Beyond Bleak House: wills and estates in literature

Jane Needham SC[1] presented the Sir Ninian Stephen Lecture on 24 May 2017.

When people ask me what kind of work I do, they almost invariably respond 'that must be awful' (unless they are a Sydney taxi driver, when they start asking me about how to overturn a failed NCAT application revoking their security licence to carry a firearm). And it can indeed be awful – the third family provision mediation in three days where the unresolved grief and anger is sometimes unbearable, or the hearing at which the judge takes an unjustly optimistic view of your adult child's ability to earn his or her own living, and you have to explain to your client – again – about Calderbank[2] offers and indemnity costs orders. There are bad days.

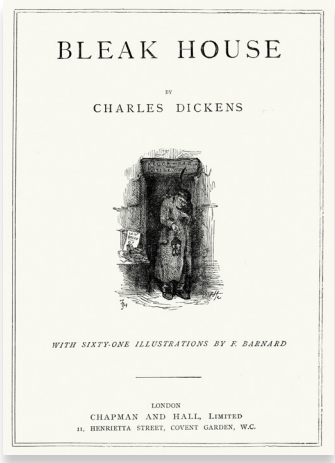
But succession law calls into mind Tolstoy's observation - each unhappy family is unhappy in its own way.[3] The rite of passage of death and property transfer has a universal application. Everyone has relatives and everyone's relatives die, and every generation has to deal with the shuffle of assets, responsibilities, and – what is sometimes even more important – the perceptions as to who is now the 'head' of the family.

I have a mental list of answers to the question I ask each of my clients – 'what do you want out of this litigation?'. If they say 'a lot of money' then we all know where we stand. Occasionally it's framed, although generally not expressly, as revenge of some kind – against 'dad's new wife' (usually a widow of 20 + years) or the stepchildren, for ransacking the personal items of the recently deceased. Very often it is an item of minor value, such as 'grandma's engagement ring' which was given to a daughter-in-law, not the daughter. In a diminishing way in this digital age, it can be the family photograph album. I once had a mediation which hung on who would get the kitchen clock – finally, my party's support person offered to buy a new clock, my party happily accepted, and we settled. I have no doubt that the offer was called upon. I've also had cases where the trigger for the proceedings was the gift of Dad's Kangaroos rugby league jersey to one of the children – 'he doesn't even follow the Rabbitohs!' was the forlorn cry. The saddest was a woman who said her motivation was 'to be accepted once more as a member of the family'. That, I couldn't begin to promise.

These kind of complex family relationships are woven through history. We're fascinated by the Tudors and their predecessors the Plantagenets and Yorks. Each chapter of history involves an issue of inheritance law, which then was bound up in perceptions about primogeniture and male succession lines. There is much of that concept in society today – I think in particular about some correspondence with the only surviving son of a testator, who shared the bulk of the residuary estate with his niece, the only child of his deceased brother. He persisted in referring to himself as 'my father's principal surviving heir' (which, given he had a larger share than his niece, was possibly technically correct) and relied on that status to require the executor to provide him with items left to the testator's spouse, to which he was not entitled; his father's personal items, and even the family plot.

The passion with which some people regard inheritance is of course a staple of literature. Oddly enough I know very few estate lawyers who have actually read *Bleak House*.[4] Oddly enough for a daughter of a man who named his first son Charles after Dickens, I have been unable to finish it.

Bleak House is famous for its depiction of the Chancery dispute of *Jarndyce v Jarndyce*, which when finally determined, has costs which have entirely consumed the estate. I do like the description of how long the case had taken: 'The little plaintiff or defendant


BLEAK HOUSE

BY

CHARLES DICKENS

WITH SIXTY-ONE ILLUSTRATIONS BY F. BARNARD

LONDON
CHAPMAN AND HALL, LIMITED
11, HENRIETTA STREET, COVENT GARDEN, W.C.

