



Estate Planning Tasmania News

Issue 30 October 2012

In this Issue

- Royal Hobart Show — Fine Wool Prize
- The Importance of Ensuring that Your Will is Drafted Correctly
- A Note About Updating Trusts



Our Firm News

Kimberley Martin has been appointed as a lawyer assisting Peter Worrall in Estate Planning matters.

Sam McCullough has been nominated as the Tasmanian representative on the National Elder Law & Succession Committee.

Royal Hobart Show — Fine Wool Prize

For the past three years, Worrall Lawyers has sponsored and presented the Fine Wool Prize on behalf of the Royal Agricultural Society at the Royal Hobart Show. For a third year in a row, the Fine Wool Prize was won by Scott Bowden of Cluny. The Fine Wool Prize is part of our commitment to the Agricultural Industry in Tasmania.

The Importance of Ensuring that Your Will is Drafted Correctly

If you died tomorrow, who would you like to receive your estate? Who would you like to manage your estate?

If your Will is ambiguous or incorrectly drafted, a Court may be required to determine its validity and clarify any ambiguity by determining what your intentions or wishes were. It is generally accepted that the Court has no power to add or alter words when admitting a Will to probate, even if there is clear evidence that the omission of the correct word or words was unintentional.

To ensure your willable estate is distributed in accordance with your wishes after your death, and to guarantee that an Executor is appointed to manage your estate, it is important that your Will is current, unambiguous and correctly drafted.

Your willable estate includes those assets that you own in the full sense of beneficial ownership. They are assets not affected by a rule of law, or by documents which indicate something other than beneficial ownership. They exclude: superannuation death benefits that are not paid to the estate (noting that some superannuation death benefits are paid to the estate); interests in family trusts (but note that a loan account with a family trust owned by a person is paid to their estate); joint tenancy assets of the first person to die when there is a joint tenancy form of ownership of an asset (but note when the second person of two joint tenant dies, it is part of their estate); and those insurance proceeds where the person who has died (or their estate) is not the owner or nominated beneficiary of the insurance, the proceeds of which are not paid to an estate.

Examples of ambiguous or incorrectly drafted Wills include: describing a gift imprecisely; gifting assets not owned by the Willmaker at their death; describing beneficiaries/groups of beneficiaries with insufficient clarity; assuming that superannuation is part of the Willmaker's estate (it may be or it may not be); making an ambiguous bequest to a person as trustee; not specifying end dates of trusts; not providing substitute beneficiaries; not appointing an Executor, or describing them incorrectly; and not revoking all earlier Wills.

A recent example of an ambiguous appointment of an Executor in a Will that went all the way through to trial is the estate of Chomiak. This Will went before the Honourable Justice Tom Gray of the Supreme Court of South Australia for decision.

In this case the Will named the 'Priest in charge for the time being' of a particular Church as the sole Executor of the Will. The Registrar of the South Australian Court identified an issue with the Will, namely that these words could refer to a number of different people. These included the person in the office at the date of the making of the Will, the person in the office at the date of the Willmaker's death, or a person who is in the office, but only while that person holds the office.

It was decided by the Court that the Willmaker had been sufficiently clear in her appointment of an Executor, and that the words 'in charge for the time being' validly appointed the Priest in charge of the Church at the date of the Willmaker's death as Executor. All of the trouble and expense of having the trial could have been avoided had the Willmaker ensured that appointment of the Executor was properly drafted, and perhaps more precisely drafted.

Determination by a Court will result in additional legal expenses, be stressful for your beneficiaries and cause delay in the administration of your estate. To avoid what can be an expensive exercise, it is important to ensure that your Will is clearly and correctly drafted in accordance with your wishes.

There are numerous factors that need to be identified and considered when drafting a Will, and this is best carried out by an estate planning lawyer, or at the very least with advice from an estate planning lawyer.





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A Note About Updating Trusts

The Australian Tax Office's more relaxed approach to amending Trust Deeds is good news for those looking to update their Trusts.

Taxation Determination TD 2012/21 sets out the Commissioner of Taxation's current view about where a change to a Trust Deed will lead to Capital Gains Tax events E1 or E2. The Commissioner's view is that, providing the Trust Deed gives the Trustee the power to amend the Trust and this power is validly exercised, the amendments will not give rise to Capital Gains Tax events E1 or E2 except in certain circumstances. The Trust may also be varied with Court approval without Capital Gains Tax consequences.

The Commissioner states that the following will not generally lead to Capital Gains Tax events E1 or E2 occurring:

- the addition of new beneficiaries of the Trust;
- the exclusion of existing beneficiaries of the Trust;
- expanding the Trustee's powers. The Commissioner gives the example of the expansion of the power to invest;
- adding definitions of income and the power to stream income. These amendments are important to avoid negative taxation consequences and to allow for the most beneficial treatment of trust income, following the decision in the case of *Bamford* and the subsequent legislative amendments; and
- extending the vesting date of the Trust.

Those who wish to update their Trust Deeds for tax, control or estate planning purposes can now proceed with the amendments in the knowledge that adverse tax consequences are less likely to occur.



Alex Bobbi

Glossary

Willmaker

A term for a person who makes a Will.

Also referred to as a Testator, a male Willmaker or a Testatrix, a female Willmaker. This term however has the benefit of being both modern and gender neutral.

Estate Administration

The Process that occurs after the Grant of Probate or the Grant of Letters of Administration in an estate that encompasses the collection and recording of the Willable Assets, the payment of the debts of the Willmaker who has died, and the transfer of the remaining assets to the Beneficiaries or to a Testamentary Trust for the benefit of the Beneficiaries.

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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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