

No Wine or Roses or Testamentary Disposition

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Summary

Reschke v Reschke [2017] SASC 192 (22 December 2017) is the most recent development in what *The Weekend Australian* has called “a tale of grapes, and wrath; and of brothers, grim”.¹

The court decision emphasises the importance of correctly identifying the property that belongs to the testator when drafting wills.

Background of the family and Coonawarra land

Trevor Reschke (Trevor) was married to Vivian Reschke (Vivian). Trevor and Vivian had 2 sons being Burke and Dru, and a daughter Joanne.

The Reschke family has interests in substantial tracts of farmland and vineyards in the Coonawarra wine region accumulated over a number of generations.

These interests include land acquired in 1989 by Fabriano Pty Ltd (Fabriano) as trustee of the Rocky Castle Trust (Trust), a discretionary trust. Trevor and Vivian each held one share in the Trust and were each a director of Fabriano.

Trevor’s will and the estate dispute

On 1 August 2007, Trevor made his last will. Trevor passed away on 21 June 2008 and probate was granted in respect of his will.

According to *The Weekend Australian*, Trevor’s eldest son, Burke has said that ‘he always expected to inherit the family farm because “that’s the way it traditionally was: the eldest son is asked first, and if he has the passion, he inherits.”’² This was not the case under Trevor’s will.

Under the will:

- Trevor appointed his wife, Vivian, as the executrix and trustee.
- Trevor gave some of his land and water licences to Burke’s entity, the trustee of the Koonara Property Trust.
- Trevor also gave other land and water licences to Dru’s entity, the trustee of the Altruism Trust.
- Leaving aside some other specific gifts, Trevor otherwise gave the residue of his estate to Vivian.

As he had not inherited the entire family farm,³ Burke started court action. His action sought replacement of Vivian as the executrix by an administrator and replacement of the trustee of the Trust. In turn, Vivian and Fabriano instituted a cross action against Burke. Vivian and Fabriano’s cross action related to the construction of clause 28 of the Trust Deed and clause 8 of the Will.

The power of appointment in the Trust Deed and attempted vesting of the Trust’s land

Clause 28 of the Trust Deed conferred powers of appointment on Trevor. That is, it enabled Trevor “during his lifetime” to remove and replace the trustee of the Trust. Clause 28 also provided that upon Trevor’s death the power of removal and replacement was to vest in Trevor’s legal personal representatives.

Clause 8 of the Will attempted to:

- give Trevor's power of appointment in the Trust and his shares in Fabriano to Vivian, an accountant, Brenton Scott and a solicitor, Peter Westley;
- direct Vivian, Mr Scott and Mr Westley as trustees of the Trust to vest the Trust's farming land in favour of Dru and Burke equally (taking into account their inheritance from their grandmother's estate);
- declare that the Trust's assets remain subject to the lease of those assets to Vivian for the term of her natural life;
- declare that the Trust's land may remain subject to any existing mortgage or security registered over the land for the term of the lease.

Issues

There were three issues before the Court:

- Whether Vivian in her capacity as executrix of Trevor's estate holds the power of appointment (the First Issue).
- Whether clause 8 of the Will fails, effects an appointment or is in any event void for uncertainty (the Second Issue).
- Whether the trustee of the Trust must vest the Trust's land in Dru and Burke (the Third Issue).

The favourable outcome for Burke arising from these issues would be the vesting of the Trust's land in him and Dru. Therefore, it was in Burke's interest to find that clause 8 of the Will was effective or that the trustee otherwise should vest the land in him.

First Issue – the power of appointment vested in Vivian

As clause 28 expressly limited Trevor's power of appointment to 'during his lifetime', the power endured only during Trevor's lifetime. Therefore, Trevor could not transfer this power by Will as a testamentary disposition.

It was held that since under clause 28 the power of appointment vested in Trevor's legal personal representative, the power vested in Vivian in her capacity as executrix.

Second Issue – clause 8 fails as a testamentary disposition of the power of appointment

The Court held that Clause 8 was ineffective to the extent it purported to be a testamentary disposition as it was not an exercise of the power during Trevor's life.

Its text, context and evident purpose all indicated that Trevor mistakenly believed that he could make a testamentary disposition of the power of appointment and purportedly did so.

Therefore, Fabriano remained the trustee. The part of clause 8 conveying the power of appointment to Vivian, Mr Scott and Mr Westley was ineffective.

The section of clause 8 providing for the vesting of the land owned by the Trust in favour of Dru and Burke was ineffective as well.

The parts of clause 8 declaring that the Trust's assets remain subject to a lease and that land may remain subject to existing securities were also consequentially ineffective.

However, Trevor could make a testamentary disposition of his share in Fabriano. Therefore, the testamentary disposition of that share in favour of Vivian, Mr Scott and Mr Westley was effective.

Third Issue – the Trustee was not obliged to vest the Trust's land

The Court found that the trustee needed to give consideration to Trevor's wishes. However, the trustee was not required to give specific weight to those wishes – that was a matter for the trustee. Therefore, the trustee was not obliged to vest the Trust's land in Burke and Dru.

Lessons

The Court commented that clause 8 of the will “evidences apparent misunderstandings by Trevor as to what was and was not legally possible.”⁴ Trevor needed to appreciate that he could only exercise his power of appointment while alive and not through his will. Consequently an amendment to the Trust Deed itself was necessary in order to give the power of appointment to Messrs Scott and Westley.

Trevor also appeared to not understand that he could not compel the trustees to vest the Trust’s land. He could not do this because the Trust’s land did not belong to Trevor. Instead, it belonged to Fabriano as trustee.

The Court ultimately resolved this by largely treating clause 8 of the will as Trevor’s non-binding wishes. If Trevor were intent on the land vesting in Burke and Dru, then he needed to do this through or as the Trustee while he was alive.

This case is a timely reminder that you cannot ‘rule from the grave’.

If you are thinking about making a new will or updating your existing will, we recommend that you try and keep it simple! It is also important to provide your solicitor with all relevant documents such as trust deeds, constitutions of any companies you are a director of and details of all your property to ensure your last wishes are effective.

¹ Caroline Overington, ‘Sour grapes in Coonawarra’s great family feud’, *The Weekend Australian*, 6-7 January 2018.

² Ibid.

³ Ibid.

⁴ *Reschke v Reschke* [2017] SASC 192 (22 December 2017), [40].

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