Estate Planning Tasmania News

Issue 32 December 2012

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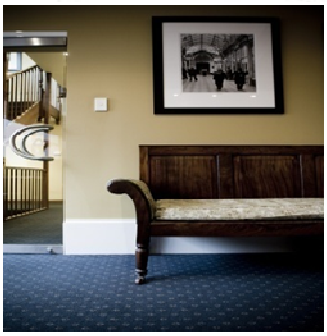

Recent Tasmanian Testator's Family Maintenance Claims

Two recent Tasmanian cases involving Testator's Family Maintenance claims indicate that adult children who have been left without "adequate provision" may now have a better chance of succeeding than ever before.

In Tasmania, the *Testator's Family Maintenance Act 1912* (Tasmania)("the Act") provides that if a Willmaker fails to make adequate provision in their Will for an eligible person, then after the Willmaker's death, that person can apply to the Supreme Court for an order which makes adequate provision for them from the estate.

People able to bring a claim under the Act include a surviving spouse or de facto (including same sex couples); children (including ex-nuptial, adopted and some stepchildren); parents (if the Willmaker dies without a spouse or children); and a divorced spouse (who is receiving or is entitled to receive maintenance from the Willmaker at the date of the Willmaker's death).

If a claim is made, the Supreme Court will consider whether there has been adequate provision for the applicant's proper maintenance and support and, if necessary, will adjust the distribution that the Willmaker made in their Will. The Supreme Court may increase or decrease the amounts the beneficiaries in the Will are to receive, or may add beneficiaries who were left out of the Willmaker's Will altogether.

Two recent Tasmanian cases that involved successful Testator's Family Maintenance claims are *Trumbull-Ward v Michell and Haley* [2012] TASSC 67, and *Doddridge v Badenach* [2011] TASSC 34.

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Our Firm News

Worrall Lawyers presented a follow up to our successful February seminar, "**Estate Planning for Farmers**", on Thursday 9 August 2012.

Entitled "Working to Create a Succession Plan for your Farm", the seminar provided attendees with practical information to work towards creating a succession plan that addresses the variety of needs of farming families.

These seminars will continue to be held in 2013, and in other rural districts. This is part of our commitment to the Agricultural Industry.

Worrall Lawyers presented three seminars during Seniors Week in October on Self Managed Superannuation Funds, Powers of Attorney and Enduring Guardians, and Testamentary Discretionary Trusts.

The seminars were well received by the attendees.

Casewatch - Willmaker's Capacity

***Howroyd v Howroyd* [2011] TASSC 73 is a recent Tasmania case that is subject to an application for special leave to appeal to the High Court. The case involves a Willmaker who was dying at the time he gave instructions to draft his Will. The lawyer who drafted the Will was the Willmaker's nephew.**

The issues before the Court included whether the Willmaker:

1. lacked testamentary capacity; and

2. was medicated to such a state at that time as to not be able to appreciate the effect of his actions.

Justice Wood held that the Willmaker did have testamentary capacity to execute a Will, finding on the evidence that the Willmaker was able to comprehend:

(a) the nature of what he was doing and its effects;

(b) the extent and character of the property with which he was dealing; and

(c) the claims, and a weighing of the claims to which he ought to give effect.

Justice Wood found that feebleness, grave illness or extreme age were not sufficient to disentitle the Willmaker of his right to dispose of his or her property by Will. Such conditions or symptoms will only do so if the feebleness, age or illness so affected the mind of the Willmaker that the Willmaker lacked testamentary capacity. An appeal was subsequently lodged with the Supreme Court and the Court of Appeal dismissed the appeal.

This case is a reminder of the importance of establishing the testamentary capacity of a Willmaker when there is any suggestion or evidence of a lack of, or declining, testamentary capacity. In a future article we will discuss what constitutes "testamentary capacity", a topic on which Peter Worrall has written and lectured on both in Tasmania and interstate.

Kimberley Martin

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Can Superannuation be Paid to an Ex-Spouse?

Whilst on first glance it may appear surprising, there are circumstances where a member of a superannuation fund may wish to have their superannuation death benefits paid to their ex-spouse. Superannuation law in this area is complex, and includes a prohibition that must be overcome in order for payment to be made as intended.

The meaning of "spouse" within the *Superannuation Industry (Supervision) Act 1993* (Commonwealth) ("the SIS Act") does not include a person who is a former spouse of the member at the date of their death.

