As you will have noticed, this is a special edition of our bulletin. It marks the 30th anniversary of the commencement of our Firm, a time which has seen incredible change.

Some of that change is not so remarkable when we reflect on the fact that an iconic business such as Google has only been part of the landscape for 12 years.

The last 30 years has taken our Firm from a manual typewriter and a part time typist to cloud-based computing and a practice operating across three states, through our offices in Brisbane, Sydney and Melbourne shown below.

Law generally is now utilising artificial intelligence in providing answers to many legal problems and that trend is only likely to continue.

We see great opportunities to add value to the services we provide by embracing the remarkable technology driven changes which are occurring. So much of the mundane, mechanical and sometimes tedious work of the law - we can now be freed from. While we have already taken steps in that regard, we recognise that there will always be much more to do.

One thing we are particularly grateful for is that personal interaction, which is at the heart of our business, can never be taken over by a computer nor can the very personal judgement calls that are part of our work.

Professor Peter Little, at the firm’s annual lectures in Sydney and Melbourne and when launching the book I have co-authored with Mark Vincent (referred to elsewhere in this bulletin) highlighted the confronting recent work “Average is Over” by the American scholar, Tyler Cowen. Cowen suggests that a new social compact is emerging in which partnerships between people and computers... will define success, or at least those who will be capable of rising to the top.

Cowan also considers that successful people will be those with a strong professional base and who are able to harness the power of computers and technology. This is a challenge that we accept and we look forward to providing increasing value to you, our clients, in this way.

In the midst of all the disruption we are experiencing, it is more important than ever to support philanthropy and charities in our community. In this Bulletin, we refer to charitable bequests and some of the issues that can arise when seeking to provide for them.

We continue to provide lectures for bodies such as the Queensland State Library to raise awareness of some of the issues that our area of the law addresses. In August, we hosted a luncheon to raise awareness of the Learning Potential Fund of the Queensland University of Technology. This fund assists students who are in financially necessitous circumstances and might otherwise not be able to pursue or continue to pursue their university studies. It is a unique initiative of the QUT, which we hope will be adopted by other universities in Australia.

No doubt the next 30 years will see changes as dramatic as those of the past 30 years. We thank you for being part of the journey with us and look forward to your continuing support in the future.

Margot de Groot, Director
In Brief

**Solicitor’s duty of care.** A beneficiary brought an action against a solicitor for negligence in not advising the testator of the possibility and options available for a Family Provision claim. The estranged testator’s daughter was successful in her provision claim. The High Court held that, while the solicitor had a duty of care in preparing the will according to the testator’s instructions, he had no duty of care, in the circumstances, to the beneficiary: *Badenach v Calvert* [2016] HCA 18.

**A statutory will.** The court granted leave to apply for the authorising of a statutory will but was not satisfied that the testator lacked testamentary capacity as required for authorising the will under s 21, Succession Act 1981. The court ordered not only a geriatrician’s report but also an accredited succession law specialist’s assessment and opinion regarding testamentary capacity in accordance with the test given in *Banks v Goodfellow* (1870) LR 5 QB 594: Re Hay [2016] QSC 106.

**Loan or gift.** As the executors were unwilling to bring an action, a residuary beneficiary sought to recover for the estate the sum of $1.2 million which he claimed was a loan by the testator to one of the executors who contended that it was a gift. The court held that the onus of proof was on the plaintiff beneficiary which he failed to meet. The court found that the sum was a gift: *Steiner v Strang* [2016] NSWSC 395.

**Family provision – time limit.** Two daughters of the testator made a Family Provision application about two months after the expiration of the time limit. Immediately after the expiration, the executor, another daughter of the testator, made a substantial distribution of the estate. She applied for summary dismissal of the Family Provision application. The court refused to dismiss the Family Provision application stating that negotiations between the parties had been continuing, the distribution was made without notice to the applicants and that it was not satisfied that the Family Provision application would be unsuccessful. The court described the executor’s behaviour as ‘disgraceful’ and ordered that she pay the applicants’ costs personally: *Vickers v Pickering* [2016] QDC 58.

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**Digital Assets**

**BY DION MCCURDY, LAWYER**

With the rise of the information age, people are dying today with digital assets of high sentimental and monetary value. The term ‘digital asset’ is relatively new in succession law and there is no commonly agreed upon definition. In Australia, no legislation defines it and the courts have offered no clear direction.

