

Speaker 1: On 8826PR this is Peter Bell.

Peter Bell: Okay it's six past one. Joining us in the studio is Neville Friedman from Friedman, Lurie, Singh & D'Angelo. Good day Neville.

Neville F.: Good day to you all.

Peter Bell: Have you been busy this last couple of weeks?

Neville F.: Oh, been seriously busy, and very, very interesting. We've just had a decision handed down in England, which I thought the listeners might be interested in, so let's have a quick chat about that.

Peter Bell: Okay, if [00:00:30] you've got a question for Neville, family law, wills, probate, or anything at all legally related. 92211882 is the number, get in nice and quick, the lines will fill up quickly.

So tell us about this case from the U.K.

Neville F.: Okay, just for the purpose of the record. A gentleman called Marley, M-A-R-L-E-Y, brought an application in relation to a gentleman's estate, and the judgment was given on 22nd January 2014, so it's really [00:01:00] current. Husband and wife each executed a will, and they had been prepared for them by a lawyer. And what they did was they each gave to the other the whole of their estate in the event that either party passed away. And in the event that the other party had predeceased the estate, which would then be the entire estate of the family, would actually go to a friend. A chap called Terry Marley who was the applicant.

Now, the problem with [00:01:30] all of this is that Mr. And Mrs. Roulands had a couple of sons, and they weren't happy with the distribution. Obviously, because they didn't get anything out of the will.

Peter Bell: So, two of the sons missed out, and the whole estate was to be left to another person.

Neville F.: A third party, yep.

Peter Bell: Okay, right.

Neville F.: That's okay, except that this is what happened. The lawyer came to visit these two people after he had prepared the documents for them, [00:02:00] and in shuffling the papers around the table, Mister signs Misses' will and to Misses signs Mister's will.

Peter Bell: Okay, so everything's in order except they've just signed the wrong page.

Neville F.: So, we've now got a problem, because the ... What we need to persuade the court is, that the person who's signed the document intended that document to have his, or affect his testament intentions, and obviously it's different. The names [00:02:30] are all wrong, so they've got the piece of litigation running. Mr. Marley makes the application for probate, and the original court has a look at it and says, "Look, this will has not been signed in accordance with the rules, which are required for signing that." Just to make it clear, Mrs. Roulands had passed away previously, so it was [00:03:00] Mr. Roulands' will, which was left over and, which was the subject of the problems, which occurred, and the litigation. Interestingly, nobody picked up the problem of the erroneous signatures when they dealt with Mrs. Roulands' will. So, there's a whole stack of people looking at all of this.

Peter Bell: Could it have been fixed then? Or have we still got the same issue?

Neville F.: Well we don't know. Well, we've got a problem. Yes, Mr. Roulands could have reprinted the will, or had it reprinted and then just gone and signed his proper will. But, of course, nobody picked [00:03:30] it up, and they only pick this thing up at the end when it's too late. And that's a typical sort of thing that happens.

So, what happens is at the first stage of dealing with this problem. The probate section of the Supreme Court there says that it doesn't accept that the document complied with the rules, and that would really mean that Mr. Marley dipped out, didn't get anything. And the kids would share in the order that is prescribed [00:04:00] by the rules of Intestacy.

So, Marley's not happy with that decision, of course, and it's gone all the way up to the Court of Appeal, right up to the Supreme Court in England and this judgment's just come down. And what the courts did there, was that they had a look at the ... And dealt with the history of interpretation of wills and rectification of wills. One is to determine what does it say, and other's, if you've found an error, can we [00:04:30] fix it.

Peter Bell: Yes we can, hopefully.

Neville F.: Well, it's not always so simple. So, the old rules talked about a clerical ... And in fact the rules applicable. They talk about clerical errors and another question, which arose during this fascinating matter was whether the error of the practitioner in letting these people sign these wills incorrectly was in fact a clerical error. And clerical errors are usually taken as a number that's transposed, or a person's name is put back to front, or something [00:05:00] like that.

Anyway, the long and the short of it was that they had a look at all of the case. Also, interestingly, had reference to ... As a position taken in Scotland. Now, we've got to understand that for a long, long time there's been a stand off between the Scottish judiciary and the English judiciary. And the Scottish people want to go off on their own,

and the English people want go for them. But, the judges here made some nice comments and said that, "Really, we should be a little bit more [00:05:30] practical about these things."

So, ultimately they found that they were satisfied that because the wills were exactly the same in content and the intention was that really Mr. Roulands was going to sign his will and Mrs. Roulands was going to sign hers, that they then rectified the document on the basis that ... They really top and tailed the documents, they really fixed the error. [00:06:00] But, of course, the problem is that these poor people ... There was only about £70,000 in Mr. Roulands' estate, and this was what they were arguing about. Of course, these reports don't tell us how much money was involved. But, they had, when one looks at the report, each side had a QC coming up ... Attending, and then, of course, the practitioners underneath him. So, you can well imagine the cost to the estate in having this resolved.

Peter Bell: Okay, Neville Friedman, moral to the story.

