

Our will to travel

The conflict of laws and intestacy

with Christine Smyth



*"I haven't been everywhere, but it's on my list."*¹

Australians are a peripatetic lot. In 2012, a record-breaking 8.2 million Australian residents travelled abroad.²

Add to that our reluctance to make a will³ and it is not surprising conflict of laws is a trending feature in estate administrations. *Application of Perpetual Trustee Company Ltd; Re: Estate of the late Evelyn Mary Dempsey* [2016] NSWSC 159 traverses the many issues arising when intestacy and uncertainty of domicile intersect, giving us a comprehensive analysis on how to approach estate administrations with these features.

Evelyn Mary Dempsey (the deceased) was born in Queensland, but spent much of the second half of her life in England and New South Wales,⁴ dying in an institution in England in 1982. She left an Australian will dated 1 April 1968, in which she left the residue to two individuals who predeceased her, creating a partial intestacy.

This raised the question, through an application for judicial advice, as to which intestacy provisions applied to the residue of the estate – NSW, Queensland or England?⁵ Relevantly, the bulk of her assets were Australian shares,⁶ with a small portion of her assets in England.⁷

The deceased did not marry, had no issue, was an only child,⁸ and was survived by at least⁹ four cousins.¹⁰ She travelled extensively, basing herself in the UK and travelling to various places throughout the world, but frequently spending time in NSW and Queensland.

Four years before her death she became incapacitated and was admitted to a UK facility, at which time her affairs were placed under administration. As a result, the court was asked to identify her domicile. Through paragraphs 168-200 there is a detailed consideration of her lifestyle, investments, testamentary dispositions and capacity, with the court ultimately finding¹¹ that the plaintiff executor would be justified in treating the deceased as domiciled in Australia.

However, uncertainty prevailed as to whether she was domiciled in Queensland or NSW,

with the court advising that further investigations were required. To that end the decision is highly instructive as to the general principles of domicile and the treatment of shareholdings, affirming that shareholdings are a moveable asset.¹²

Probate update – Cognitive illnesses, wills and affidavit of testamentary capacity¹³

Increasingly, the Probate Registry is processing applications for a grant in circumstances in which the testator's death certificate cites a cause of death related to an illness or condition affecting cognition.

Frequently, the death certificate fails to identify the length of time the testator suffered from the condition. This can cause difficulties in the process of applying for a grant by raising red flags for the registry as to testamentary capacity, often resulting in requisitions. Practitioners alive to these issues are aware that differing remedial actions have been suggested in the List of Probate Requisitions and troubleshooting guide for this issue.

As part of QLS advocacy on succession law matters, we liaised with the Supreme Court Registrar of Probate, Leanne McDonnell (Brisbane Registry), to seek guidance and clarity as to what the registry requires in the circumstances.

Ms McDonnell advises that if a will was made 10 or more years before death and there is a cognitive illness listed on the death certificate with unspecified duration, the registry is unlikely to order a requisition. If a will was made less than 10 years before death, the registry is unlikely to order a requisition if the application is furnished with an affidavit deposing to testamentary capacity as per paragraph 4 of Form 105 and Form 106.

The registrar advises that practitioners *should* follow the probate requisition list which requires the following remedial action:

"Cause of death – Testamentary capacity

"25. A cause of death namely <~State cause of death~> mentioned in the Death Certificate raises a question of testamentary capacity. The duration of this illness

specified in the death certificate raises the possibility the will may have been executed during this period.

"Action required:- File a further affidavit by the applicant/s with the details as required by para 4 of form 105 of the *Uniform Civil Procedure Rules 1999*."

Note that the supporting affidavit of testamentary capacity must be completed by the applicant/s, (that is, the executor, administrator etc.). However, practitioners may obtain an affidavit of testamentary capacity from a medical practitioner if they consider the circumstances of the case warrants.

The registry is revising the troubleshooting guide, but in the interim practitioners are directed to follow the List of Probate Requisitions (accessible at courts.qld.au > Wills and estates (probate) > Requisitions Estate Matters).

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Notes

¹ American writer, filmmaker, teacher and political activist Susan Sontag.

² auspost.com.au/how-australians-travel.html.

³ Some estimates say that at least 45% of Australians die without a will, tag.nsw.gov.au/wills-faqs.html.

⁴ At [6].

⁵ At [57].

⁶ At[23] which had increased in value from the date of her death of \$698,455.19 to \$6,340,672.89 as at 1 March 2016.

⁷ This created the issue of whether English Inheritance Tax applied, not discussed here.

⁸ At[32].

⁹ A comprehensive genealogical analysis was undertaken by the solicitors with significant portions referenced in the judgment.

¹⁰ At [90].

¹¹ At [235].

¹² At 170.

¹³ Thank you to Supreme Court Registrar of Probate, Leanne McDonnell (Brisbane Registry), for her assistance with this issue and to QLS policy solicitor Louise Pennisi for her liaison assistance.