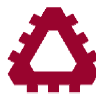

Estate Planning Tasmania News

Issue 33 February 2013

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Our Firm News

Sam McCullough is presenting on superannuation and estate planning at a seminar organised by ANZ Hobart Business Banking on 7 March 2013 in Hobart.

Peter Worrall is currently rewriting the Estate Planning Chapter in the Australian Succession Law Loose Leaf Service by Thomson Reuters.

Attorneys making gifts and benefiting themselves

The ability of an Attorney to provide financial assistance to family members of the person they represent, including to themselves where they are a spouse, is more limited than generally thought.

It is not uncommon for spouses to appoint each other as their Attorney, and to expect, if something happens to them, the other will use their shared financial resources for their joint benefit. Where particular assets (for example, share investments) are in the name of one of the couple, the ability to continue to receive and benefit from the income and financial resource represented by that asset could be critical for a spouse acting as Attorney in the event of their partner losing capacity. In many cases, it will be both proper and necessary for the Attorney, in those circumstances, to use the assets they control as Attorney for the benefit of both them, and their spouse.

In Tasmania, an Attorney is subject to the provisions of the *Powers of Attorney Act 2000* (Tasmania) ("the POA Act"), which includes some important restrictions on a spouse Attorney providing gifts or other benefits to themselves, or to other family members who may need support.

The first restriction arises from Section 32 of the POA Act, which deems an Attorney to be a trustee of the financial affairs of the person they represent where that person has lost capacity, and directs that the Attorney must exercise their powers in the best interests of the person, in those circumstances. An Attorney also owes fiduciary duties to the person they represent. The effect of the trustee, fiduciary and statutory duties owed is that the Attorney must not make an unauthorised profit or gain from their position, and must not allow their personal interests to conflict with the interests of the person they represent. This can cause a conflict between the personal needs of the Attorney for support from their spouse's resources, and their duty as Attorney.

The second restriction is that Section 31 of the POA Act contains a prohibition on an Attorney benefiting themselves or any other person from the assets of the person they represent. There are some limited exceptions (for example, low value gifts for Christmas or birthday presents), but general financial support to a spouse constituting a "gift" will not be permitted unless the Power of Attorney document itself authorises it, or the Guardianship & Administration Board approves general financial support.

Sam McCullough

(Continued Page 2)

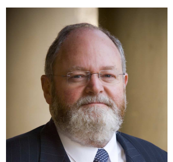
Case watch: *Howroyd v Howroyd* - Special leave to appeal to the High Court refused

In our December 2012 edition we reported on the case of *Howroyd v Howroyd* [2011] TASSC 73, a recent Tasmanian case involving a Willmaker who was dying at the time he gave instructions to his lawyer nephew to draft his Will which was the subject of an application for special leave to appeal to the High Court.

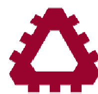
The application for special leave to appeal was heard on 12 December 2012. Justice Gagaler & Justice Kiefel refused to grant special leave to appeal to the High Court and dismissed the application with costs.

The Justices held that the Full Court of the Supreme Court of Tasmania did not err in the application of established legal principles guiding the determination of an issue about whether the Willmaker has the capacity to make a Will.

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.



Peter Worrall



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The importance of estate planning that provides protection for family wealth

A recent case heard in the New South Wales Supreme Court by Justice White emphasises the importance of having an estate plan, and, most importantly, a Will that protects family wealth from bankruptcy, litigation and family law proceedings.

In *Hausfeld v Hausfeld & Anor* [2012] NSWSC 989 a male Willmaker prepared his Will in 2004 which left his estate to his wife. His wife then died. No new Will was completed after the death of his wife. The Will also provided that if his wife died first then his estate was to go in equal 1/3 shares to each of their sons. By 2012, the Willmaker was suffering from dementia and had lost testamentary capacity. That is, his mental state was such that he could not of his own volition act to amend his Will.

One of the Willmaker's sons made an application under the provisions of the *Succession Act 2006* (New South Wales), seeking an alteration to his father's Will, by removing him (i.e. that son) as one of the beneficiaries, and instead gifting that share of the estate to that son's wife.

