Newsletter of the Law

REABURN SOLICITORS

Winter 2017

SNAPSHOT ON SOLICITORS

Each year, the Queensland Law Society undertakes a snapshot of the membership of the profession.

In 2015-2016 total membership grew by 5.14% to 13,252, made up of 9,971 full members (75.2% of members), 578 associate members (4.4%), 129 honorary members (1%) and 2,574 student members (19.4%).

One of the interesting observations from the membership data is that the gender gap continues to move slowly but surely toward parity. In 2015-2016, 51.7% of full members were male and 48.3% female. The previous year it was 52.8% male compared to 47.2% female.

However, male predominance has been well and truly smashed when looking at the younger generations. This year saw the first Generation Z (1995-2010) full members, with 6 females and 4 males. The gap for Generation Y (1980-94) lawyers was considerable, with 1,533 males and 2,626 females.

While these figures might indicate a female future, there remains much to be done to ensure that talented women practitioners are not lost to the profession as their careers progress. The Law Society is firmly focused on encouraging a future in which opportunities and career progression are equal for all of the Society's members, both male and female.

Some of the other data looked at the size and shape of law firms in Queensland. 952 full Law Society members are sole practitioners, with another 2,158 in 'micro' firms of 2 to 5 practising certificates. These practitioners represent more than a third (40.2%) of members working in law firms (this data set excludes in-house counsel, government lawyers, etc).

A quarter of the Law Society members (25.1%) work in large firms (more than 50 practising certificates), with the remainder spread across small to medium-size firms.

THE GRAND HANDOVER

The grit and determination that is so often characteristic of family business founders can bring great success, but can also be the undoing of the business when the founder will not let go or appears to want to retain control. There are many reasons why a founder may not want to let go.

They may think they are immortal, or that 'nobody can run this business as well as I can', or fear an uncertain future, and so on.

What we do...

Are you aware of the various areas of law in which we practise?

We concentrate on the following areas:

- **Wills and Estates**
- **Family Law**
- **Property Transactions**
- **Business Law**
- **Commercial Law**

If you have any queries in relation to any of these areas of law, please call us on 5586 2222 for an appointment.

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Learning to Let Go

From the next generation's point of view, the inability of the founder to let go can be hugely frustrating and demotivating. But what does it look like from where the founder is standing? Leaving aside thoughts of immortality, the founder faces a Pandora's box of complex issues if they are to pass the business on to the next generation.

Succession planning requires many issues to be worked on at once, and often a solution to one problem will raise many more questions in relation to another. Succession is not just about retirement planning, Wills or tax. The complexity of succession planning can prove daunting so it should come as no surprise that many founders are reluctant to start. Many will just ignore the issue, often creating the impression that they do not want to let go.

Succession in a family business involves change – major change. So the success of any transition depends very much on the willingness and ability of the family and the business to change. In the rush to provide a solution to business owners who say they want to retire, or who wonder which of their children should inherit the business, advisors often overlook this very important fact and then wonder why either the business owner gets stuck or the succession does not go as smoothly as it might have.

To the outside world, succession can appear to be all about titles – who is going to take over as managing director or chairman – or about who will inherit ownership control and how that will affect the family and the business.

On the other hand, inside the family business system, succession is really about whether the family glue is strong enough to keep the family in business together, to grow and manage, or govern, the business. This raises questions about the life aspirations, career plans, readiness and capabilities of those affected by the succession plan – not just the next generation, but also the seniors and the employees.

Planning Makes Perfect

Help and support can be provided by advisors who understand that succession is a project that needs to be managed, and who can guide the family through the process. The key shapes in the planning process are:

- Identifying the event that will trigger the start of the process, and an acceptance by the family (and key management) that change is inevitable.
- Managing the uncertainty that is inevitable during a transition when different options are being explored, and investing in educating the key players to create an acceptance and understanding of what is happening, and the work that needs to be done.
- Identifying and testing the feasibility of all alternatives, always keeping a focus on the future, and avoiding a premature choice.
- Compromising to reach the best outcome possible in the circumstances.
- Creating a timetable and putting in place the building blocks for the transition, whether the latter be an announcement strategy, mentoring for the next generation or the legal and financial structures required to effect the transition.

Who Starts the Process

Succession in a family business entails the seniors letting go and the next generation being willing and able to step up to the mark. But who starts the process? The seniors may be anxious about pushing the next generation into making decisions, while the next generation may be reluctant to be seen to be pushing the seniors out of the way.

In reality, change cannot happen until those currently in power indicate that they are ready to discuss letting go. It is preferable for that willingness to be made very clear, rather than giving vague signals that are open to interpretation.