In some circumstances, a member may wish to direct their Superannuation Death Benefits ("Death Benefits") to a former spouse. Reasons for doing so may include: the former spouse of the member continuing to care for the member's minor children; an ongoing personal relationship; or an absence of other desired beneficiaries.

The key point is that you should not assume that you can validly nominate that person as a beneficiary of your Death Benefits if they are a former spouse.

In some circumstances, the member's former spouse may be nominated as a beneficiary because they are a "financial dependant" of the member, or if they are in an "interdependency relationship" with the member within the meaning of the SIS Act.

To qualify for payment of the Death Benefits on this basis, and to receive concessional tax treatment as a "financial dependant" or "interdependant" of the deceased member, a former spouse must satisfy the Trustee that they fall within these definitions. This can be a difficult process, and creates uncertainty about the payment and taxation of Death Benefits.

The most certain solution can be for a member to make and maintain a Binding Death Benefit Nomination ("BDBN") in favour of their estate. Because the Trustee does not need to make an assessment of the relationship between the member and the other person, the payment will be made to the member's estate without enquiry into the nature of the relationship between the deceased member and their former spouse.

It is important that proper estate planning strategies are put into place to ensure that the payment of Death Benefits is in accordance with the wishes of the deceased member. These strategies require a well drawn Will that specifically deals with superannuation and in a way that allows an ex-spouse access to the relevant funds.

Kate Moss

Estate Planning Tool —Insurance Bonds

Insurance Bonds are a financial product that can be useful in estate planning.

Insurance bonds are a product obtained through an insurance provider. As long as particular conditions are met, the capital used to purchase the bond can be removed from a willable estate and the pool of assets available to a claim under the *Testator's Family Maintenance Act 1912* (Tasmania).

The owners of the bond can usually make a binding nomination of a beneficiary to receive the investment on their death. Depending on the bond, the capital and income may be able to be assessed before the bond matures, however, this may lead to adverse tax consequences.

Please seek legal advice, for estate planning purposes, and financial advice before proceeding with this type of investment.

Maggie Keeling

Establishment of STEP Tasmania

The Society of Trust and Estate Practitioners (STEP) Tasmanian Chapter was launched on 1 November 2012. Peter Worrall is the Deputy Chair of the Tasmanian Chapter.

The official launch of STEP Tasmania by the Honourable William Cox AC, the former State's Chief Justice and Lieutenant-Governor of Tasmania was held on the 1 November 2012 .

STEP is a unique professional body for practitioners in the fields of trusts, estates and related issues providing over 18,000 members with a local, national and international learning and business network focusing on the responsible stewardship of assets today and across the generations.

With members in 84 countries worldwide, STEP can offer the trust and estate community in Tasmania an international perspective and extensive industry expertise.

David Russell TEP AM QC, Chair of STEP Australia delivered a paper at the launch on the operation of the Hague Convention on Trust recognition. Peter Worrall noted that the paper is an excellent example of the high quality of continuing education available through STEP.

Peter Worrall is looking forward to a strong contribution in Tasmania from Financial Planners, Lawyers, Accountants and Trustee Professionals involved in the trust and related tax, estate planning, estate disputes and estate administration industry to the development of STEP Tasmania.

To receive STEP Tasmania membership information and criteria please email peter.worrall@pwl.com.au.

Peter Worrall

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Testator's Family Maintenance Claims (continued)

Trumbull-Ward v Michell and Haley [2012] TASSC 67 involved a Willmaker who had, over a number of years, a series of disputes with one of her daughters (the Applicant) resulting in her making a Will in 2006 that expressly excluded that daughter.

Notwithstanding the fact that the relationship that the Applicant had with the Willmaker had deteriorated and that the Applicant's conduct contributed to the deterioration, Associate Justice Holt was satisfied that the Applicant had been left without adequate provision for her proper maintenance and support.

The Applicant daughter received a twenty percent (20%) share in her mother's estate.

Doddridge v Badenach [2011] TASSC 34 involved an unusual situation of the Applicant having had little contact with her father since she was three years of age, notwithstanding the fact that they both lived in Southern Tasmania for all of the Willmaker's life.

Justice Evans was satisfied that the Applicant should have been provided for by the Willmaker in his Will and provision in the amount of one third (1/3rd) was ordered. The Orders were appealed by the Respondent beneficiary, however, that appeal was discontinued and withdrawn shortly before it was heard.

Although no two cases are the same, and every case must be determined on its own facts, these two cases indicate a new era for Testator's Family Maintenance decisions by the Supreme Court of Tasmania, and infers that adult children who have been left without adequate provision for their proper maintenance and support may have a higher chance of success than previously expected.