The relevant legislation in Tasmania is the *Wills Act 2008* (Tasmania) ("the Act"). The law provides that a Court may, on application by any person, make an order authorising the making or alteration of a Will in specific terms approved by the Court, or the revocation of the whole or any part of a Will, on behalf of a person who lacks testamentary capacity.

Apart from this law case, the son was a party to litigation proceedings for damages in respect of allegedly negligent property valuations, which had the potential to make him bankrupt. The son did not wish to be a beneficiary of his father's Will because he did not want to see his share of the estate potentially lost to his creditors if he lost the second case.

In determining whether to alter the Willmaker's Will, the Court considered whether it was reasonably likely that the proposed alteration would have been made by the Willmaker if he had testamentary capacity, and whether it was appropriate for the order to be made.

The Court held that whilst it was reasonably likely that if he had the ability to do so, the Willmaker may have amended his Will in the terms sought by his son, it was not appropriate for the Court to authorise the alteration in order to defeat the son's creditors. The public policy of the law that individuals should pay their debts so far as they are able to do so was considered by the Court to be paramount.

This case highlights the importance of ensuring that there are mechanisms in place to protect your estate from being given to your beneficiaries' creditors on your death. If you have persons who you wish to include in your Will, who may be deemed as "at risk" beneficiaries, or if you would like to ensure that your family wealth is protected from circumstances similar to the case mentioned above, please contact us. Most of the Wills completed with us in recent years would not have resulted in a case like this being necessary.

Although this is a New South Wales case, the law is similar in Tasmania. The lesson to be learned from this case is to always have a good Estate Plan in place, and the plan for contingencies. What that good Estate Plan will be for you will depend on your circumstances.

Kimberley Martin

Glossary

Trust

A Trust has three special elements. There must be a Trustee; there must be a Beneficiary or Beneficiaries; and there must be assets held within the Trust. There are various forms of Trusts, such as: life estate trusts; discretionary trusts; unit trusts and others.

Trustee

The person who is responsible to hold assets for the benefit of a Beneficiary or Beneficiaries on the terms of a Trust.

Beneficiary

A person who is given a gift in a Will. Also, in relation to a Testamentary Trust, a person:

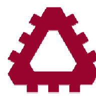
- who has a right subject to conditions to receive a benefit; or
- who has a mere expectation to be considered for a benefit by the Trustee where the Trustee has a discretion.

Attorneys making gifts and benefiting themselves (continued)

A spouse (or any other) Attorney who breaches these rules exposes themselves potentially to serious adverse consequences. These may include: the transaction conferring the benefit being set aside and having to be paid back; having to account for the benefit of the use of the property; being prevented from obtaining support from assets that were previously available to meet joint needs; exposure to the risk of an application to have them removed as an Attorney; the risk of disputes after the represented person has died; and (in some cases) the risk of civil and criminal penalties.

It is possible for a donor of an Enduring Power of Attorney to pre-authorise an Attorney to benefit themselves, or other family members. The person making an Enduring Power of Attorney can set the limits to that authority. However, particular provisions must be included in the Enduring Power of Attorney document to achieve this.

Sam McCullough



Estate Planning Tasmania News

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The taxation advantages of testamentary discretionary trusts

Recent changes to the *Income Tax Assessment Act 1936* (Commonwealth) ("ITAA") provide substantial tax advantages to beneficiaries of a testamentary trust.

The increase of the tax free threshold from $6,000 to $18,200 in 2012/2013 (and increasing to $19,400 from 1 July 2015) makes testamentary trusts even better instruments for clients wishing to achieve tax efficiency.

Section 102AG of the ITAA is a special provision which provides that children under the age of 18 years ('minors') who receive income from a testamentary trust are taxed on that income as an adult and therefore receive the normal tax free threshold of $18,200 (or up to $20,500 if the low income tax offset applies) and the benefit of marginal tax rates which apply to adults on income figures above that level.

