

Days of the dead

‘Double, double toil and trouble; fire burn and cauldron bubble.’¹



To many, Halloween is a commercialised American tradition; to others a superstitious event involving ghosts, ghouls and goblins.

Its history hovers somewhere in between. ‘Halloween’,² held on 31 October, derives from All Hallows Eve, the eve of the Catholic All Hallows Day (1 November), also known as All Saints Day. However, 31 October was also the last day of the Celtic calendar, and originally a pagan holiday honouring the dead. Hence, we have a name with Christian origins for an event with pagan background.

Nowadays, the challenges for those who celebrate Halloween involve costumes and candy, but for succession lawyers it can present legal challenges.

Halloween decorations are particularly fraught. For example, in *Purtell v Mason*³ Halloween tombstone decorations inscribed with insults resulted in a finding of defamation. Such findings are not restricted to decorative tombstones; they can extend to actual tombstone inscriptions.⁴

For estate planning and administration lawyers, beware of the haunted house. The New York appellate court decision of *Stambovsky v Ackly*⁵ famously involved a purchaser using equitable remedies to exorcise the contracted property.

The purchaser sought to rescind the contract on the basis that the house was haunted. In a spirited decision, the appeal court raised the spectre of estoppel and found that as the seller had previously publicly declared it was haunted, he was “estopped to deny their existence and, as a matter of law, the house is haunted”.⁶ I’m not sure what spooked the buyer.

Puns and peculiarities aside, while these examples identify extremes, upholding the rights of the dead is a key function of what we do as succession lawyers. Lawyers have duties to their clients that continue beyond death, both at common law and pursuant to the *Australian Solicitors Conduct Rules 2012*.

For example, pursuant to rule 9 the lawyer has a duty to keep client information confidential. It is a permanent duty and one that continues beyond the death of the client, attaching to the deceased’s legal personal representative.⁷ It should be noted that legal professional privilege is a “subset of client confidential communications”,⁸ though in certain circumstances that confidentiality may be overridden.⁹

One such circumstance is that explored in the decision of *Nolan v Nolan & Ors* [2013] QSC 140. There, a separated wife sought a declaration as to her interest in matrimonial property, in support of her application which sought for her husband’s estate planning

lawyers to disclose their will file and his will. In that decision the court determined privilege attached but it had been waived through the conduct of the solicitors.¹⁰

When in doubt about your ethical obligations, I recommend you liaise with the QLS Ethics Centre whose unique and valuable work assists practitioners in navigating their duties. Seeking ethical advice not only assists the practitioner but the court, as was demonstrated in the recent decision of *Re Toulitch (Deceased)* [2016] QSC 219.

Toulitch involved an uncontested application arising from issues of testamentary capacity. It also addressed the distinction between a common form grant and a solemn form grant, and the circumstances of when a solemn form grant will be issued.¹¹ The applicant’s solicitor was challenged with placing before the court material that was “hearsay” and “double hearsay”,¹² and as is usually the case, the deceased testator was no longer available to give evidence. In providing her affidavit to the court, the applicant’s solicitor took ethical advice in determining to include that voluminous material. The court commended her actions, in taking that ethical advice.¹³

In the spirit¹⁴ of levity, Halloween turns our mind to death, but it is not something with which we as a society are comfortable. Every 3 minutes and 20 seconds a person dies in Australia.¹⁵



with Christine Smyth

Earlier this year, the Australian Academy of Science conducted a series, 'The Science of Life & Death',¹⁶ which was designed to open up dialogue about death and dying. It seems that, unlike ancient cultures, modern western society struggles to discuss death and its impact.

Succession lawyers are all too well aware of death and its effect on our clients, and we hold a special place in opening up that dialogue this Halloween and beyond.

Christine Smyth gratefully acknowledges the ideas, inspiration and input on this topic from QLS governance executive Louise Pennisi and ethics solicitor Shane Budden. Christine is deputy president of Queensland Law Society, a QLS accredited specialist (succession law) and partner at Robbins Watson Solicitors. She is a member of the QLS Council Executive, QLS Council, QLS Specialist Accreditation Board, the *Proctor* editorial committee, STEP, and an associate member of the Tax Institute. Christine recently retired her position as a member of the QLS Succession Law Committee however remains as a guest.

Notes

¹ *Macbeth*, Act 4 Scene 1, William Shakespeare.

² All Hallows Eve (Halloween) is the evening before All Saints Day, 1 November, created by Christians with the aim of converting pagans. See halloween-website.com/history.htm, catholicculture.org/culture/liturgicalyear/overviews/months/10_2.cfm.

³ New York State Bar Association Journal, October 2011, cited at 59, 'Case Law from the Crypt, The Law of Halloween' by Daniel B. Moar, accessed at goldbergsegalla.com/sites/default/files/DBM%20NYSBA%20Journal%20Oct%202011.pdf.

⁴ *Retreat from Injustice: Human Rights Law in Australia* by Nick O'Neill, Simon Rice, Roger Douglas, citing at page 440, *Gately on Libel and Slander*, London, Sweet and Maxwell, 10th ed., 2004.

⁵ As above at 2.

⁶ *Ibid*.

⁷ *Gartside v Sheffield, Young and Ellis* [1983] NZLR 37; see also 'Confidences – a question of succession' and 'Keeping secrets – or not' at qls.com.au/Knowledge_centre/Ethics/Resources/Confidentiality/Confidentiality.

⁸ See also 'Confidences – a question of succession' at qls.com.au/Knowledge_centre/Ethics/Resources/Confidentiality/Confidentiality.

⁹ *The Australian Solicitors Conduct Rules 2012 in Practice, A Commentary for Australian Legal Practitioners*, published by Queensland Law Society.

¹⁰ For more detail see the writer's article, 'Does professional privilege apply to wills and estate planning files?', *Proctor*, November 2013, pp40-41.

¹¹ [32] citing with approval *Estate Kouvakas; Lucas v Conakas* [2014] NSWSC 786 where "in a survey rich with reference to earlier writings and cases" the NSW court "considered the development of probate law".

¹² At [3].

¹³ At [3].

¹⁴ @ I couldn't help myself with the puns...

¹⁵ abs.gov.au > Population clock.

¹⁶ science.org.au/news-and-events/events/public-speaker-series/science-life-death.

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