Walker Art Library / Alamy Stock Photo

who was promised a new rocking-horse when *Jarndyce and Jarndyce* should be settled has grown up, possessed himself of a real horse, and trotted away into the other world.' The litigation was described by one of the characters as 'the family curse'. There is a lately discovered will, revoking previous ones, and a character named Lady Dedlock. All most Dickensian.

'Jarndyce' has become both a term of denigration for those who spin out litigation, and the pleased squeak of a barrister receiving a lengthy brief. Much depends on one's perspective of course.

The title of this talk is, however, 'Beyond Bleak House' – what else is out there for lovers of literature and family disputes?

We are told to 'write about what we know', and barristers often stray into literature, including my chambers colleague Littlemore QC.[5] He, however, does not know much about succession law – Harry Curry is, of course, a criminal defence lawyer. Wilkie Collins, on the other hand, did. He trained as a barrister, and his heroine in *The Woman in White*[6] cannot leave her marriage settlement of £20,000 to anyone other than her husband or her child. In a somewhat complex plot, the heroine Laura is drugged

and placed in an asylum under the name of her dying illegitimate half-sister Anne, who is buried as Laura, so that Laura's husband can inherit the fortune. Laura needs to escape the asylum, but her insistence that she is not Anne is seen as proof of her insanity. The plot thickens with a number of dodgy rectifications of official documents and gravestones, and the discovery of illegitimate half-siblings and secret marriages, before one of the best-named characters in literature, Count Isidor Ottavio Baldassare Fosco, is killed by a member of an Italian nationalist society and the son of Walter and Laura properly inherits the family house.

Slightly less fantastical plot points arise in *The Last Will and Testament of Henry Hoffman*, by John Tesarsch,[7] a Melbourne barrister, which was published in 2015. It was described by a reviewer in *The Australian* as 'a detailed wrangle over probate'.[8] I downloaded it onto my Kindle for a recent holiday but failed to read past the sample – it felt just a little too much like work to be read on a Great Barrier Reef island. The story feels like it is inspired by the Brett Whiteley[9] saga – a seemingly rational will is post-dated by a handwritten one, which is hidden due to the fact that the entire estate was left not to the children of the deceased but to 'a mystery woman'. Those of you who practise in estate law know that this kind of thing doesn't happen very often; testators tend to be boringly predictable. Our lives would be a little more exciting with more mystery women.

A number of succession-themed literary works feature aspects which are not commonly found in the Probate List of the Equity Division. Agatha Christie, in *Motive v Opportunity*,[10] a short story featuring Miss Marple, featured as a plot point a bequest in a will written in disappearing ink. A book I have not read, Catherine Aird's *A Going Concern*,[11] includes a will, a codicil, the appointment of a great-niece as executor who has only met the testatrix once, a precatory trust and the testatrix's request for a police presence at her funeral after a detailed medical examination of her body to rule out murder.

Most wills in literature – as in life – are not so exciting. Possibly the most famous of dull succession themes in novels is Jane Austen's *Pride and Prejudice*[12] – a wonderful tale of marital necessity forced by the fact of daughters not being able to inherit an estate in tail. I have read that book many times – and not just because I was named after Austen. (My sister is named Emma, and I have a brother with a middle name Henry after Henry James. You can tell my parents' taste in books did not progress much beyond the 19th century). The book is interesting in how it tackles discussion of the issue of the limited nature of Mr Bennett's landholding – there is very little explanation of it, and most of it is done by the book's ditziest character, Mrs Bennett, who basically wails about it loudly and often. A contemporary Austen reader, it is assumed, would need no explanation of the ins and outs of property law and succession.

An example of this kind of exposition appears in chapter 13. The scene is Mr Bennett telling his family about a letter he received from the Reverend Mr Collins, his cousin.