With such lack of legal clarity, it is imperative that succession lawyers act to fill this need. The crux of a digital asset is that it is any right or interest in data held in a digital format, whether that be audio, codes, images, information, videos or text. This includes online data, such as that found on collaborative platforms (such as Uber and AirBNB), communication service (such as WhatsApp and Skype), content distributors (such as YouTube, Instagram, Twitter, Soundcloud and blogs), dating sites, email, entertainment (such as Spotify, Apple TV, iTunes and Netflix), gambling, gaming (such as characters), health records (such as held by private health insurance and Medicare), loyalty programs (such as Netflix), social media (such as Google+, Facebook and Twitter), storage (such as Dropbox) and web domains.

Digital assets also include offline data held on a digital storage device such as a CD, DVD, computer, mobile phone, music player, hard drive, tablet and USB flash drive.

Without explicit authority, knowledge and means to access your digital assets, your legal personal representative may not know their extent and value or deal with them in the way you would have wanted. Additionally, identity fraud is increasingly an issue, with the vast amounts of data that is being left online after people have died. The improper use of this data may take a financial and emotional toll on your family.

**Identity fraud is increasingly an issue with the vast amounts of data that is being left online once people have died.**

How digital assets are treated on death will depend of the underlying character of the right or interest of the particular digital asset involved. For each digital asset, your legal personal representative will have to consider what rights or interests survive your death, where the digital asset is stored, how it may be accessed and what your wishes were in relation to it.

If you have concerns about your digital assets, you should contact us to discuss them with a solicitor and perhaps record information in a digital asset register or management plan, to be kept with your will. We may also include in your will:

1. a definition of your digital assets;
2. an explicit power for your legal personal representative to access, use, modify, delete, control and transfer your digital assets; and
3. the appointment of a digital executor, ie. someone especially appointed to deal with your digital assets.

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**Alumni Authors Showcase**

**On 20 August 2016, the Queensland University of Technology held its inaugural Alumni Authors Showcase.**

15 to 20 authors participated and shared their experiences with around 120 attendees.

The motivation for the showcase was twofold – to celebrate the books written by QUT Alumni and to provide an opportunity for potential authors to question published authors on the challenges and opportunities of writing a book.

Seeking an understanding of the process of writing and publishing proved to be the main interest of the attendees.

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On 27 September 2016, Treasury released the second tranche of exposure draft legislation and explanatory material in relation to the Federal Government’s proposed superannuation reforms. These materials provide long-awaited detail on the workings of the $1.6 million transfer balance cap measure.

The transfer balance cap

Broadly, the $1.6 million balance cap measure is a limit imposed on the total amount that a member can transfer into a tax-free pension phase account from 1 July 2017. Treasury has confirmed that this measure impacts less than 1% of all fund members. However, the compliance systems and costs will impact every member for many years to come. This measure will have a substantial impact on those with pensions exceeding $1.6 million and on the death a surviving spouse will also be limited to a $1.6 million balance despite receiving a reversionary pension from their deceased spouse which has already been tested.

The general transfer balance cap is $1.6 million for the 2017-18 financial year subject to indexation. An individual’s personal transfer balance cap is linked to the general transfer balance cap. All fund members who are in receipt of a pension on 1 July 2017 will have a personal balance cap of $1.6 million established at that time. Otherwise, a fund member’s personal balance cap comes into existence when they first become entitled to a pension. An individual’s personal transfer balance cap is equal to the general balance cap for the relevant financial year in which their personal balance cap commenced.

Usage of personal cap space will be determined by the total value of superannuation assets supporting existing pension liabilities for a member on 1 July 2017, as well as the capital value of any pensions commenced or received by a member from 1 July 2017 onwards.

A member’s available cap capacity over time is subject to a system of debits and credits recorded in a ‘transfer balance account’, which is a kind of ledger whereby amounts transferred into pension phase are credited to the account and amounts commuted or rolled-over are debited from the account.

Earnings and capital growth on assets supporting pension liabilities are ignored when applying the personal transfer balance cap. Thus, a member’s personal balance cap may grow beyond the $1.6 million cap due to earnings and growth without resulting in an excess.

Any amounts in excess of a member’s personal transfer balance cap can continue to be maintained in their accumulation account in the superannuation system. Thus, members with superannuation account balances greater than $1.6 million can maintain up to $1.6 million in pension phase and retain any additional balance in accumulation phase.

