Estate Planning Tasmania News

Issue 37 August 2013

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Our Firm News

Peter Worrall spoke about a paper he co-authored with **Kimberley Martin** on *Ownership of and Access to Digital Assets on Death* at the 4th Annual Wills and Estates Conference in Queensland on 22nd and 23rd August 2013.

An Inadequacy in the Law - Our Intestacy Provisions

There is an inadequacy in the law that is difficult to address in moral terms.

A situation that we commonly come across in the area of estate administration is where a person has died intestate (that is, without a valid Will), and as a consequence, the person's estate is to be distributed in accordance with the *Intestacy Act 2010* (Tasmania). Problems often arise because there is an inadequacy in the law that is difficult to address in moral terms.

For example, in circumstances where a child dies intestate, if they are not survived by a spouse or children, their estate is to be distributed equally between their parents (or the survivor of them).

What happens where a child's parent has had little or no contact with them (or one of them) during their life? What if they have made no financial contribution to the child's development, education and care?

The position at law is that, unless there has been an adoption, the biological parent is the parent of the child, and is entitled to share in the child's estate. The person, who as a parent has not been involved in the child's life, is also entitled to make an application to the Court to be appointed the Administrator of the estate (similar to the role of an Executor appointed by a Will).

Not only do these circumstances give rise to the distribution of your estate in a way that may not reflect your wishes, but it has the effect of causing additional stress and anxiety for a parent who has cared for you and provided financial support during your life.

The inadequacy in the law is that it does not take into consideration the estrangement or the lack of financial contribution made by a parent. Whilst there may be alternative remedies available (including an application for additional provision under the *Testator's Family Maintenance Act 1912* (Tasmania)), it is best that this situation is avoided by making proper arrangements in relation to your estate planning, including having a Will.

If you would like advice in relation to the distribution of estates on intestacy, please contact us.

Kate Moss

A note from our Commercial Practice Group - First Home Owner Assistance

In the 2013-14 budget, the Tasmanian Government announced changes to the First Home Owners Grant ("FHOG") scheme.

The FHOG is a government payment of up to $7,000.00 for eligible first home buyers or builders. The grant is not means tested and there is no limit on the purchase price for the property.

Changes to the FHOG mean that contracts for the purchase of established properties which are signed on or after 1 July 2014 will not be eligible for the grant. After 1 July 2014, first home buyers will only receive the FHOG if they are building a new home.

The First Home Builder Boost (FHBB) scheme is due to expire on 1 July 2014. The FHBB provides a payment in addition to the FHOG of up to $8,000.00 for homes built under a building contract; homes built by an owner-builder; homes purchased off the plan; or new homes.

Various eligibility criteria exist for the FHOG and FHBB, and first home buyers should consider them prior to signing a contract.

Alex Bobbi

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Asked and Answered: Relationship Breakdown

Q. After a relationship breakdown what considerations do I need to make, if any, for my Estate Planning?

A. Your current Estate Planning is likely to have been undertaken when your marital or defacto relationship was healthy. Unless you are aware of the issues and take steps to address them as soon as your relationship breaks down irretrievably, some unwanted consequences may occur.

You should consider revoking, if you have them in place, your Enduring Power of Attorney and Instrument Appointing an Enduring Guardians.

Waiting until your divorce and/or property settlement is finalised is not sensible. If, as a result of accident or illness, you are deemed incapable of managing your own affairs or making your own decisions, the last person you might want acting as your Attorney or Guardian may be a former partner or spouse.

You should consider reviewing your current Will.

Unless a contrary expression is made in your Will, divorce will:

- revoke any gift made to your former spouse in your Will;
- revoke any appointment in your Will of your former spouse as an executor, trustee, advisory trustee or guardian;
- revoke any grant made by your Will of a power of appointment exercisable by, or in favour of your former spouse; and
- not revoke an appointment of your former spouse as trustee of property left on trust for beneficiaries that include children of both you and the former spouse.

Unless a contrary expression is made in your Will, separation will not have any effect on your current Will. If you were to die without reviewing your current Will, and you were in a defacto relationship or had not yet divorced, your former partner or spouse would retain any benefit they had been given in your Will and will remain a "person entitled to claim" on your estate under the *Testator Family Maintenance Act 1912* (Tasmania).

You should also review any Binding Death Benefit Nomination (BDBN) you have made.

Some Superannuation Funds allow for a BDBN.

Although some BDBN's lapse after 3 years, some do not and will remain in place until revoked. After a relationship breakdown a BDBN can remain effective, even though the relationship has ended. In any case they should be reviewed.

You should review the structure and management of any jointly owned assets.

Many couples own property as joint tenants, this means that if either of the joint owners dies, the surviving owner automatically owns the whole of the property absolutely, regardless of what provision is made in the Will of the deceased joint owner about that property. There can be merit in considering the severance of a joint tenancy in the event of a relationship breakdown. After severance your share of the property will pass to whoever you want it to go to as set out in your Will.

Similar considerations arise in relation to life insurance.

You should also consider changing your nominated beneficiary of your (non superannuation) life insurance policy.