> About a month ago I received this letter, and about a fortnight ago I answered it, for I thought it a case of some delicacy, and requiring early attention.[13] It is from my cousin, Mr. Collins, who, when I am dead, may turn you all out of this house as soon as he pleases.
>
> 'Oh! my dear,' cried his wife, 'I cannot bear to hear that mentioned. Pray do not talk of that odious man. I do think it is the hardest thing in the world that your estate should be entailed away from your own children; and I am sure if I had been you, I should have tried long ago to do something or other about it.'

Jane and Elizabeth attempted to explain to her the nature of an entail. They had often attempted it before, but it was a subject on which Mrs Bennet was beyond the reach of reason; and she continued to rail bitterly against the cruelty of settling an estate away from a family of five daughters, in favour of a man whom nobody cared anything about.

Possibly the most famous of dull succession themes in novels is Jane Austen's Pride and Prejudice

Of course, in such a circumstance Mrs Bennett could have an interesting notional estate argument, since most estates in tail were re-settled by the heirs shortly after turning 18, on the promise of an increased income, to avoid the rule against perpetuities. But these circumstances would not now arise, because s 19(1) of the *Conveyancing Act 1919* deems an instrument creating an estate tail to create an estate in fee simple, neatly making *Pride and Prejudice* very much a period piece. The same is true in the land where it was set; fee tail was abolished in the UK in 1925, by the Law of Property Act.

There are reflections of the entail in that classic of modern times, *Downton Abbey*,[14] which opens in 1912, before the abolition of fee tail. There, the great house of the Crawley family, Downton Abbey, is held in estate tail. Lord Grantham has three daughters, and luckily the eldest of them is engaged to marry Patrick, her first cousin and Lord Gratham's heir. He, however, drowns in the Titanic. Eventually the problem is solved – although not without plot complexities and many one-liners from the Dowager Countess – by= Mary marrying, and having a son with, the next heir to the title and the land. Matthew Crawley is much maligned within the nobility as being a 'mere solicitor'. He is enough of a solicitor at least to have a will, leaving everything to his wife. Not

before time; in the third series, he dies tragically, just after the birth of his son, in a car accident. As he had previously bailed out his father-in-law by using an inheritance from his dead fiancee's father, and was a half-owner of Downton, the inheritance issues are muddied further, with property and titles going every which way (but mainly to the males).

Rather disappointingly for one interested in intestacy and limited estates, this issue isn't much further explored, the writer Julian Fellowes being far more interested in the accuracy of the cutlery[15] than with succession law. In contrast with Austen, the issues would need to be carefully explained in order for them to be comprehensible. The television viewer of the early 21st century cannot be assumed to have a decent grasp on feudal succession law, let along the grounding supplied by a good reading or three of *Pride and Prejudice*.

An interesting article in the *Vanderbilt Law Review*, En Banc, by JB Ruhl, 'The Tale of the Fee Tail in Downton Abbey',[16] traces the fee tail back to the mediaeval concept of marigatium, or a grant of land to a woman on her marriage with reversion to the grantor should she not have children of that marriage. The author notes that the legal issues are, as in Austen, raised in conversational exposition; between the Countess of Grantham, Cora, and her mother-in-law, the Dowager Countess, and between the Earl and his daughter Mary.

The Anthony Trollope novel, *The Kellys and the O'Kellys*,[17] has estate law at its core. Trollope's novels revolve around money – where it goes, who deserves it, how it is managed, and what it means. In the novel, Lord Cashel manoeuvres to gain his ward Fanny's inheritance for his son despite the clear conflict of interest that entails. Barry Lynch has so keenly looked forward to his father's estate that when he finds out it has been left in equal shares to his sister and himself, he begins to fantasise about her death. Fantasies turn into threats and then into a vague plan without Barry ever quite choosing to commit murder. Had he made that choice, Barry would, of course, be subject to the forfeiture rule – that a person criminally responsible for a person's death may not inherit, whether by will or intestacy. I note that the forfeiture rule is called the rather more entertaining 'slayer rule'[18] in the US.

