Article Information

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Service: Estate & Succession Planning, Estate Administration
Sector: Not-for-Profit, Private Clients

Share splits in Wills – But three into two won't go

In the recent case of De Lorenzo & Anor v De Lorenzo [2020] NSWSC 188, the Supreme Court of New South Wales has given some guidance on the interpretation of a will clause governing the gift of shares which were not equally divisible in number between the beneficiaries.

Background

The Deceased had three children, Christopher, Jo-Anne and Vincent, all of whom were appointed as executors under the will. At the time of her death, the deceased held two ordinary shares in De Lorenzo Hair and Cosmetic Research Pty Ltd and two shares in De Lorenzo Australia Pty Ltd.

Clause 10 of the Will read as follows:

I GIVE AND BEQUEATH to my children the said **VINCENT JOSPEH DE LORENZO**, **CHRISTOPHER JOHN DE LORENZO** and **JO-ANN DE LORENZO** as tenants in common in equal shares all shares in the companies De Lorenzo Hair & Cosmetic Research Pty Limited ACN 003 128 577, De Lorenzo Australia Pty Limited ACN 003 218 586 and Pavin Investments Pty Limited ACN 000 277 261 registered in my name at the date of my death **AND I DECLARE** if in the division of such shares in accordance with the terms of this Clause 9 [*sic*] of my will the shares are not divisible by three (3) my daughter the said **JO-ANN DE LORENZO** is to receive more of such shares than my said sons so as to achieve the intent of this clause.

Two of the children, Christopher and Jo-Ann, issued proceedings seeking orders that all the shares be transferred to Jo-Ann.

Proceedings

The plaintiffs asserted that the clause must be construed strictly. They argued that because "*three into two won't go*", Jo-Ann was to receive more of the shares than Vincent and Christopher. "More", they argued, meant "all".

In a very succinct judgment, Justice Hammerschlag dismissed the plaintiffs' claim, and ordered that the shares be distributed to all three beneficiaries in equal proportions as tenants in common. It was first noted that tenancy in common is a concept well known to the law. It has an accepted meaning. It is a form of co-ownership where each owner has a distinct but undivided share in the whole in common with the others. It is not individual ownership of split up parts.

His Honour then identified three issues with the plaintiffs' construction:

1. it ignored the words "tenants in common", and wrongly assumed that the gift was of individual parcels of shares, rather than an interest in the whole in equal proportions;
2. following from the first point, that the plaintiffs misread the words "in the division of such shares" as meaning into shareholdings, rather than into interests; and
3. it was inimical to the deceased's expressed desire "to achieve the intent of this clause".

In addition, the companies' Articles of Association contemplated the joint registration of share certificates to one of several joint holders.

Observations

This dispute might have been avoided if the drafting of the clause in the Will had been more decisive. It is difficult to see what utility there was in the second part of the clause dealing with unequal division of shares, and in what circumstances that part of the clause would apply. It was also at odds with the reference to "tenants in common".

This judgment confirms that a gift of shares "as tenants in common" does not, in and of itself, require a share split if the shares being gifted cannot be evenly divided. The gift is of an interest in a parcel of shares, not of a specific share itself.

However, if a company's constitution were to prohibit joint shareholding, then issues would arise with the registration of that interest on the company's register. It therefore remains important to review company constitutions at the time of drafting the Will to determine whether or not there is a prohibition on shares being jointly held.

His Honour makes the point that there is "*no inhibition, legal or practical in shares being owned by the beneficiaries as tenants in common in equal shares*". While that may be true in this case, for the effective administration of a company, a share split would be preferable so as to avoid complicated issues of the joint exercise of voting and other shareholder rights.

It would be simpler, provided the company constitution permitted it, to insert a clause into the Will permitting the Executors to undertake a share split to ensure that the number of shares can be equally divided amongst the beneficiaries.