Estate Planning Tasmania News

Issue 35 June 2013

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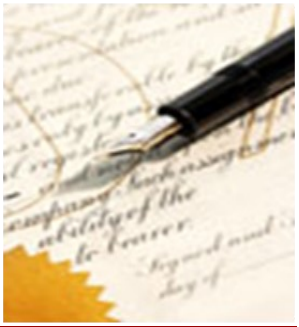

Advertising Notice for Claims – Protection for Personal Representatives

How does a personal representative protect themselves, or limit their liability for estate debts, as they approach the end of the administration period?

On being appointed an Executor or an Administrator (collectively referred to as a "personal representative") of a deceased estate, the personal representative holds the property of the estate on trust, and is liable to pay the debts of the estate.

If the personal representative distributes part or all of the estate, and then finds that they have not held sufficient assets to pay the estate debts, the personal representative may be liable for the value of the debt in the absence of other arrangements. This is usually so, even where the personal representative was not aware of the debt.

There are a number of things a personal representative can do to protect themselves, or to limit their liability in respect of estate debts. The most obvious is to make a thorough and proper search of the deceased's personal effects and papers. However, this task may present some difficulties for various reasons, and will not always ensure that all matters about the estate are discovered, nor does it release the personal representative from liability.

One option that is available is to advertise what is known in Tasmania as "Notice for Claims". This is a statutory protection contained in the *Administration and Probate Act 1935* (Tasmania) and the *Trustee Act 1898* (Tasmania) ("the Acts").

Once the period for claims (usually thirty days) has expired, if there is a claim, then the personal representative needs to attend to that claim before any estate assets can be distributed.

Once the personal representative has distributed part or all of the estate after the expiry of the claims period, they are not liable for the value of the estate distributed if a claim is received at a later time. However, if the personal representative receives notice of a claim after the expiry date, and still holds part of the estate, the personal representative is liable to pay that claim (or part thereof if there are insufficient estate assets).

The strict legal position is that the personal representative has no protection from the debts of the estate if they fail to advertise. Even if they do advertise, in some very limited circumstances, a creditor can trace the assets past the personal representative through to the beneficiaries receiving a distribution. This is because it is a statutory protection for the personal representative, as opposed to a statutory protection for the beneficiaries of an estate.

To obtain the protection awarded by advertising Notice for Claims, the notice must be advertised in accordance with the strict provisions contained in the Acts. We strongly recommend that any personal representative seek specialist legal advice about their role.

Hayley Mitchell

Our Firm News

Asset Protection Seminars

Our second Asset Protection Seminar on *Discretionary Trusts – Are They Still Protective?* was held on 19 June 2013, with one seminar to follow later this year. Please email hayley.mitchell@pwl.com.au if you are interested in attending, as places are limited. All seats were taken at the last seminar.

Tax Institute Australia

Sam McCullough presented a paper on aspects of business succession planning at the Tax Institute's National Conference for advisers to the Wine, Beer, Cider and Spirits industry on 25 May 2013.

Glossary

Will

A document created by a person with the intention of appointing an Executor to administer that person's estate in the way that is provided for in the document. It only takes effect on death. It may be changed before death only if the person retains testamentary capacity. Only the last Will is effective. Other things that may be mentioned in Wills include funeral wishes, testamentary guardians and the exercising of a power of appointment on death.

Estate Planning

A process of organising a person's assets, circumstances and personal affairs in a way that achieves, both during life and at death, the result that the person wishes to achieve within the constraints imposed by the personal circumstances and the law. The process should take into account Succession Law and laws relating to tax, Trusts, company law, superannuation, Powers of Attorney, Instruments Appointing Enduring Guardians, and related laws. The process must also take into account the client's wishes and the client's family circumstances.

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Australia's Complex and Conflicting Succession Laws

Dying when resident outside Tasmania may affect how your estate is distributed. Having assets in a number of States or Territories in Australia may also impact the law to be applied to those assets.

In Australia there is no uniform succession legislation. Instead, a patchwork of legislation exists, with each State and Territory having laws and rules that differ widely. Although there are suggestions from time to time that uniform legislation should be introduced, it is unlikely that this will occur anytime in the near future, as it has been largely ignored for many years by most States and Territories. The legislation is often similar, but not the same.

The three areas of succession law where there are substantial differences across Australia include:

1. how Wills are made;
2. what happens when someone dies without a Will; and
3. what happens when someone who can legally expect to inherit from an estate does not inherit anything, or receives less than they expected.

The result of this lack of uniformity is that when a person dies in Australia, the State or Territory in which they die, or in which their willable assets are deemed to be held, will determine, and possibly affect, how their estate is administered and distributed.

Examples of these differences include:

- in the event of an intestacy (where a person dies without making a valid Will) in Tasmania a surviving spouse or partner where there are no children would receive the whole of the estate. In Western Australia, if the intestate is survived by a spouse or partner and a parent or brother or sister (or the issue of a sibling), the spouse or partner is only entitled to the whole of the intestate's estate if its value is below a prescribed amount; and
- a person may have a right to bring an application for family provision for proper maintenance and support in some States and Territories, but would be excluded from doing so in others. An example of this is claims by grandchildren.

(Continued Page 4)

Casewatch - Vagg v McPhee [2013] NSWCA 29 (22 February 2013)

The recent case of *Vagg v McPhee* [2013] NSWCA 29 heard in the New South Wales Court of Appeal emphasises the importance of ensuring that you understand the nature of your home ownership.

The case involved a Will which included a "request" that the Willmaker's house (which she owned as Joint Tenants with her husband) be sold and the proceeds given to her five children. After the wife's death, the husband sold the house, but refused to distribute any proceeds to the children. Instead, he bought another house for himself.