Forfeiture cases are fortunately rare in our courts.[19] They do however make interesting literature. Ian McEwan's recent novella, *Nutshell*,[20] revolves around the planned murder of John, a poet, by his wife, Trudy, and her lover, John's brother, Claude. In a plot twist that will not surprise Sydney residents, the ramshackle house John himself inherited is now worth £8M, and his wife and her lover want to kill him to inherit it. The hook in this plot is that the book is narrated by a foetus – John and Trudy's child. A *Guardian* review describes the book as 'This is a short novel narrated by a foetus who is also Hamlet'.[21] This was a fascinating read, although I enjoyed his The Children Act[22] much more; that novel centred on a High Court, Family Divison judge who needed to decide whether a young man, a Jehovah's witness, should receive a blood transfusion. It seems McEwan has a taste for drama with a legal touch.

Sirius had been disowned by his parents for failing to be a sufficiently Dark Wizard, but his older brother Regulus died intestate, and so Sirius inherited the Black family fortune and thus was able to leave it to Harry

Even the Harry Potter novels have a plot hook relying on a will. Harry is, by the standards of his friends, quite wealthy, because he inherited his parents' fortune of Galleons, Sickles, and Knuts. In the sixth book, *Harry Potter and the Half-Blood Prince*,[23] Harry's godfather, Sirius Black, is killed by his cousin Bella Lestrange, but has the forethought to make a will leaving everything to Harry. Sirius had been disowned by his parents for failing to be a sufficiently Dark Wizard, but his older brother Regulus died intestate, and so Sirius inherited the Black family fortune and thus was able to leave it to Harry – coincidentally providing a schoolchild trying to save the wizarding world with access to a magical property in London from which to base his endeavours. Apparently the laws of wizard succession trump the not inconsiderable powers of He Who Must Not be Named, because the discovery of the will (only a week after Sirius' death) meant that the Dark Lord was unable to find or enter the house. As Elizabeth Cooke notes in her chapter in *Responsible Parents and Parental Responsibility*,[24] reprovingly entitled 'Don't Spend It All At Once',[25] Harry's inheritance comes with no mention of trusteeship despite the fact that he is only 15 or so when his godfather dies. Cooke links that to Victorian inheritance laws, saying that 'the conservatism of the Ministry of Magic is such that it would be unlikely to sanction the enactment of legislation analogous to the 1925 property law reforms'.[26]

Unusually for modern readers, the definition of 'personal effects' in the wizarding world meant that Harry also inherited a slave – Kreacher, the house-elf. Those of you who have read the middle books in the series will recall Hermione's worthy but tiresome efforts to free the house-elves. Harry – who is at best a morally ambiguous figure – never does free Kreacher. At the end of the series, Kreacher is a house-elf at Hogwarts, a kind of indentured servant below stairs, still bound to obey his master

without question. We know this because after the great battle of Hogwarts, where Voldemort is defeated and against whom Kreacher fought bravely despite his Dark Wizard beginnings, Harry wonders whether Kreacher might bring him a sandwich. Along with being the saviour of the wizarding (and Muggle) world, he remained a slave-owner when he already knew how to free a house-elf – and indeed previously had. This part of the story uneasily reflects the status of African-American slaves who also made up part of their masters' personal property, being bought and sold and left to family members at will.

I will finish this eclectic collection with a helpful suggestion from one of the practitioners in the audience this evening. The Janacek

Kreacher the house elf in Harry Potter and the Order of the Phoenix

Image: Everett Collection Inc / Alamy Stock Photo

opera, *The Makropoulos Secret*,[27] based on a play by Czech playwright Karel Capek, concerns the probate case of *Gregor v Prus*, which, rivalling *Jarndyce v Jarndyce*, has been going on for almost 100 years. The first act opens in a law office, where, perhaps explaining the opera's relative obscurity, there is some discussion of a directions hearing. The denouement of the plot centres around the discovery of a secret will, which allows the case to resolve, in a somewhat odd form of alternative dispute resolution, by the enactment of a mock trial. Mr Moloney suggests that the whole thing could have been sorted out with a well-directed subpoena. I heartily agree.

