

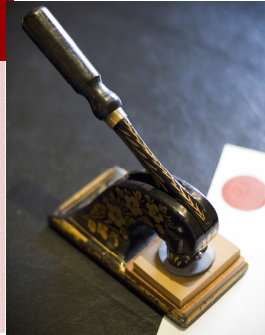


Estate Planning Tasmania News

Issue 28 June 2012

In this Issue

- Advisers Acting as Executors
- Binding Nominations and RBF Superannuation
- Consideration when you or a Beneficiary hold a Commonwealth Concession Card
- Getting Advice Before Entering Elder Care
- Our Regular Features



Power of Attorney Tips

- Always think about appointing substitute Attorneys in case your first Attorney cannot act.
- Think about any limitations you wish to place on the powers of the Attorney when dealing with your financial and property matters.
- Always consider doing an Enduring Power of Attorney so that your financial and property affairs are looked after by someone you trust if you are incapacitated.

Advisers Acting as Executors

Being asked by a client to accept an appointment of a trustee can be a compliment, however fiduciary appointments carrying significant time commitments, risk and responsibility should not be taken on lightly.

Clients may wish to appoint their professional advisers as Executors of their Will, provide for them to make financial decisions on their behalf as their attorney, or involve them in succession planning for trusts that the client controls, including Self Managed Superannuation Funds.

An adviser asked to take on an appointment should identify the risks associated with particular appointments, and, to the extent that it is reasonable and proper to do so, consider minimising those risks.

Risk management techniques can include:

1. requesting that limitation of liability clauses be included in the document(s) making the appointment;
2. ensuring that the document(s) making the appointment are in a modern and comprehensive form, to avoid the situation where the adviser will or could be hindered when carrying out the role;
3. obtaining and relying on external advice from experts in the area, which can shift the risk to those advisers, and assist the adviser in a fiduciary position to satisfy their duty of care;
4. requiring clients to regularly review their documents and keep them up to date;

Continued Page 3

Recent/Pending Legislation & Cases

Wills Amendment (International Wills) Bill 2012 (Tasmania) is pending.

Our Firm News

Sam McCullough presented at a Tax Institute seminar in Launceston on 4 June 2012.

Our first Accountants seminar was held on 30 May 2012, and was a success. The second seminar is being held on 18 July 2012.

Sam McCullough will be presenting at a seminar at the Hobart & Macquarie Probus Club on 10 July 2012 about estate planning.

Worrall Lawyers will be conducting a follow up seminar to the seminar held in Oatlands in February. It will be about "Working to Create a Succession Plan for your Farm", and will take place in August 2012 by invitation.

Casewatch - Ademption of Gifts in Wills by Sale by an Attorney

The recent decision of the NSW Court of Appeal in *RL v NSW Trustee* provides some clarification of the law in Australia applying to when an Attorney sells an asset of the person they represent which is gifted by that person's Will.

Mrs M made a Will that provided a gift to neighbour "Mr A" of "my lock up garage for his sole use and benefit absolutely". The balance of her estate was to be left to Mrs M's two brothers and another person "RL" as to a third each. RL was appointed as Mrs M's Attorney under a Power of Attorney and then later Mrs M lost capacity so that RL began to act as the Attorney of Mrs M. As Attorney for Mrs M, RL sold the garage, which was the subject matter of the gift mentioned above. This happened whilst Mrs M was still alive.

The Attorney sought advice from a lawyer about whether the NSW Trustee (who in NSW has similar powers to our Guardianship and Administration Board in giving rulings about Powers of Attorney) had power to require that the sale proceeds of \$75,000.00 from the sale of the garage be "earmarked" for "Mr A" in light of the provision in the Will. The advice received from the lawyer was to the effect that there was no requirement that RL as Attorney must put the money aside in a separate account. This was confirmed by the NSW Court of Appeal. The Court also commented that the gift is said to be adeemed by the sale and thus the gift fails. This means that the money from the sale of the asset could not be "traced", and the beneficiary would not receive the gift.

An interesting result in the interplay between the law of Wills and Powers of Attorney.