Unless the specific policy provides otherwise, if your former partner or spouse is the beneficiary of a life insurance policy, divorce or separation will not revoke the policy.

There are other considerations that need to be made, and the above is not a complete list.

If you have recently experienced a relationship breakdown and would like to discuss which of these considerations, and possibly others, may be relevant to you, please contact us.

Kimberley Martin

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The Appointment of Alternative Decision Makers

In our last edition (Issue 36), we looked at how to appoint an Administrator to act for a person in relation to their financial affairs. In this article, we discuss how a Guardian can be appointed as an alternative decision maker for someone in relation to their personal circumstances, and the role of the Guardianship & Administration Board ("the Board").

A Guardian makes decisions about a person's personal circumstances, including their health, medical and lifestyle matters.

Any interested person can make application to the Board seeking the appointment of a Guardian. The Board may appoint a full guardian, or limited guardian. The Board will not make an order appointing a full guardian unless it is satisfied that an order for limited guardianship would be insufficient to meet the needs of the proposed represented person.

In order to be successful in an application for the appointment of a Guardian, it must be established that:

1. the person has a disability, as defined in the *Guardianship & Administration Act 1995* (Tasmania) ("the Act");
2. by reason of their disabilities, the person is unable to make reasonable judgments in respect of matters relating to all or any matters relating to his or her person or circumstances; and
3. there is a need for a Guardian to be appointed.

As noted in our earlier article, a major reason why an application to the Board may fail is due to there being a lack of need for a Guardian to be appointed. One of the guiding principles of the Board, set out in section 6 of the Act, and reinforced in section 20, is that the powers of the Board must be performed by "the least restrictive" means.

If there is another method of ensuring that the person's best interests are upheld, without the appointment of a Guardian, then the Board will not intervene and make Orders.

In considering the appointment of a Guardian, the Board must be satisfied that the person:

1. will act in the best interests of the proposed represented person; and
2. is not in a position where the person's interests conflict or may conflict with the interests of the proposed represented person; and
3. is a suitable person to act as guardian of the proposed represented person.

In relation to the third limb of this test, the Board must take into account:

1. the wishes of the proposed represented person so far as they can be ascertained; and
2. the desirability of preserving existing family relationships; and
3. the compatibility of the person proposed as guardian with the proposed represented person and with their Administrator (if any); and
4. whether the person will be available and accessible.

If the Board is not satisfied as to these matters, then it will appoint the Public Guardian to act as Guardian. Often this is not desirable, due to the fees associated, and the fact that it moves the decision making process away from family members.

We recommend that a person considering making an application to the Board for the appointment of a Guardian obtain our assistance, at least in the preparation of their application to the Board, as in our experience, the Board appreciates applications that are fulsome, based on legal argument, and address all relevant matters. A person also has the choice to obtain legal representation to appear for them at a hearing of the Board, or they may decide to represent themselves at the hearing.

If you would like any further information, please do not hesitate to contact our Estate department.

Kate Hanslow

Glossary

Defacto relationship
A relationship where there is a commitment to a common, continuous and lasting domestic relationship between a man and a woman where it is similar to a marriage but no lawful marriage has taken place.

Spouse
A term that for married couples means the other of them, hence the husband is the spouse of the wife and the wife is the spouse of the husband. Note that there can be an extended meaning of spouse in some documents where the couple is in a Defector Relationship or a Same Sex Relationship.

Intestacy
This term covers the effect of dying without a Will. There are laws which are different in each State and Territory, which provide for the disposal of your Willable Assets that you have not effectively disposed of under a Will.

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Case watch: *DC* [2013] QCAT 108

The decision of the Queensland Civil Administration Tribunal (QCAT) in *DC* [2013] QCAT 108 provides a recent example of how a failure to properly complete "simple" statutory forms such as a Power of Attorney may result in expensive legal proceedings.

In this case, a man had executed an Enduring Power of Attorney ("EPA") in the presence of a social worker, appointing his wife and his son as his attorneys. The man subsequently lost capacity, and when his attorneys attempted to use their powers under the EPA it was found that numerous errors had been made when the EPA was completed, including:

1. a box confirming that the man was not appointing more than one attorney was ticked, when clearly the man had appointed two attorneys;
2. the wife, although she had signed her acceptance as attorney, had not ticked the necessary boxes acknowledging that she was able, under the specifications listed, to accept her appointment as attorney; and
3. the son had signed his acceptance as attorney before his father signed the document.

The original EPA had also been lost, and only a certified copy was able to be found.

The attorneys applied to QCAT for a ruling that the Enduring Power of Attorney was valid. Of the issues presented, a key finding of the Tribunal was that an attorney cannot accept their appointment until an EPA has been executed by the principal who is granting the power in the first place. Given that the man had not signed the EPA before his son, no grant of power had been made and therefore the son's purported acceptance was invalid.

Although QCAT confirmed the invalid acceptance, and the other minor errors, could be remedied the cost of these proceedings could have been avoided if legal advice had been sought. There are numerous factors that need to be identified and considered when drafting any estate planning document, and this is best carried out by an estate planning lawyer.

Kimberley Martin

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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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