



# Estate Planning Tasmania News

Issue 38 September 2013

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## Our Firm News

**Bridget Caplice and Hannah Edwards** have joined the team at Worrall Lawyers as Graduate Clerks.

## Glossary

### Philanthropy

The desire to promote the welfare of others, expressed especially by the generous donation of money to good causes.

### Estate Administration

The process that occurs after the Grant of Probate or the Grant of Letters of Administration in an estate that encompasses the collection and recording of the estate, the payment of the debts, and the transfer of the remaining assets to the Beneficiaries or to a Testamentary Trust for the benefit of the Beneficiaries.

### Probate

This is the Order made by the Court granting Probate to the Executors. It is the authority which comes from the Court Order that allows the Executor to undertake the Estate Administration.

## Tasmanian Charities Receive Substantial Bequests



*Scott Donoghue, third from left, of Hillross Financial Services, with representatives of the beneficiaries of Mollie Chick's donations, from left, Beverley Guy, Hobart Cancer Auxiliary; Kate Baker, Leukaemia Foundation; Peter Milne, Clifford Craig Medical Research Trust; Don Roddam, Uniting Church; Dr Rob Fraser, Council of Tasmanian Churches; Rob Floyd, Uniting World; and at front Larissa Bartlett, Menzies Research Institute. Picture: Leigh Winburn Source: Mercury. Published with the permission of the Mercury Newspaper.*

**Worrall Lawyers hosted an afternoon tea to celebrate the charitable giving of the Reverend Mollie Chick at the conclusion of the administration of her estate. The following is an article which featured in the front page of the Mercury Newspaper on 2 October 2013, and is used with their permission, and the permission of the Executors of the Will, Scott Donoghue and Glen Penno.**

"She was the Hobart nurse who rose to the top of her profession before taking cloth as a trail-blazing female minister in the Uniting Church. But a year after her death aged 86, Mollie Chick yesterday provided the final twist in a life defined by generosity, bequeathing more than \$1 million to a group of Tasmanian charities including the Menzies Research Institute, Hobart Cancer Auxiliary and the Leukaemia Foundation. For those who knew her, Ms Chick's largesse was consistent with a quietly spoken but strong-willed woman for whom money meant little when compared to the riches improving the lives of others.

"Mollie inherited the majority of what she had, and I saw no change in her behaviour after she received the money. It did not change her lifestyle or her outlook," financial adviser Scott Donoghue said yesterday. "She was totally about caring for people, and simplicity was one of her core values. As a person there were bigger things to look at in life than money."

It was a sentiment echoed by Uniting Church Reverend Rod Peppiatt, who got to know Ms Chick well over a long period of time as a member of his Hobart North congregation. He described Ms Chick as a generous person who had a real passion for serving others with whatever resources she had, not only in the ministry but as a nursing sister and later in her role as a hospital chaplain.

Menzies Research Institute community engagement co-ordinator Larissa Bartlett yesterday described Ms Chick's \$100,000 gift as vitally important for her team's work, saying donations of that size allowed the institute to stay internationally competitive in health and medical research. Ms Bartlett said she wished the benefactor had been available yesterday to thank personally.

Other beneficiaries attending yesterday's ceremony included representatives from Uniting Church in Australia Property Trust (Tasmania), the Clifford Craig Medical Research Trust, and Uniting Church charity Uniting World who will use their funding for a new program working for the rights of women throughout the Pacific.

Mr Donoghue said he hoped Ms Chick's unusually generous community-mindedness would one day become commonplace in Australia as people considered how they left their money behind. "Unfortunately, unlike the United States of America and even the United Kingdom, philanthropy doesn't yet play a major part in our society," he said.



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## Dementia Awareness Week — The Issue of Capacity

**Dementia Awareness Week occurred this month, from 16 to 22 September 2013. With over 321,600 Australians living with dementia, including one in four people over the age of 85, the capacity of those with cognitive conditions to understand the nature and effect of legal documents and other acts is becoming an increasingly live issue. An estimated 1.2 million Australians are caring for someone with dementia<sup>1</sup> – you may be one of those carers. This article looks at how a person's capacity is a relative concept, dealing with the example of capacity to complete an Enduring Power of Attorney.**

An Enduring Power of Attorney is a document that provides a person or people (the "Attorney") with the power to act on another person's behalf (the "Donor") in relation to their financial, property, and business affairs. The word "Enduring" means that the powers granted in the Power of Attorney are exercisable notwithstanding the Donor later suffering from a mental incapacity – that is, the Attorney is able to act for the Donor when the Donor no longer has the capacity to act for themselves. This is very different to a General Power of Attorney, which ends on loss of capacity.