The cases demonstrate how the law of Testator's Family Maintenance can be used to assist people who are entitled to a share of a deceased estate, and reinforce the importance of having a professionally prepared Will, to try and avoid a Testator's Family Maintenance claim being made against an estate, or alternatively reduce the prospect of a claim being successful with appropriate estate planning being put in place.


Our lawyers can also advise you about Testator's Family Maintenance claims if you are a potential applicant for provision, a Willmaker, an Executor, or one of the named beneficiaries in a Will that may be or has been challenged.

Edmund Gale with Kimberley Martin

The Relevance of the Personal Properties Securities Regime to Estates

The PPSR commenced on 30 January 2012 and has implications for the administration of deceased estates. Unless proper searches and other steps are taken, beneficiaries and Executors risk unforeseen claims on estate assets by third parties.

Where a Will makes a gift of specific property — for example, a car, or a piece of artwork — to a named beneficiary, where that property is held as security by a third party for a debt or other obligation owed by the Willmaker at their death, issues can arise during the administration of the estate in relation to the title to the particular item.

If an Executor fails to investigate whether specifically gifted items are subject to a "security interest" under the PPSR, the asset may pass to the beneficiary subject to the debt or obligation, which may not be what the Will requires, and may impact on the beneficiaries enjoyment of that asset if the secured party later seeks to rely on their security.

It is prudent for an Executor to conduct searches of the PPSR to identify whether there are any security interests registered in relation to the deceased. Those searches must be carried out carefully if they are to result in potential matches with the deceased or the specific property.

Where a security interest is identified, the Executor should in most cases consult with the beneficiary, and obtain expert legal advice as to the consequences of the security interest, including how it can or should be dealt with.

Alex Bobbi

Asked and Answered:

Q. I had a Power of Attorney for my Mother, and it is a lot of work, am I entitled to be paid for acting?

A. An Attorney who is not acting in a professional capacity will generally not be entitled to be paid for their time and effort, unless the Power of Attorney document itself expressly provides for a right to charge. Many Power of Attorney documents do not provide that right. It may be possible for the Attorney to enter into a contract with the Donor in relation to payment. It may also be possible in some limited cases for an Attorney who is acting for a Donor who has lost capacity to apply for appropriate remuneration from the Supreme Court, however in practice many family/friend Attorneys act without payment, and there have been cases where the Court has not approved payment. It is also important to distinguish payment from reimbursement for expenses properly incurred, as an Attorney acting properly will always be entitled to be reimbursed for the expenses they properly incur.

Sam McCullough

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Directions to a Guardian by the Guardianship Board

Where a person has not appointed an Enduring Guardian, and they lose capacity to make medical and personal decisions for themselves, their family may have to seek appointment as their Guardian by application to the Guardianship and Administration Board. A recent Tasmanian case has clarified the extent to which the Board can direct the Guardian appointed in those circumstances.

The Board has a supervisory role in relation to the activities, powers and duties of guardians. This includes both guardians appointed by the Board, and those that are acting under an Enduring Guardian instrument. For this purpose, the Board is given a number of powers under the *Guardianship and Administration Act 1995* ("the Act").

Section 31(4) of the Act gives the Board the power to "...direct, or offer advice to, a guardian in respect of any matter." In a recent Tasmanian case, the Supreme Court considered how the Board may use this power to provide advice and directions to guardians (including the Public Guardian).

Under the Act, provided that a guardian acts in the best interests of the person under their guardianship, a guardian has the discretion as to how to perform their powers and duties afforded to them, and how to reach their objectives.

In the case of *Public Guardian v Guardian and Administration Board,* the Court held that the Board's power to direct and offer advice to a guardian was intended to be invoked only in unusual, doubtful or difficult situations. The power relates to the scope and appropriateness of the use of power by a guardian, and the appropriateness of the continuation of the guardianship order itself. The provision does not provide an unlimited power, and should not be read literally.

Hayley Mitchell

Interestingly, in 84% of cases where a person loses capacity and the appointment of a guardian is required, the Board appoints the Public Guardian to act as guardian.

The appointment as a guardian may mean taking on an onerous task. If you require advice about being appointed as a guardian, please seek our legal advice.

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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

Caution: This newsletter contains material for general educational purposes and is not designed to be advice to any particular person in relation to their own affairs as it does not take into account the circumstances of the reader as an individual. It is recommended that appropriate professional advice be obtained by each reader so that reliance can be taken upon that advice.

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