Estate Planning Tasmania News

Issue 34 May 2013

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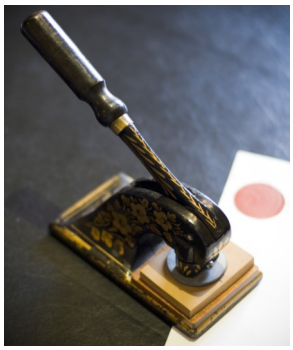

Recent/Pending Legislation

Proposed Amendments to *Powers of Attorney Act 2000* (Tasmania)

There are proposed amendments to the *Powers of Attorney Act 2000* (Tasmania), and our firm was asked to comment on it.

We undertook a review and as there were a number of matters which we consider would not be in the interests of our clients or the general public, we provided submissions on how the draft Bill should be changed before it is put to the Parliament.

We will have further material on this topic in later Editions.

The importance of estate planning that provides protection for family wealth (No 2): Statutory Wills

Re Matsis; Charalambous v Charalambous & Ors - Another recent case which emphasises the importance of estate planning that provides protection for family wealth.

In our last Issue (*Issue 33*) we reported on the case of *Hausfeld v Hausfeld & Anor* [2012] NSWSC 989 which emphasised the importance of having an estate plan, and, most importantly, a Will that has some protection for family wealth from bankruptcy, litigation and family law proceedings.

Another recent case which emphasises the importance of estate planning that provides protection for family wealth is the Queensland Supreme Court decision in *Re Matsis; Charalambous v Charalambous & Ors* [2012] QSC 349. The case involved an application for orders from the Supreme Court of Queensland under their Statutory Wills provisions, that a Codicil to a Will be made on behalf of a male Willmaker, who was a 90 year old and who did not have capacity either to alter his Will, or to make a new one. Tasmania has similar Statutory Wills provisions.

The Willmaker had a large and valuable estate, said to be valued in excess of $13 million, some of which was located in Greece. His existing will made on 14 May 2001 left his house to a grandson; and the rest of his estate was to be divided equally between his three sons.

The Willmaker's sons were engaged in businesses which carried with them some degree of financial risk, and it was desirable that their inheritance pass to them within a protected and tax effective environment. As the Willmaker had lost testamentary capacity any amendment under Queensland law could only be made by order of the Court.

Although there was no current evidence of any creditor claims or any current exposure to liability, the Court accepted that there is a potential exposure to liability in relation to their business activities. The Court also accepted that it would be advantageous, for estate planning purposes, with the substantial legacies they stand to receive from the Willmaker's estate, that they be placed into testamentary trusts rather than received as outright gifts.

The proposed alteration did not disturb the scheme for distribution set out in the existing will, merely providing that the gift for each beneficiary be paid to a testamentary trust for each beneficiary. And there was evidence, which the Court accepted, that were the Willmaker able to understand the protection that a testamentary trust can provide, he would have been strongly supportive of the concept.

We note that similar but more severe financial risk factors existed in *Hausfeld v Hausfeld & Anor* [2012] NSWSC 989 however the decision in that case was very different with the Court finding that it was not appropriate for the Court to authorise an alteration in order to defeat a son's creditors, which were known creditors at the time.

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 and also that flexibility is given to your beneficiaries in how they receive their share of your estate.

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, or if you consider a Statutory Will or Statutory Codicil might be of advantage where a Willmaker has lost capacity please contact us.

Sam McCullough

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Critical issues for sole director companies

Sole Directors/Shareholders of a company need to be aware of the risks and complications that can arise if they die without a Will.

When a person dies without a Will, the Law of Intestacy applies. Intestacy is the area of Succession Law that is concerned with people who do not have Wills. The *Intestacy Act 2010* (Tasmania) applies to relevant Tasmanian assets and the distribution required under that Act often is not what a Willmaker may have wanted had they considered their own circumstances. A further complication is that there may be additional delay, and expense in the estate administration, because of the lack of a Will.

If you find that a member of your family dies without a Will and there are assets to administer, prompt contact with our firm - to either Kate Moss or Hayley Mitchell - is a sensible approach. It is a common piece of folk-lore that families in these circumstances must go to the Public Trustee - but of course this is not true, as many of them choose to go to Lawyers.

Particular difficulties arise where the person who died without a Will is the sole director and/or sole shareholder of a company. Sole director and sole shareholder companies have now existed for a number of years, so we are finding that it is an increasing problem in estate practice. These sole director companies may be a trading company, trustee of a family trust or other trust, or trustee of a superannuation fund (where it is a self managed superannuation fund).

Section 201F of the *Corporations Act 2001* (Commonwealth) provides that, if there is a death of a single member/director of a proprietary company, the Executor or other personal representative appointed to administer the deceased's estate may appoint a new director to the company. The difficulty is that, even if there is a Will, having the Executors appointed by the Court takes time, unless the lawyers involved undertake the complex, and at times expensive, procedure of having a temporary administrator appointed to the estate under the procedure known as *ad colligenda bona*, which is the Latin term for getting a court order that someone responsible will administer that estate for the emergency at hand, until the formal Grant of Probate (if there is a Will), or the formal grant of Letters of Administration (if there is no Will) is issued by the Court.

