

Worrall Moss Martin News

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Presumption of Order of Death in Simultaneous Death Cases

If two people die together, and it cannot be determined who was the first to die, what happens? If they were entitled to all or part of the other's estate, does the law step in to determine who died first?

In *Re Tucker; Nunan v Aylward* [2019] VSC 210, the Supreme Court of Victoria recently answered these questions in circumstances where a couple were stabbed to death in their home, and there was contradicting evidence about who was the first to die.

Facts: Gregory John Tucker ("Mr Tucker") and his domestic partner, Korinne Aylward ("Ms Aylward"), were murdered on 8 December 2013. Mr Tucker and Ms Aylward both died without a Will. Mr Tucker's estate was estimated to be worth \$3.4 million dollars, and Ms Aylward's was estimated to be worth \$120,000.

The issue of who was first to die was a critical issue in this case due to the operation of the Intestacy Provisions in the *Administration and Probate Act 1958* (Victoria), which provided that:

- if Ms Aylward was the first to die, the estate would be distributed equally between the couple's three minor children, and Mr Tucker's three adult children from a previous relationship; but
- if Mr Tucker was the first to die, the couple's three minor children would receive approximately \$1.2 million more than the adult children.



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Lawyer



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Director

Relatives of the couple applied to the Supreme Court of Victoria for a determination of who died first, for the purpose of determining what should happen to their respective estates.

Orders Sought and Expert Evidence: Mr Tucker's adult children sought a declaration that Mr Tucker had survived Ms Aylward, and provided expert medical evidence in support of the application.

Ms Aylward's mother, on behalf of the deceased couple's three minor children, opposed the application and provided expert evidence that it could not be determined who died first. She argued that the presumption in section 184 of the *Property Law Act 1958* (Victoria) should be applied, with the effect that (as the older person) Mr Tucker had died first.

Despite the conflicting evidence, as a result of discussions at mediation, the parties submitted a 'global' settlement for the Court's approval (as it affected the rights of the minor children) which included:

- an agreement about the order of death;
- a proposed division of Mr Tucker and Ms Aylward's estates (adjusted in favour of the adult children); and
- full releases from all parties from any further claims (including family provision claims under the Part IV of the *Administration and Probate Act 1958* (Victoria)).

The Court informed the parties that a determination was required about the order of death before any settlement could be approved, and ordered them to provide evidence for the purpose of making that determination. The Court also appointed an independent party to represent the interests of the minor children, and provide confidential advice to the Court.

The Law: Where simultaneous deaths occur, and the deceased persons are beneficiaries of each other's estates, it is necessary for the order of death to be determined so that the estates can be administered. The statutory presumption in relation to the order of death only applies where **the Court** determines the order of death is uncertain (1).

In Victoria, section 184 of the *Property Law Act 1958* (Victoria) provides:

"Presumption of survivorship in regard to claims to property

In all cases where, after the second day of December One thousand and nine hundred and twenty-five, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the Court), for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder."

The Decision of the Court: The Court held that the order of death of Mr Tucker and Ms Aylward was uncertain, and applied the presumption in section 184 of the *Property Law Act 1958* (Victoria) with the effect that Mr Tucker (as the older person) had died first.

The Court however refused to approve the proposed settlement, noting that it had not been provided with sufficient evidence to enable it to do so. The Court ordered the parties to proceed with the administration of the respective estates of Mr Tucker and Ms Aylward, and noted that those beneficiaries (being adult children) who wished to claim further provision should do so through the usual procedure under Part IV of the *Administration and Probate Act 1958* (Victoria).

Relevance in Tasmania: The corresponding legislation in Tasmania, which contains the same presumption as the Victorian legislation, is the *Presumption of Survivorship Act 1921* (Tasmania).

Although the issue of order of deaths would have still arisen, and required determination by the Court, if Mr Tucker and/or Ms Aylward had completed Wills setting out their wishes for the distribution of their respective estates, this matter could have been dealt with more simply and avoided the high legal costs that were incurred (the Court recorded that the costs to date of the adult

children in this case were \$85,000.00).

While this is an unusual situation, it highlights the importance of couples making a plan for what should happen to their estate when they die. This is particularly important where one or both have children from a previous relationship.