If the seniors must accept responsibility for starting the process of succession planning. It is equally important that the next generation is willing to enter into discussions, based on a clear understanding of what they want for themselves, as opposed to passively accepting whatever they think the seniors want.

Succession planning is best viewed as a negotiation in which each person taking part has a clear understanding of their own best outcome and a willingness to work collaboratively to achieve the best possible outcome in all the circumstances. This will enhance the quality of the negotiations and help everyone achieve a consensus. A practical definition of consensus here is 'I don't agree with everything, but I don't disagree strongly enough to want to sabotage the outcome'.

Case Study: The Jones Family

Ted owns and manages a big manufacturing business. Ted and Anne have 4 children Kate, Sarah, Andrew and Robert. Kate and Robert work in the business with Ted, while Sarah and Andrew have forged successful careers outside the business.

Ted has decided that he wants to retire at 65 and that he needs to make a new Will. Aside from their house and some modest savings, Ted has a reasonable pension pot, but the bulk of the family's wealth is tied up in the business. Ted plans to leave the business to Kate and Robert because they work in it, but, although he feels this is fair, he feels slightly uneasy about leaving Sarah and Andrew out. Anne has other ideas. She is strongly of the view that being fair means treating the children equally; each should inherit an equal share of the business.

Anne is aware that Kate and Robert are wondering what the future holds for them, but Ted has so far played his cards close to his chest – not so much because he does not acknowledge that things will have to change, but rather because he is unsure about what to do.

For the Jones family, the planning process might go along these lines:

- Ted has decided that he wants to retire at 65, providing the trigger to start the process. He needs, however, to communicate his intention to retire and what he means by 'retirement' to the whole family and key management, and the family and management need to accept that change is inevitable.

- A plan, including a timetable, is drawn up for a series of meetings involving Ted and Anne, each of the children and key management. The plan includes the topics for discussion at these meetings. Each family will have a preference for whether these meetings should be between individuals or groups.

- Key issues for the family that will need to be explored include:

    - What does Ted mean by 'retirement'? Does he want a continued role in the business and, if so, what will that role be?

    - How do Kate, Robert, Andrew and Sarah feel about the business and about being in business together? The feasibility of all the permutations of ownership needs to be tested, taking account of, among other things, the children's personal aspirations and abilities, and what is best for the business.

    - Who will take over Ted's role as managing director? Will it be Kate, Robert or an outsider?

- At the end of the exploration period, the family must make a choice. It is unlikely that any one option will be perfect, so this choice has to be made on the basis that everyone can honestly say 'I don't agree with everything, but I don't disagree strongly enough to want to sabotage the outcome'.

- A timetable for the transition will be drawn up, setting out when Ted will announce his intention to retire at 65 to the employees and the wider world; the management succession route for Robert, Kate or an outsider; and when ownership will transfer. The financial and legal structures that might be required to implement the plan include Wills for all the family members, pension planning, life insurance and a Deed of Family Arrangement.

FIVE FINE ACTS

From 7 to 13 March Queensland celebrated the achievements of women in business, leadership and government. As mentioned in our previous article, women now play a substantial role in the legal profession and are clearly recognised as "equals" under the eyes of the law. That was not always the case. The path to equal rights has been slow. Here are some examples of legislation:

1. ***The Married Women's Property Act 1890*** **(Qld)**

It could be said that legal identity is the heart of every jurisdiction. In Queensland it is considered as a fundamental legislative principle, implicitly recognising that the rights and liberties of people are paramount. During the 1850s and 1860s women's groups in England strongly advocated for married women to be recognised as having a separate legal identity from their husbands. This began to take shape in England during the 1870s with the introduction of the *Married Women's Property Act 1870* (33 & 34 Vict. c93) and then the *Married Women's Property Act 1882* (45 & 46 Vict. c75).

These Acts overturned the common law doctrine of coverture, thus expanding the proprietary and legal rights of married English women. They were also supported in Queensland and in 1890 the Queensland Parliament, led by Sir Samuel Griffith, introduced the *Married Women's Property Act 1890* (Qld).

This was monumental, as at that time it was an all-male parliament and Queensland women's suffrage was 15 years away. The act commenced on 1 January 1891 and "allowed married Queensland women to both acquire and dispose of property and other investments independent of their husbands. Under the Act, women who acquired property and/or investments prior to a marriage were entitled to retain sole ownership of that property after marriage and to administer and execute upon it. This development paved the way for legislative advancements in succession and family law, particularly with respect to the devolution of property on divorce and death.

2. ***Testator's Family Maintenance Act 1914*** **(Qld)**

Prior to 1914, a spouse or a child of a Deceased Testator could not apply to the Queensland Courts for maintenance in the event the Deceased Testator did not provide for them in the Will. This meant that many widows and children were left homeless, poor or destitute on the death of their spouse, which in most cases was the Deceased husband.