The Willmaker had previously been advised about the nature of her ownership and that she could sever the joint tenancy. She chose not to sever the joint tenancy but included the "request" in her Will mentioned above. The children claimed that there was a failure by the solicitors who drafted the Will to properly advise the Willmaker about severing the joint tenancy; and to properly implement her wishes by not severing the joint tenancy.

The court held that for beneficiaries to be entitled to compensation where a solicitor failed to give effect to a Willmaker's intentions by severing a joint tenancy, these intentions must be clear and discernible from express terms in the Will. There was no such intention revealed in this Will. On the contrary, the "request" revealed that the Willmaker understood that she could not dispose of her half interest in the property. The case was dismissed, both in the first instance and on appeal.

In Tasmania, real estate can be owned by multiple parties in two ways, namely:

1. as *Joint Tenants*, which means that if any of the joint owners die, the surviving owner(s) automatically own the whole of the property absolutely, regardless of what provision is made in the Will of the deceased joint owner about that property. A joint tenancy may be severed (that is, converted to a tenancy in common) and then each owner can then direct how their share in the property is passed following their death, by making provision in their Will; or
2. as *Tenants In Common*, which means that each owner has a separate interest in the property which will form part of their estate, and this separate interest is capable of being left by a Will. If no Will has been made, the interest in the property will pass under the provisions of the *Intestacy Act 2010* (Tasmania). Also, the owners can hold their shares in equal or unequal shares.

To ensure that your property ownership reflects your current circumstances and wishes, it is important to ensure that you understand how you own real estate with another person, and also that your Will is clearly and correctly drafted in accordance with that ownership and those wishes. This may require a changes being made to how you currently own this real estate. For further information please contact us.

Kimberley Martin

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Cost versus Value in Estate Planning

How much a person should spend on a review of their Estate Planning, and the value of seeing an Estate Planning Lawyer, are often underestimated.

Ensuring that you have an Estate Plan which accurately reflects your financial and family circumstances should not be underestimated. There are websites which boast "How to do your Estate Planning on the Cheap" and every week various media advertisements encourage people to bypass lawyers and create their own Wills, using cheap or free "Will kits".

In difficult financial times, people may be tempted to choose these avenues to complete their Estate Planning. Others may resist or resent spending money on Estate Planning, because they think that they won't gain any benefit, that they only have simple circumstances, or that they either don't need a Will, or only need a "simple" Will. These assumptions are quite often incorrect, and although not everybody has complex circumstances – a lot of people do.

Most people have no idea what happens after they die without a Will or Estate Plan. Many rely on the misguided notion that a free or cheap Will kit is good enough to protect their family and assets. The reality of the situation is quite different, as any mistakes made with these kits (or in a Will drafted by an inexperienced person) can result in thousands of dollars in additional legal expenses, be stressful for family members and cause delay in the administration of an estate.

When considering a review of your Estate Planning it is best to think of it as being similar to buying a car, you get what you pay for. Completing an Estate Plan well is obviously a little more important than buying a car, but the message is still appropriate.

Many lawyers charge between $300.00 and $450.00 per hour plus GST. A lawyer with a good understanding of investment and business structures charges no less than $300.00 per hour plus GST. A lawyer with tax or superannuation expertise will usually charge significantly more.

It is a good idea to ask yourself:

- what exactly you are getting for the low price?
- does the person actually knows what they are doing?
- how much of their time do they spend in this area of the law?
- if they do know what they are doing, then why are they charging below market value?
- how sure are you that, if you complete a "Will kit" at a low cost, or have a Will completed with someone who lacks comprehensive Estate Planning skills, you have not overlooked something that is important, or have not answered a question incorrectly?

Another way to answer this question is to ask what you do not get with a "simple Will" at a cheap price. What you are unlikely to get is:

- proper advice and guidance that takes into account your particular circumstances;
- advice about your superannuation on death;
- advice about tax on death;
- asset protection for beneficiaries who may need it, including children under the age of 18;
- advice about guardianship of your children;
- strategies to reduce the risk of family money ending up outside of the family;
- substitute provisions if your initial wishes are not able to be carried out; and
- a good understanding of your investment and business structures, and how they should be dealt with on your death.

For a low fee you simply will not get the benefit of an experienced lawyer investing the time to get an understanding of these issues.

Completing your Estate Planning with an experienced Estate Planning Lawyer will give you and your loved ones the peace of mind to know that if you become mentally incapacitated, that arrangements are in place for people you know and trust to supervise and manage your financial decisions and your health and lifestyle decisions. The alternative is a government appointed guardianship and administration appointment.

You and your loved ones will also have peace of mind to know that, during the difficult time that will follow your death, the settling of your affairs and distribution of your property will be conducted in the way you wanted, and by people you know and trust.

For details on completing or reviewing your Estate Planning please contact us.

Peter Worrall and Kimberley Martin

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Australia's Complex and Conflicting Succession Laws (Cont)

It is now common enough for an estate to be across two or more jurisdictions, and possibly even include property overseas. It is therefore important to understand the differences in the law across the jurisdictions and to carry out estate planning that accurately reflects and implements the law and distribution that the Willmaker wants.

This is particularly relevant where there is real property involved. However, other assets (for example, accounts opened in other jurisdictions, including superannuation) are a common issue that need to be dealt with in the administration of estates. Some other issues that can arise include considering where the Willmaker is domiciled, and the considerations in relation to the appointment of suitable Executors, and the administration of their estate in the different jurisdiction. You should also seek advice prior to acquiring new assets if they are outside of the jurisdiction that you normally reside in.

If you have recently moved between jurisdictions, or hold property in more than one jurisdiction, we suggest that you contact us to discuss your options.

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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