Worrall Moss Martin Lawyers has specialist skills and experience in estate planning, estate administration and estate litigation. We urge our clients to ensure that they have a comprehensive estate plan that ensures their assets will pass in accordance with their wishes. Please contact Kimberley Martin, Ashleigh Furminger, Kate Moss or Hannah Boxall if you have any questions about the matters set out in this article.

(1). *Re Comfort; Re Tinkler; Equity Trustees Executors & Agency Co Ltd v Cameron* [19147] VLR 237 ('*Re Comfort*'); *Re Brush* (n 5); *Re Zapullo* (n 5).

Can a Person Gift (Un-Subdivided) Sections/Parts of a Property in their Will?



David Bailey
Senior Associate

In the Western Australian case of *Fremantle Lawyers Pty Ltd & Anors v Ivan Josip Sarich As Executor of The Estate of Ivan Branimir Saric* [2019] WASCA 48, the Court of Appeal of the Supreme Court of Western Australia considered whether a Will made an effective gift of un-subdivided land. In particular, the Court considered whether a gift in a Will breached section 135(1)(a) of the *Planning and Development Act 2005* (WA) ("the PD Act"), which prohibits subdividing land without the approval of the Western Australian Planning Commission ("the Commission").

The Facts: The deceased died in 2015. He left a Will dated 28 April 2011. Probate of the Will was granted to the deceased's son, Ivan Sarich ("Ivan"). At the time of his death, the deceased owned land, comprised of a single 'lot' of approximately 10 acres, in Caversham in Western Australia.



Robert Meredith
Senior Associate

In his Will, the deceased gifted:

- part of the lot, including a house an approximately 3 acres of land to Ivan and to Ivan's children in equal shares as tenants in common; and
- the remainder of the land, a further 7 acres, between five beneficiaries in equal shares as tenants in common.

Ivan, in his capacity as Executor, commenced proceedings in the Supreme Court of Western Australia seeking a declaration about the proper interpretation of relevant parts of the Will.

The Issues: The following issues were raised in the proceedings:

- was the gift of the land void for uncertainty?
- were the gifts of the land illegal and void, for breaching the PD Act?
- was the gift of the "remainder of the land" effective to dispose of the residue of the deceased's estate?

If the gifts in the Will were found by the Court to be void, illegal or ineffective, it would have resulted in the gifts of the land passing to different beneficiaries than as directed in the Will.

Decision at First Instance: Master Sanderson, at first instance, determined that the clauses were not void for uncertainty, but that they were 'void and of no effect' as they were in breach of the PD Act, and that the Will did not effectively dispose of the residue of the estate.

The lawyers who prepared the Will appealed the Master's decision.

Decision of the Court of Appeal: The Court of Appeal comprehensively reviewed the relevant case law and legislative provisions. In two separate judgments, the Court held that:

- nothing in the PD Act prohibits a Willmaker from gifting part of a lot by Will, and that doing so does not constitute 'subdividing' the lot; and
- a person does not 'subdivide' any lot, within the meaning of the PD Act, until they have lodged, with the Commission, an application for the creation and registration of new certificates of title, accompanied by the requisite plan or diagram.

The Court of Appeal held that the gifts of land in the Will involved the creation of equitable interests in the lot. The legal title to the lot passed to the Executor on trust to be dealt with in accordance with the Will, and the Executor had power to apply to the Commission for approval to subdivide the lot in accordance with the terms of the Will. If the approval was obtained, the Executor could then carry out the subdivisions and transfer the legal title. The Court observed that any inability to transfer legal title did not affect the equitable interests held by the beneficiaries.

Relevance in Tasmania: Although the Tasmanian legislative provisions are not identical to those in Western Australia, there are a number of provisions in the equivalent Tasmanian legislation that court lead to a similar outcome if this case had arisen in Tasmania.

It is important that anyone considering gifting portions of un-subdivided land obtain legal advice to ensure that the terms of their Will are not void for uncertainty, or in breach of Tasmanian planning laws.

Worrall Moss Martin Lawyers has specialist skills and experience in dealing with property subdivisions, both during life and as part of a direction and gift in a comprehensive estate plan. Please contact Robert Meredith, David Bailey or Kimberley Martin if you wish to discuss your options in subdividing property, or gifting property on your death.

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