LEGACY LAW

Protecting the assets in your family tree

When is a gift not a gift?

There is a well-known asset protection strategy called a "gift and loan back". If we mention it to our clients, as they are well-informed, they usually ask "has it been tested in Court?"

Finally, we can say "yes". A recent Queensland case has cast a light on the strategy in the context of Queensland succession law which is materially different to the law in NSW. Still, the case is instructive.

In a case called *In the Will of Prudence Veronica Permewan* [2022] QSC 114, the deceased effectively disinherited her two daughters and was properly concerned that they might challenge her Estate when she died. A law firm called Cleary Hoare presented her with a Queensland strategy designed to reduce the net assets of her Estate so that there would only be a small Estate to fight over.

Until this decision, this strategy could have worked in Queensland but not in NSW where we have the concept of notional estate which is designed to capture attempts to keep Estates artificially small.

The Court heard evidence from the lawyer who prepared the documents and, based on that evidence, the Estate no longer asserted that the documents succeeded in reducing the size of the net Estate. The Court suggested that it would have come to the same conclusion.

The Court's reasoning was based on the following:

1. To enforce the strategy would be contrary to Queensland public policy which gave certain people the ability to challenge Estates. This was the principal ground for the invalidity.

2. There were technical problems with the documents. The Trustee of the Trust was a company that did not exist at the time it was gifted and then loaned the asset. The Promissory Note was not dated initially and not delivered.

3. There was no prospect of the loan being called in during the life of the lender.

4. Neither the lender nor the borrower had the funds to honour payment of the Promissory Notes.

In NSW, the first point is not as relevant given the law in NSW is different. The second and third points were problems with the way the documents were prepared. The final point is one we always raise with clients. In terms of bona fides, cash always beats a cheque or promissory note that is not cashed. Fortunately, most of our clients are in a position to fund such payments.

While there is always the chance that a future case may find that a strategy was unenforceable, we stand by our asset protection strategies. They can still work in NSW.

As always please contact us to arrange a meeting tailored to your specific circumstances because neither a single case like the above nor a general article like this is enough to say whether an asset protection strategy would work for you or not.