I have mentioned that today's court cases lack the colour and movement of those in literature. There are, thankfully, exceptions. Most estate lawyers have handled at least one case which, in their heads, would better the most outrageous episode of *Rake*.[28] The most exciting case[29] in which I was involved had all the elements of high drama - unrequited love, a suicide pact, a treasure hunt, and exotic birds. In the testator's will, his long-time but unrequited love, Imelda, received his personal effects. He had written to her before his death to let her know that she had ten years to approach the long-suffering executors to find out what she had been left. He also told her in that letter that he was about to kill himself. A few days later, she received another letter, saying words to the effect, 'that didn't work, I'm going to try something different. Stay out of the bathroom if you come to the house'. No more letters were received. The personal effects included a tin box, found by way of clues in a treasure hunt given to her by the executors. The box contained keys, and part of the dispute was about whether the gift to Imelda was a gift of the keys, or a gift of the contents of the safety deposit box which they opened. Sadly for true love, the gold Kruggerands in the safety deposit box remained with the estate. This will also established a trust for two peacocks – named John and Imelda after his love and her husband - to live at the testator's land in the Daintree, but that was found by Justice White of the Queensland Supreme Court to be invalid as being a non-charitable purpose trust. It was also ineffective in a practical sense because the peacocks departed not long after the testator, the person who regularly fed them, died.

Taking a cue from the peacocks, I will now depart as well. Thank you for your attention.

Endnotes

1 Jane Needham SC is a Sydney senior counsel practising in succession, equity and land law. Her website is www.janeneedhamsc.com.au
2 *Calderbank* v *Calderbank* [1975] 3 All ER 333.
3 *Anna Karenina*, *The Russian Messenger*, Moscow, 1877.
4 Charles Dickens, Bradbury & Evans, 1853.
5 Harry Curry series; HarperCollins, 2011-2014.
6 Harper & Brothers, New York, 1860.
7 Affirm Press, Melbourne, 2015.
8 Miriam Cosic, http://www.theaustralian.com.au/arts/review/tesarschs-expertise-informs-his-engaging-henry-hoffman-novel/news-story/50e7616d0dbadbb229c75604d67aef26, accessed 22 May 2017.
9 *Whiteley v Clune (No 2)*, unreported, Powell J, Supreme Court of New South Wales, 13 May 1993.
10 in the collection The Tuesday Club Murders, Collins Crime Club, 1932, now re-issued by Harper Collins.
11 St Martin's Press, London, 1993.
12 Egerton, Whitehall, 1813.
13 Clearly this passage was written before email.
14 ITV, 2010-2015.
15 See 'The Queen Found A Historical Mistake In Downton Abbey', http://www.cinemablend.com/television/Queen-Elizabeth-Found-Historical-Mistake-Downton-Abbey-83927.html, accessed 24 May 2017.
16 (2015) 68 Vand L Rev 131.
17 Colburn, London, 1848.
18 *Riggs v Palmer*, 115 N.Y. 506 (1889).
19 For one example, see *Troja v Troja* (1994) 33 NSWLR 269.
20 Jonathan Cape, London, 2016.
21 https://www.theguardian.com/books/2016/aug/27/nutshell-by-ian-mcewan-review accessed 22 May 2017.
22 Jonathan Cape, London, 2014.
23 Bloomsbury, London, 2005.
24 eds Rebecca Probert, Stephen Gilmore, Jonathan Herring, Bloomsbury, London, 2009.
25 ibid, ch 11.
26 at 208.
27 world premiere at the National Theatre in Brno on 18 December 1926.
28 Essential Media and others, 2010-onwards.
29 In the Matter of the Will of Boning [1997] 2 Qd R 12.