who may be interred in that particular plot.

A right of burial is a chose in action, and as such can be the subject of transactions. However, once the right of burial has been exercised, then the right to control the interment site passes to the legal personal representative of the original deceased (buried in the plot),

not the legal personal representative of the person who is the holder of the right of burial.⁷

In *Vosnakis*, the deceased was the wife of Mr Vosnakis. Her mother, Mrs Arfaras, held a burial licence to a double plot at the Eastern Suburbs Memorial Park (ESMP), Matraville, NSW. There was a further licence to an adjacent double plot, in which Mr Arfaras’ mother was buried. Mrs Arfaras offered Mr Vosnakis the burial licence to the empty double plot, on the basis that he would bury his wife (her daughter) in that plot and that he could later be buried in the plot with his wife. Mrs Arfaras stated she would have her body interred in the plot with her mother.

It was later revealed that Mrs Arfaras’s mother owned the burial licence to the plot in which she was interred and it would be necessary for a grant of probate to issue to Mrs Arfaras to give effect to that arrangement. Various discussions took place over several days, in front of witnesses, to this effect.

Mrs Arfaras, however, did not sign the transfer of the licence for the empty plot to Mr Vosnakis. The parties attended upon the funeral arranger and ESMP to arrange for Mrs Vosnakis to be buried in the disputed plot. After the burial, Mrs Arfaras wavered in her commitment to transfer the licence to Mr Vosnakis.

Mr Vosnakis instructed his solicitor to commence the process of Mrs Arfaras obtaining a grant of probate of her mother’s will. It was at this point that Mrs Arfaras reneged on the arrangement, refusing to proceed with the grant process. Consequentially, Mr Vosnakis commenced proceedings to have the burial licence transferred to him, pleading two grounds, one based in contract law, the other in estoppel.

The court at first instance found the particular facts did not give rise to a contractual relationship (at [147]), in so far as the facts did not give rise to an intention to create a legally binding arrangement, nor was there any consideration (at [149]). However, the court did find that Mrs Arfaras induced Mr Vosnakis into burying his wife in the plot (at [153]) and by doing so he effectively relinquished his right to bury his wife elsewhere.

Mrs Arfaras took the matter to appeal, with Mr Vosnakis filing a cross appeal on the contract claim. The Court of Appeal concurred with the court of original decision.

Of note, the appeal court explores the precision with which the estoppel was formulated in the primary judgment, in particular whether it was a proprietary or promissory estoppel.

The primary decision provides an analysis of the law related to burial rights. The appeal decision provides a detailed analysis of the application of estoppel, especially the difficulty in extrapolating the different types of estoppel. In doing so, it analyses (at [82]-[114]) the six essential elements of equitable estoppel articulated in *Waltons Stores v Maher*⁸ in the context of the facts of this matter, concluding that the court in the first instance did not err.

Probate practice update – Brisbane Registry

Queensland Law Society has commenced regular consultation with the Brisbane Probate Registry,⁹ expanding the meetings to include the probate registrars for Rockhampton, Townsville and Cairns, with the objective of achieving greater engagement between the profession and the courts.

We thank each of the court probate registrars for their insight and assistance. This month we are pleased to advise that the Brisbane Registry has approved for publication the following protocol for processing court-approved statutory wills.

Statutory wills protocol – Brisbane Registry

This protocol is intended to set out the administrative process for obtaining an order for a statutory will on the day of the court application in the Brisbane Registry. It is not intended to be an exhaustive list:

- The solicitor emails the draft order in Word to the associate and judge.
- The s21 application is heard in court.
- The court makes an order pursuant to s21, *Succession Act 1981* (Qld).
- If there are any revisions to the draft order during the application, the solicitor makes revisions and emails the draft order in Word to the associate and judge.
- The associate returns the order and the file to level 1 – Records Management, Courts.
- The associate contacts the probate registrar to advise of the order.



with Christine Smyth

- The solicitor calls the will maker and the probate registrar speaks to the will maker or the will maker's carer to confirm that the will maker is alive.
- The will is signed and it is entered into the Register of Statutory Wills by the probate registrar

As to the correct attestation clause for a statutory will, the Supreme Court Registrar of Probate (Brisbane Registry), Leanne McDonnell, has approved the following:

"Signed for and on behalf of [will maker's name] as his/her last Will by [Registrar's name] a Registrar of the Supreme Court of Queensland at Brisbane and sealed

with the Seal of the Court as required by section 26(1)(b) of the Succession Act 1981 pursuant to an Order of the (Hon) Justice [Judge's name] under section 21 (1) of the Act made on [date] in processing number [court number] of [year].

Dated [date]

*Registrar of Probates,
Supreme Court of Queensland*

A Word template for the attestation clause of a statutory will may be downloaded at qls.com.au > Knowledge centre > Areas of law > Succession law.

Christine Smyth is deputy president of the Queensland Law Society, a Queensland Law Society accredited specialist (succession law) and partner at Robbins Watson Solicitors. She is a member of the QLS Council Executive, QLS Council, the Proctor editorial committee, STEP, and associate member of the Tax Institute.

Notes

- ¹ Napoleon Bonaparte.
- ² *Calma v Sesar & Ors* (1992) 2 NTLR 37;106 FLR 446; *Robinson v. Pinegrove Memorial Park Ltd & Anor* (1986); *Beard v Baukham Hills Shire Council* (1986) 7 NSWLR 273; *AB v CD* [2007] NSWSC 1474.
- ³ *Smith v Tamworth City Council* (1997) 41 NSWLR 680 at 694, Young J.
- ⁴ *Ibid*; see *Succession Act* requirements for a will.
- ⁵ See 15 points enunciated in *Smith v Tamworth City Council* (1997) 41 NSWLR 680 at 694, Young J.
- ⁶ *Beard v Baukham Hills Shire Council* (1986) 7 NSWLR 273.
- ⁷ As above.
- ⁸ [1988] HCA 7; (1988) 164 CLR 387.
- ⁹ The meetings are an initiative of the QLS Succession Law Committee, led by its chair, Gary Lanham, and assisted by policy solicitor Louise Pennisi.

WR | WillRegistry *Let your will be done*

Australia's Premier Will Registry

Providing a bridge between the public and legal practitioners.



Join Before 30 June 2016 and **Receive 6 Months Free!**

12 Good reasons to choose Will Registry

- Unlimited wills registered for one membership fee
- Added to our public 'Find a Solicitor' database
- Solicitor profile page - linked to 'Find a Solicitor'
- Annual reminder on updating will details
- Free access to will search match details
- Will data entry service
- Free search of wills database (Probate issue mitigation)
- Will reference file locator (your office backup)
- Exposure to potential new clients
- Public exposure to wills you are holding
- QLR probate notice - email notification
- BDM death registration - email notification

Would You Like To Know More? Please visit us at www.will-registry.com.au