This is different from the situation when income is distributed from a trust to a minor when the trust is established outside a Will. If this special provision (s102AG) did not exist testamentary trust distributions to minors would be subject to a tax free threshold of only $416 (with no low income rebate) and after that the tax rate which would be applied is 66% of income up to $1,307 and 45% after $1,308 on the entire amount of income (excluding the Medicare levy).

Example of the tax advantages of testamentary trusts

Assume Beth dies leaving two adult children. Beth's estate is valued at $2,000,000. If this were invested at, for example 5%, it would generate an income of $100,000 per annum. Beth's adult children also have minor children of their own.

Example 1: Beth leaves everything to her children in equal halves. The tax position might be:

Beneficiary	Income	Tax	
Child 1	$50,000	$8,297	(if Child 1 has no other income)
Child 2	$50,000	$8,297	(if Child 1 has no other income)

Example 2: Beth's Will establishes a testamentary trust for each of her children and their families. The trusts are controlled by those children and the beneficiaries are her children and grandchildren. The family's tax position might be (if they have no other income):

Beneficiary	Income	Tax	Beneficiary	Income	Tax
Trust 1			*Trust 2*		
Child 1	$18,000	Nil	Child 2	$18,000	Nil
Grandchild 1	$16,000	Nil	Grandchild 3	$16,000	Nil
Grandchild 2	$16,000	Nil	Grandchild 4	$16,000	Nil

If you require specific legal advice about your circumstances, or would like further information about the benefits that testamentary discretionary trusts can provide (including further taxation and asset protection benefits) please contact us.

Alex Bobbi with Kimberley Martin

Dealing with simple trusts for grandchildren

It is not uncommon for parents and grandparents to settle sums of money, or particular investments, on simple trusts for their grandchildren. How these trusts are dealt with when that parent or grandparent dies is something that needs to be considered.

Simple trusts such as these are often not documented, other than there being a record of where the asset is held. Typical amounts in these trusts range from $2,000 to $10,000. Usually the set up of these trusts is informal, and the "Trustee" will pay out the trust when the child turns eighteen (18) or at a specified date, and it is often only the bank account that shows any detail of the trust.

Sometimes a parent or grandparent can die whilst these simple trusts are ongoing. Section 13(1) of the *Trustee Act 1898* (Tasmania) will apply in many of these cases. The first thing to do in these circumstances is to check the terms of the trust (if there are any). It is likely that there will not be any terms regulating the trust.

If there are terms regulating the trust, and if they deal with Trustee succession, then they will apply. If there is more than one Trustee, the survivor will continue on the death of the other Trustee, and on the death of the survivor, the terms relating to appointment will apply.

If there are no terms, or if the terms do not deal with Trustee succession, and if there is only one Trustee, on the death of that person their Executors/Administrators will have the power to appoint a new Trustee. Note the Executor or Administrator does not automatically become Trustees by virtue of their appointment.

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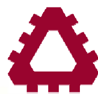

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Dealing with simple trusts for grandchildren (continued)

The position between death and an appointment of the Trustee and transfer of trust assets to them is that the Legal Personal Representative would hold legal title, but on a different trust than that which applies to estate assets.

These simple trusts raise a number of estate planning, and then estate administration issues:

1. at the estate planning stage, it is important to identify the existence of trusts, and to understand their terms, including:
   - how the simple trusts will fit with gifts by Will to the beneficiary and others – for example, is there to be an adjustment to what the beneficiary receives under the Will, or do they get both?; and
   - the timing of distributions of the simple trusts – for example do they get $10,000 at age eighteen (18), and then nothing until age thirty (30) from the estate? The Will, and related planning, needs to deal with these issues; and
2. at the estate administration stage, there are practical issues including:
   - identifying the assets as being held on a different basis from other estate assets;
   - who becomes Trustee; and
   - how the assets are called in and distributed to the new Trustee.

Another important issue to consider is that sometimes people put money aside to fund gifts in their Will. If this occurs and there is not a separate trust created, the Will needs to clearly identify that this is what they intend.

If you have created, or wish to create, a simple trust for your children or grandchildren, we suggest that you speak to one of our Estate Planning Lawyers to ensure that it is structured correctly, and that it compliments your other Estate Planning arrangements.

Kate Moss

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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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