Edmund Gale



Estate Planning Tasmania News

Issue 28 June 2012

Binding Nominations and RBF Superannuation

Special rules apply to the payment of superannuation held with the RBF on the death of an RBF member, and those rules are very different to those applying to most other superannuation funds.

The payment of superannuation benefits on the death of a Retirement Benefits Fund ("RBF") member is governed by regulation 130 in the *Retirement Benefits Regulations 2005* (Tasmania) ("the Regulations").

Rule 130(2) of the Regulations allows an RBF member to nominate their estate to receive all or part of their superannuation benefits on their death by notice in writing to the RBF Board. The flipside is that the Regulations do not allow an RBF member to nominate a beneficiary other than their estate to receive their superannuation benefits. For example, a child cannot be nominated.

If no nomination is made to the Board, regulation 130(1) sets out who will receive the payments. The Board will first look to the RBF member's surviving partner to receive the superannuation benefits. If there is no partner, the Board will look to whether the RBF member was in a caring relationship with another person, registered by Deed under the *Relationships Act 2003* (Tasmania), and, if so, will pay the superannuation benefits to that person. If there is no surviving partner or caring relationship, the Board must pay the superannuation benefits to the member's estate.



Diana Kelsall

Glossary

Administrator—A person appointed by the Supreme Court exercising its probate jurisdiction. The Administrator is given a grant of Letters of Administration for the purposes of collecting the assets, paying the debts and administering the estate. An Administrator is appointed where there is no Will, but may also be appointed where there is a Will but no Executors.

If there is no Will, or the assets are not dealt with in the Will, the Administrator must distribute the assets in accordance with the Intestacy Rules.

If the administration arises as a result of there being no Executors, then the Administrator must distribute the assets in accordance with the Will.

A note from our Commercial Practice Group— Buying a Retail Business

The purchase of any business involves key issues that must be properly identified and addressed in order to ensure that the business goodwill and assets pass to the new owner.

Set out below are a number of the key issues that can arise in the purchase of a retail business:

- 1. Identifying the assets** – the business assets that are being purchased must be identified. For example, there would usually be plant & equipment, stock, an interest in land (i.e. a lease), good will and intellectual property;
- 2. Stock** – the stock of the business must be accurately identified and valued (a stock take is typically undertaken for this purpose), and the parties must agree whether the stock being purchased is included in, or payable in addition to the purchase price;
- 3. Suppliers** – will the purchaser be taking on the existing suppliers of the business or engaging new suppliers? If taking on the existing suppliers, the benefit of any supplier contracts must be transferred to the purchaser at completion;
- 4. Transfer of Employees** – will the purchaser be taking on existing employees or hiring their own? Complex rules apply to the transfer of employee entitlements and legal advice is essential to ensure that the parties comply with their legal obligations;
- 5. Restraint of Trade** - a purchaser should consider limiting the extent to which the former owner can operate a similar type of business in the area. An effective restraint of trade clause provides an invaluable protection for a new owner, giving them the opportunity to develop business goodwill without unnecessary competition; and
- 6. Intellectual Property** - most businesses will have intellectual property attached to them, for example, a business name, logo or registered trade mark. A purchaser will want to ensure that the benefit of this intellectual property is transferred at completion.

The examples above are just some of the key issues that can arise in the purchase of a retail business. Every transaction will be different, and tailored legal, financial and accounting advice is essential in every transaction to ensure that the purchaser's interests are protected.



Maggie Keeling



Estate Planning Tasmania News

Issue 28 June 2012

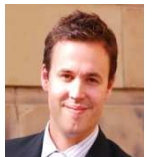
Advisers Acting as Executors (continued)

5. check key issues including: is the appointment "first line" or "default"?; is the adviser the only one appointed, and, if not, who are the others with whom the adviser must carry out the role?; and is there a potential for conflict between the roles that the adviser is being asked to take on?; and
6. make clear arrangements in relation to remuneration for undertaking the role.

All professional advice firms should have a "Fiduciary Appointments Policy", preferably in writing, but at least agreed and consistently applied by the principals and employed advisers within the firm.

