

INDEX

Victoria's new ademption exception	1
When does a disability necessitate greater provision?.....	2
Sacks v Klein [2011] VSC 451	2

Victoria's new ademption exception

"Ademption" refers to the failure of a specific gift under a will because at the date of death, the deceased no longer owns the subject matter of the gift. For example, a gift in Adam's will of "my house at 123 Brown Street, Box Hill" would fail if Adam sold the house before he died.

Moores Legal recently acted in an estate matter (*Simpson v Cunning*) where the deceased's house (that was specifically gifted to her son in her will) was sold by her attorney prior to death. When the house was sold, the deceased lacked capacity and could not amend her will to account for the disposal of her house.

The same issue arose in an earlier Victorian case, *Mulhall v Kelly*, which was the subject of an article in our Elder Law briefing published in 2007. Because of the circumstances in which that decision was made, *Mulhall v Kelly* did not provide a binding rule for future cases.

Simpson v Cunning provided the Court with an opportunity to determine whether *Mulhall v Kelly* should be followed, or whether a more narrow test (which applies in the UK) should apply in Victoria.

Having reviewed the evidence, Hargrave J determined that there should be a broad exception to ademption which will apply in all cases where there has been the disposal of a specifically gifted asset prior to death where:

1. The deceased lacked testamentary capacity;
2. The Court is satisfied that the deceased, if possessed of testamentary capacity, would have intended the beneficiary of the asset in the will to receive the remaining proceeds of sale; and
3. The remaining proceeds of sale can be identified with sufficient certainty.

On this basis, the Court ordered that the deceased's son should receive the remaining proceeds of sale of the house.

Although this new rule will operate to save a gift in certain (limited) circumstances, there are practical steps which can avoid the problem ever arising, such as:

- Avoiding specific gifts – use general words of distribution;
- Providing for contingencies – such as a gift of a property "or its sale proceeds or any substituted property purchased with the sale proceeds";

Editorial

Welcome to the final Elder Law briefing for 2011.

In this edition we continue to focus on the development of the law by the Courts and a number of recent cases in the area of family provision claims.

The common theme that emerges through the matters discussed in this briefing is the importance of careful planning and competent advice when contemplating the preparation of a will and when considering taking action against an estate seeking further provision.

Andrew Simpson
Principal
Elder Law

Sacks v Klein [2011] VSC 451

Two brothers purchased an investment property in East St Kilda as joint proprietors. The mortgage loan was made to them jointly and severally. One brother died and the survivor claimed to be entitled to be registered as the surviving sole proprietor. The administrator of the deceased's estate sought a declaration that the survivor held the land on trust for himself and the plaintiff as tenants in common in equal shares.

This case highlights the important difference between owing real estate as joint tenants and owning real estate as tenants in common.

Each owner of property held as joint tenants has an entitlement to the whole asset. Therefore, if one joint tenant dies, the surviving joint tenant continues to own the whole asset (ie, the interest of the deceased joint tenant dies with him/her). Conversely, each holder of an asset held as tenants in common has a distinct interest in the asset that can be disposed of via their will.

The presumption of joint tenancy ownership can be rebutted in favour of ownership as tenants in common in some circumstances.

In this case, Justice Hargrave held that the brothers purchased the land as a joint business undertaking.

Despite finding that the brothers agreed to be registered as joint tenants, Justice Hargrave held that the brothers intended to divide their interests in the flat equally, thereby rebutting the presumption of joint tenancy.

Key points:

When purchasing a property or undertaking estate planning, it is important to consider the way in which property is purchased or owned.

If you own property with another person as joint tenants and it is not your intention for your interest to pass to the other owner should you predecease him/her, you should consider altering the ownership arrangements.

Andrew Meiliunas
Lawyer

- Giving a monetary gift (whether indexed or not) of equivalent value to the property;
- Providing specific directions to an attorney – such as a direction to fund an accommodation bond otherwise than by selling the property.

Chris Groszek
Lawyer

When does a disability necessitate greater provision?

Increasingly, members of the community are becoming aware of their rights to challenge a will where it does not adequately provide for them.

Two recent cases before the Court have involved adults under a disability making a claim against the estate of their deceased parent. When contemplating whether to bring a challenge, the decisions emphasise the regard that must be had to the size of the estate in dispute and the competing moral claims of the beneficiaries.

'Classic' case - Tavra v Petelin

In *Tavra v Petelin & Anor* [2011] VSC 359, the applicant was the only son of the deceased, who died leaving an estate worth approximately \$2.8 million. Whilst the applicant's relationship with the deceased was not described as one of complete estrangement, it was not one where they played a significant role in one another's lives. The executors and sole beneficiaries of the estate were family friends of the deceased.

The applicant was severely injured in an accident in 1992, with the result that he was deemed permanently unfit to return to employment of any nature.

The defendants conceded that the applicant ought to receive provision out of the estate, with the extent of such provision being the primary question for determination by the Court.

Associate Justice Zammit made an award of \$1.8 million (almost two thirds of the estate) to provide 'a reasonable buffer against the various vicissitudes' of life.

When to think again - Bruce v Matthews

In contrast to Tavra is the decision by Associate Justice Daly in *Bruce v Matthews and Ors* [2011] VSC 185.

The applicant in that case was a 62 year old man who had substantial needs as a result of living with cerebral palsy and other related health problems. The deceased left a modest estate of approximately \$315,000.00, which his will divided equally between his 4 children (including the applicant).

The applicant's administrator (State Trustees) made a claim on his behalf for further provision from his father's estate.

Despite conceding that the applicant had considerable need, Associate Justice Daly held that the deceased's decision to provide the applicant with one quarter of his estate was appropriate. On this basis, he held that the deceased had not breached his moral duty and declined to make an order for further provision.

What to take from these cases:

- These decisions show that two of the central questions in 'further provision cases' are the size of the estate in question and the competing moral claims of the beneficiaries.
- Prospective applicants should exercise caution and obtain advice as early as possible, particularly in cases where the estate is modest, even where the need of the applicant is beyond question.

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The Moores Legal Elder Law team

We have a range of practitioners who are able to assist with any minor queries or major issues you may have. If you require further information, please contact a member of our team.

Moores Legal is a law firm servicing companies and businesses, Not for Profit organisations and individuals across Melbourne in the areas of Commercial Law, Workplace Relations, Property & Construction Law, Not for Profit Law, Aged Care, Elder Law, Estate Planning, Superannuation & Structuring, Dispute Resolution, Family Law and Personal Injury Law.

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