The question arises, can a company operate without directors, and the answer is no. And if there is no director, things stopping in relation to the company may be disastrous for the company, and the assets under the control of the company as well as the beneficiaries in the estate. This is clearly a critical issue for most companies of the type that are sole director and sole shareholder companies. The inability to trade, the inability to make management decisions, and the lack of having someone authorised to act for the company, could result in a reduction of the value of the assets, or in an extreme case the loss of those assets. Financial institutions do not, at law, have to deal with companies which do not have an operating director. Similar constraints exist with suppliers to the company. A loss of good will and value can happen quickly, and this is not in the interest of the sole director or sole shareholder or company or the beneficiaries. Shares in the company, and the assets of the company, also cannot be dealt with quickly, where there is no director.

There are a number of techniques that have been developed to deal with this issue, and these include:

- having a valid, modern and comprehensive Will in place;
- considering quickly whether an application *ad colligenda bona* should be made in the estate to effect the appointment of a new director, or directors, for the company; and
- having a Power of Attorney registered by the company so that someone appropriate can act for the company on the death or incapacity of the sole director.

Note that in our last bullet point, we have included incapacity of a sole director, as we consider that a sole director becoming incapacitated can be just as problematic as the death of a sole director.

If you are a sole shareholder or director of a company, you should have a Will; the company should have a Power of Attorney, and your Will and related documents should make provision for a replacement director and your Will should provide for who is to be the beneficiary or beneficiaries of your shares.



Peter Worrall, Hayley Mitchell and Kimberley Martin

Our Firm News

Asset Protection Seminars

Our first Asset Protection Seminar on "Superannuation and Asset Protection" was held on 29 May 2013, with two seminars to follow later this year. Please email hayley.mitchell@pwl.com.au if you are interested in attending, as places are limited.

TEN Webinar

Peter Worrall presented a two hour Webinar on Determining Testamentary Capacity. It was broadcast to lawyers in private practice around Australia. This was done for Television Education Network from their studios in Melbourne on 6 May 2013.

Television Education Network are a major provider of continuing legal education for practising lawyers, and both Peter Worrall and Sam McCullough have delivered papers and provided material for them.

Retirement Expo

Maggie Keeling and Sam McCullough presented material on behalf of Worrall Lawyers at the Retirement Expo in Launceston on 17 May 2013. Maggie Keeling's involvement is important because of her increasing volume of work for clients of our firm seeking advice on the legal documentation on entry to elder care. It is an important part of her commercial and conveyancing practice.

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Update on Federal Government changes to superannuation and taxation

Superannuation

The Federal Government has announced several changes to superannuation which are important for all Australians.

The penalties for exceeding superannuation contribution caps will be relaxed. Where a taxpayer has exceeded the limit for concessional contributions (currently $25,000.00), they will be able to withdraw the funds paid above the limit without incurring a penalty.

The Government also announced that excess contributions will be taxed at the taxpayer's marginal rate (plus interest) instead of the top marginal rate. The Minister for Financial Services and Superannuation stated that "this reform will ensure that individuals are taxed on excess concessional contributions in the same way as if they had received that money as salary or wages and had chosen to make a non-concessional contribution." This will assist in resolving a problem that was occurring with accidental over-contribution.

The concessional limit is also set to increase, with taxpayers of 60 years and older able to contribute up to $35,000.00 at the concessional tax rate from 1 July 2013. In this financial year it is $25,000.00. Taxpayers over 50 years will be able to take advantage of this increase from 1 July 2014.

Tax Free Threshold

On 14 May 2013, the Treasurer handed down the 2013/14 Federal Budget. The already-legislated increase in the tax-free threshold to $19,400 from 1 July 2015 (which we reported on in our article on the *Taxation advantaged of testamentary discretionary trusts* (in Issue 33) is to be deferred.


The Government announced that the tax free threshold change would be deferred "until such time as the carbon price exceeds $25.40 per tonne". As a consequence of it going back to where it was prior to the 14 May 2013 announcement, the normal tax free threshold continues to be $18,200.00 (or up to $20,500.00 if the low income tax offset applies).

Alex Bobbi and Kimberley Martin

Our Lawyers

Peter Worrall
Director
Ph: 6223 8899
peter.worrall@pwl.com.au

Sam McCullough
Director
Ph: 6223 8899
sam.mccullough@pwl.com.au

Kate Hanslow
Senior Associate
Ph: 6223 8899
kate.hanslow@pwl.com.au

Kate Moss
Associate
Ph: 6223 8899
kate.moss@pwl.com.au

Maggie Keeling
Associate
Ph: 6223 8899
maggie.keeling@pwl.com.au

Hayley Mitchell
Lawyer
Ph: 6223 8899
hayley.mitchell@pwl.com.au

Alex Bobbi
Lawyer
Ph: 6223 8899
alex.bobbi@pwl.com.au

Kimberley Martin
Lawyer
Ph: 6223 8899
kimberley.martin@pwl.com.au

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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