An effective Fiduciary Appointments Policy should cover matters including the following:

1. **whether** appointments should be accepted;
2. **who** can accept appointments—principals only, principals and nominated advisers, all advisers, or decided on a case by case basis; and
3. **what kind** of appointments can be accepted—Executorships, Trusteeships, appointment as Attorney, appointment as Guardian, or other?



Sam McCullough

Estate Planning Considerations when you or a Beneficiary holds a Commonwealth Concession Card

When reviewing your estate planning, it is important for you to consider whether you or a beneficiary holds a Commonwealth Concession Card (for example, a Health Care Card (Centrelink), a Pensioner Concession Card (Centrelink or DVA) or a Commonwealth Seniors Health Card).

This is important in circumstances where you expect to receive a gift from an estate, or where you intend to benefit a person who is in receipt of any Commonwealth benefit.

The benefits that an individual receives from holding a Commonwealth Concession Card are State and Territory based, and will vary depending on where the individual resides and the individual's circumstances.

If you are concerned that a gift from an estate to you or a beneficiary may affect eligibility for, or entitlements received from, a Commonwealth Concession Card, it is important that you seek professional legal and financial advice.

Advice should be sought about the effect of receiving a gift from an estate to ensure that the best outcome for you or your beneficiaries can be achieved. That advice should take into account personal and financial circumstances, and include advising you about the options and strategies you can put in place to ensure that your beneficiaries get the most out of their gift under your Will, including minimising the impact on their Commonwealth benefits where possible.

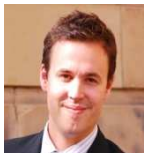


Kate Moss & Hayley Mitchell

Asked and Answered:

Q. I want to gift my home, but I have a mortgage over it—who pays the mortgage if I die?

A. This will depend on the terms of your Will, as this determines whether the home is gifted as a specific asset, or as part of the residuary estate, and will determine whether the mortgage liability passes with the gift, or must be paid out by the estate so that the gift is made free from the liability. Unless the Will provides otherwise, a gift of real estate in a Will is taken to be made subject to liabilities secured over the real estate. This means that unless the Will expressly says otherwise, the beneficiary who receives the home will receive it subject to the debt. It must, however be remembered that in most cases the obligations of the deceased to the third party lender will provide that the deceased (and therefore their estate) remain liable for the debt.



Sam McCullough



Estate Planning Tasmania News

Issue 28 June 2012

Getting Advice Before Entering Elder Care

The need for good advice is high when either you or someone you care for is at the stage of entering Elder Care

We recently conducted a seminar on moving into Elder Care in conjunction with a representative of a financial planning firm who has expertise in this area. We see the need for advice at this important time as being twofold. Seeking advice from an appropriately qualified financial planner with expertise about Elder Care issues is the first area. At the same time, seeking advice from estate planning lawyers in the following areas is equally important:

1. advice on the sale agreement of the existing home if it is to be sold, and on the conveyancing for that property;
2. advice on the Elder Care documentation that sets out the rights and obligations for the particular institution. The reason why this is important is that every Tasmanian Elder Care institution has different documentation with different rights and obligations, and assuming they are all the same is dangerous. Some are mere rights of residence, some are leasehold interests, and some are other forms of arrangement;
3. a Will review to take account of the changed circumstances (and any other changed wishes about the disposal of your estate on your death);
4. putting in place an Instrument Appointing Enduring Guardian, so that health, lifestyle and related decisions are able to be made if you reach the stage when you do not have capacity to make your own decisions; and
5. putting in place an Enduring Power of Attorney, so that business, investment and other decisions about your property and income and superannuation can continue to be made if you reach the stage when you do not have capacity to make your own decisions.

We understand that all Elder Care places now require an Enduring Power of Attorney be in place as a condition of accepting a person into their care. They do this so they know who to deal with when there is a loss of capacity.



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Further Information

Our Website: A wealth of information in relation to estate and commercial matters can be found at our website www.pwl.com.au

Contributions: Contributions and suggestions from Estate Planning News readers are always appreciated. Email us at sam.mccullough@pwl.com.au

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