Crediting the cap?
The following items count as a credit towards an individual’s transfer balance account:

- the value of all assets supporting pension liabilities in respect of a member on 30 June 2017;
- the capital value of new pensions commenced from 1 July 2017;
- the capital value of reversionary pensions at the time the individual becomes entitled to them (subject to modified balance cap rules for reversionary pensions to children); and
- notional earnings that accrue on excess transfer balance amounts.

The inclusion of death benefit pensions as part of the reversionary beneficiary’s transfer balance cap will have a significant impact on the succession plans of fund members who collectively (with their spouse) have more than $1.6 million in superannuation.

Fortunately, there is an important concession. An excess will only occur as a result of a death benefit pension six months from the date that the reversionary beneficiary becomes entitled to receive the pension. This means there is a grace period for reversionary beneficiaries to commute their pension interest(s) to stay within their personal transfer balance cap without triggering any excess.

Typically, a surviving spouse suffers years of grieving following the loss of a spouse but only has a six month period to make a decision on a reversionary pension if that results in an excess of their personal transfer balance cap.

Link to full article: www.dbalawyers.com.au/1.5millionbalancecapexplained

Our director, Margot de Groot, was invited to participate in a panel discussion to share her experiences in co-authoring "Social Media is Not Enough to Maximise your MarketAbility".

For those who may be interested in a link to that panel discussion it is available on YouTube http://www.social-media-is-not-enough.com/margot-de-groot-qut-2016-alumni-authors.

“Social Media is Not Enough to Maximise your MarketAbility” is available from the website http://www.social-media-is-not-enough.com/about-the-book/ in paperback, hardcover and as an e-book. It is also available from a number of bookshops.


Charitable bequests are a meaningful way for individuals to make a contribution to society after they have died. One of the most important considerations when making a charitable donation is to ensure the correct description of the charity. You should also ensure that any conditions attached to the bequest can be enforced on a practical level.

The incorrect identification of a charity in a will can include things like using the wrong name for the charity, misspelling the name of the charity or using an incorrect address. Often the executor named in the individual’s will must file an application in the court to allow them to effect the gift to the charity. One example of this was where seven of twelve charities were misdescribed in a will (Kuskopf v Sippy Creek Animal Refuge Society Inc & Anor) and the executor was required to bring an application to correctly identify the charities to enable them to effect a distribution of the estate. So it is important when leaving a gift to a charity that you do your homework on the correct name the charity has been registered. This may involve personally contacting the charity to obtain the exact wording they require when making a bequest to them.

Testators may also wish to be specific about a project or charity they wish to support, or the purpose for which they want the funds applied.

If there is not sufficient certainty about the intention a testator is concerning the charitable bequest, the Attorney General or the court may be asked to direct that the bequest be administered via a cy pres scheme, in other words as close to the bequest be administered via a cy pres scheme, in other words as close to the testator's intention as possible. This case illustrates the dangers of incorrectly identifying a charity in a will and placing impractical conditions on the charitable bequest.

Unnecessary court costs can be incurred by an individual’s estate in dealing with these problems. Individuals should be careful to ensure that they avoid these problems in the drafting of their will as, despite having the best of intentions in making a contribution to society via their charitable bequest, it can be held to be unenforceable.

The unreported judgment of Bryan v Oxfam Australia (BS 6762/15) considered whether gifts to Oxfam Australia “for the purposes of (various educational activities in developing countries)” were absolute gifts, conditional gifts, or charitable trusts for the specified purpose. Oxfam could no longer fulfil the specified purposes, as the particular projects had either already been wound up, or were being wound up at the time of the testator’s death. It was held that no trust was created, but that the gifts were conditional gifts. As a consequence, because Oxfam could not fulfil the condition, the gifts failed and fell into residue. Fortunately, Oxfam was also the residuary beneficiary of the will.

This case illustrates the dangers of incorrectly identifying a charity in a will and placing impractical conditions on the charitable bequest.

It is important when leaving a gift to a charity that you do your homework on the correct name the charity has been registered.

The reported judgment of Bennett v Anor v The Royal Australian Institute of Architects & Ors. The testator had left part of his estate to The Royal Australian Institute of Architects who were to determine a scholarship, be granted to an architectural student in a prescribed school of architecture in Queensland to study architecture overseas with particular emphasis on the planning of buildings. It was found that there was a general charitable intention and ordered a cy pres scheme to make it possible to carry out the gift.

If you're online with Facebook, LinkedIn, or YouTube you can get more regular updates from us, like or subscribe to any of our social media initiatives. If you're getting the hardcopy of this newsletter, but would prefer a digital copy, please email us to request the change.