Neville F.: Moral to the story is for our listeners [00:06:30] to recognize these are very, very important documents, they need to get them right. There is a danger, even if you've got practitioners dealing with it as we've seen here, there are mistakes which occur. But those sorts of mistakes are far easier to get over if you have a practitioner involved. Whereas, if you're doing your own will at home anything can happen, and it leaves those people who you leave behind really, seriously exposed.

Peter Bell: Okay, 92211882 if you've got a question [00:07:00] for Neville Friedman from Friedman, Lurie, Singh & D'Angelo.

Neville, I've got a friend, who was in a relationship, they had a baby. Split up quite soon after, baby's less than one. Now the male is finding it very, very difficult to go and get any access to the child. He's comfortable that the relationship is ended, there's no more ... What he really wants to do is to continue to have a relationship with the child. At the moment, it seems like they arrange [00:07:30] a couple of times a week for a couple of hours for him to have access to that child. But, that's always under supervision as well, he can never have time alone. What should he be doing? What sort of court orders should he be seeking? What's the process?

Neville F.: Firstly, this is probably not something that he's going to be able to do on his own. These matters are usually aggressively contested. Particularly if the relationship between the spouses, the mum and the dad, has broken down, and it's really a bit of an acid relationship. [00:08:00] Very often the children are used as footballs, and you find that there're awful problems with that. So, he'd certainly need to go and get some advice from somebody who specializes in family law work. And what they will do is, if they can't negotiate a settlement, and sometimes it happens, but not often, then an application to court. And the sorts of orders that would be looked for is sharing the access to the child on a more even basis. [00:08:30] Remembering that the courts, unless there is

something seriously just wrong with the relationship between the father and the child, the courts really want the parents to have contact.

Peter Bell: That's good. We've got a heap of calls to get through, let's go to Kerry in Kolburne, hi Kerry.

Kerry: Hi, how are you?

Peter Bell: Good.

Kerry: My question's just about wills, and just listening to that story. I'm just wondering, if a lawyer does your will for you, do they get a percentage of your property values? Or once he's done, and he's [00:09:00] had your fees, that's it?

Neville F.: Kerry, I'm so surprised you've asked that question. You're probably the 100th person who's asked the same question. No, lawyers do not get a share of the estate which they're dealing with. They generally will ... Well, as far as I'm aware, the lawyers will simply charge you for the work that they've done, and that is ... Depending on how you look at it, it's the charge in preparing the will and then you go [00:09:30] away and hopefully, live forever. But, if you don't and you pass away, then ...

Firstly, you don't need a lawyer to make the application for probate and administer the estate but, it is preferable for all of the usual good reasons that you do so. And that work is done either on a fixed fee, or on a usual time charge basis. The one caveat that I have is that, there are a number of trustee [00:10:00] companies such as The Public Trustee and various other trustee companies. In the old days particularly they used to take a percentage of the estate, and it's traditionally been my advice to people to try to avoid that because the costs taken by reference to a percentage have as far as I'm aware always been very significantly greater than legal costs that you would be paying.

Peter Bell: Okay, Kerry?

Kerry: Okay, thanks.

Peter Bell: No worries at all, [00:10:30] thank you. To Kaz in Woodvale, hi Kaz.

Kaz: Hi, how you going? Look, my question is, I've just recently found out that my stepfather and my mother have got wills going back to about '94 and I'm completely left off the wills. I've got other stepbrothers in Adelaide, they are all in Adelaide. However, when I ask my mother, because I was visiting last year, and she showed me these things. I said, "Do you realize I'm not even on this will?" [00:11:00] Because she is Polish, and this will wasn't read out to her, or explained to her. She said, "No, I didn't know that." And when I did query the organization that drew the will up, this solicitor was very ... He thought I was accusing him, because he ... I said, "You might not know me." "Oh, you're the bloke

from Perth." I says, "Why am I left off the will? Do yo know the reason why? And anyway, I'm just wondering where I [00:11:30] stand with this?"

Peter Bell: What should Kaz do, Neville?

Neville F.: Kaz, two issues, one is you can't tell mum to whom she should leave her estate, that's obvious. But if you believe that she wishes to leave something to you and that the will doesn't reflect her wishes, her intentions. Then mum really needs to go and get some independent advice. Now, I don't know who she's seen and whether it's just a lawyer, or whether it is a public organization, [00:12:00] who sometimes have lawyers working for them. But, does she speak English?

Kaz: Oh, she understands English, yes she does.

Neville F.: You just tell her that you've made some inquiries, and she should take that document to another lawyer, not the one that she's been to. And she should have a chat with him and explain to him or her, if it's a female lawyer what her intentions are. And let them have a look at the document, and tell [00:12:30] her whether those intentions are going to be carried out when she passes away. So, they'll look at the terms of the will, and they'll say to her, "Well, look this will doesn't do what you've just told me now." And that would mean doing up a new will.

Peter Bell: Okay Kaz, have to keep moving along, but sounds like you've got a little bit of work to do with your mum. Find out exactly what it is that she wants to do, and hopefully that is then reflected in the will.

Colin, Joe you're up next. We're speaking to Neville Friedman from Friedman, Lurie, Singh & D'Angelo, 92211882.