In 1914 Queensland was the third Australian state (and the fourth common law jurisdiction after New Zealand, Tasmania and Victoria) to pass legislation to make provision for widows, widowers and children. It meant that this special class of people could apply to the court for maintenance and that the Testator could not specifically exclude them from his or her Estate.

Thus the legislative recognition that a Testator has a "moral obligation" to provide for wives, husbands and certain people on his or her death was born. This centenarian clause has been widened to include expanded definitions of "spouse" and "children", and continues to be the very fabric of Queensland succession law today.

3. ***Family Law Act 1975*** **(Cth)**

Up until 1975, there were 14 grounds for divorce. If a spouse wished to divorce, he or she had to establish s28 of the *Matrimonial Causes Act 1959* (Cth). Some of these grounds were that the spouse:

- Committed adultery;
- Wilfully deserted the petitioner for a period for not less than 2 years;

- Wilfully and persistently refused to consummate the marriage;
- During a period of no less than 1 year, was habitually guilty of cruelty to the petitioner.

This fault-based system meant that the person seeking a divorce required evidence to prove that the other party was at fault. This was done by utilising private investigators and producing photographs, receipts and statements from witnesses. These applications were routinely published in newspapers, with the parties being afforded no privacy in what was a very difficult and tumultuous time.

On 4 December 1973, then Commonwealth Attorney-General Lionel Murphy introduced the *Family Law Bill* 1973 in the Senate, with his intention "to move beyond 'a carry over of the old ecclesiastical garbage', suggesting that under the *Matrimonial Causes Act 1959* (Cth), Australia's divorce laws at the time, had become 'a sick joke which few people any longer find funny'."

The Commonwealth Parliament, with then Prime Minister Gough Whitlam, passed the revolutionary *Family Law Act 1975* (Cth). The Act brought about "no fault divorce", abolishing the prior 14 grounds and establishing only 1 ground, that the marriage relationship had irretrievably broken down and that there was no prospect of co-habitation".

Interestingly, the year it was enacted, the crude divorce rate rose by 255% to 4.6 divorces per 1000 people, but as of 2008 had declined to 2.2 divorces per 1000 people. Importantly, parties to family law proceedings are now afforded with privacy, with the best interests of the child legislatively recognised as paramount.

4. ***The Succession and Gift Duties Abolition Act 1976*** **(Qld)**

Shortly after the enactment of the *Family Law Act 1975,* then Queensland Premier Joh Bjelke-Peterson considered farmers' concerns that the imposition of succession duty (commonly known as "death duty") had a negative impact on family farms, which in turn had a significant impact on widows. Many complained that death duty was in effect a double tax, with duty being paid to both Australia and the United Kingdom.

This came to an end on 1 January 1977 when Queensland became the first Australian state to abolish death duty, following the enactment of the *Succession and Gift Duties Abolition Act 1976* (Qld). The abolition had an instrumental economic effect on Queensland with its population growth growing 0.2% higher between 1977 and 1980.

The subtropical Queensland climate and the abolition of death duty saw many flock to Queensland, with the Tasmanian Government reporting in 1977 that $11 million in capital was transferred from Tasmania to Queensland. Queensland was the trailblazer in abolishing death duty, with other Australian states following suit.

5. ***Succession Act 1981*** **(Qld) – the 2006 amendments**

Although the *Succession Act 1981* (Qld) was enacted in the early 1980s, it is the 2006 amendments, some 25 years later, that are particularly noteworthy.

While focusing on Estate planning rather than gender issues specifically, the amendments were driven by then Attorney-General Linda Lavarch (a former Miami High School girl) and were introduced into the Queensland Parliament on 23 August 2005, following consultation and advocacy by Queensland Law Society. The Bill implemented the recommendations of the National Committee for Uniform Succession Laws regarding the law of Wills, which included the following amendments:

- Court authorised Wills for minors;
- Allowing a Will to be made in contemplation of marriage;
- New rules about Beneficiaries signing Wills;
- Increasing the class of persons who may see a Will on death.

JUST FOR A LAUGH

A Lawyer meets with the family of a recently deceased millionaire for the reading of the Will.

"To my loving wife, Rose, who always stood by me, I leave the house and $2 million," the attorney reads.

"To my darling daughter, Jessica, who looked after me in sickness and kept the business going, I leave the yacht, the business and $1 million."

"And finally," the lawyer concludes, "to my cousin Dan, who hated me, argued with me and thought I would never mention him in my will. Well, you were wrong. Hi Dan!"

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