The test for whether or not a person can grant an Enduring Power of Attorney in Tasmania is contained in section **30(3)** of the *Powers of Attorney Act 2000* (Tasmania):

*"A donor is taken to understand the nature and effect of a deed or instrument only if he or she understands the following matters:*

- (a) that the donor may, in the enduring power of attorney, specify or limit the power to be given to an attorney and instruct an attorney about the exercise of the power;*
- (b) when the power begins;*
- (c) that, once the power for a matter begins, the attorney has power to make, and will have full control over, the matter subject to terms or information about exercising the power included in the enduring power of attorney;*
- (d) that the donor may revoke the enduring power of attorney at any time when he or she has the mental capacity to do so;*
- (e) that the power the donor has given continues even if the donor subsequently loses his or her mental capacity; and*
- (f) that the donor is unable to oversee the use of the power if he or she subsequently loses mental capacity."*

The common law test for capacity in executing documents generally comes from the High Court decision of *Gibbons v Wright*<sup>2</sup>:

*"The mental capacity required by law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of the transaction when it is explained."*

This authority makes it clear that the question of capacity is not a rigid concept. It is relative to the particular document or act being undertaken.

The English case of *Re K*<sup>3</sup> is authority for the proposition that a person may have the capacity to *create* an Enduring Power of Attorney whilst at the same time lack the capacity to deal with their own financial and property affairs. Justice Hoffmann stated<sup>4</sup>:

*"...there is no logical reason why, though unable to exercise her powers, she could not confer them upon someone else by an appropriate juristic act. The validity of that act depends on whether she understood its nature and effect and not on whether she would hypothetically have been able to perform all the acts which it authorised."*

In terms of a non-enduring power of attorney, he then went on to say:

*"I see no reason why the test for whether it was validly created should be the same as for whether it would be ceased to be exercisable. In principle they are clearly different."*

1. Statistics referred to obtained from the "Alzheimers Australia" website at <http://www.fightdementia.org.au/understanding-dementia/statistics.aspx>

2. (1954) 91 CLR 423, 438

3. (*Enduring Powers of Attorney*) [1988] Ch 310

4. at page 315



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## Dementia Awareness Week — The Issue of Capacity (Continued)

Tasmanian Legal academic Gino Dal Pont notes that this conclusion stems from an argument about the policy of the *Powers of Attorney Act 2000* (Tasmania) and the added protection of statute and the court to supervise the power<sup>5</sup>:

*"I think that my conclusions are in accordance with what appears to be the general policy of the Act. In practice it is likely that many enduring powers will be executed when symptoms of mental incapacity have begun to manifest themselves. These symptoms may result in the donor being mentally incapable in the statutory sense that she is unable on a regular basis to manage her property and affairs. But, as in the case of Mrs. F., she may execute the power with full understanding and with the intention of taking advantage of the Act to have her affairs managed by an attorney of her choice rather than having them put in the hands of the Court of Protection. I can think of no reason of policy why this intention should be frustrated."*

In summary, and subject to the terms of the particular Power of Attorney, which could specify an earlier or later date or event, powers of an Attorney are triggered if the Donor loses the mental capacity to manage their own financial, property, and business concerns. This is different to the test of whether or not a person has the capacity to grant a Power of Attorney, which is contained in section 30 of the *Powers of Attorney Act 2000* (Tasmania).

In reality, the distinction between these levels of capacity is often difficult to discern, as there is a fine line between the tests that apply.

Whilst the tests for capacity are legal tests, medical practitioners are often engaged in these circumstances to provide a medical opinion about a person's capacity in light of the legal tests that apply.



Kate Hanslow

5. Dal Pont, G, *Powers of Attorney* (2011), [314].

## A note from our Property and Commercial Practice Group - Buying a Property at Auction

**Buying a property at an auction can be an exciting way to acquire real estate. However, there are significant risks associated with this type of sale that potential bidders should be aware of.**

Auction conditions usually require the successful bidder to purchase the property on an "unconditional" basis. This means you will not be able to include any special conditions for finance, the sale of another property, a building inspection or other enquiries. The property itself is purchased on an "as is where is" basis, which means that the successful bidder takes it in its present state and condition, with very little that can be done if any defect or other adverse matter is uncovered after the auction. Effectively the liability of the owner is limited, with all of the risk placed on the buyer.

If you are intending to bid for a property at an auction, take the following steps to minimise the risks and maximise your chance of a successful result:

- Do your homework – any due diligence checks on the property must be done prior to the auction (including a property inspection, title searches, independent valuation etc);
- get your finances in order – if you do not have the funds available in your bank account or confirmation in writing from your bank that your finance has been unconditionally approved, then an auction purchase is not the right option for you;
- Research the market so that you go to the auction with a good idea of the value of the property;
- Familiarise yourself with the process - go to a few auctions to get a feel for how they work and, if possible, speak to people with auction experience;
- Set a budget and stick to it – remember if you are the successful bidder at the auction you will be required to complete the purchase, even if you cannot afford it;
- Auction conditions are available prior to the auction – obtain a copy well in advance and make sure you understand the terms;
- Check how much deposit is required and when (usually on the day of the auction), and ensure that you are able to access the funds if you are successful; and
- Most importantly – seek legal advice. Remember, there can be very serious legal and financial implications of purchasing a property at an auction – paying for advice beforehand can save you thousands of dollars down the track.

Our experienced property and commercial lawyers can advise you about the risks and help you to make an informed decision about whether to bid at an auction. We will even attend the auction with you, if you would like further assistance on the day. If you have any questions or require any further information please contact

Maggie Keeling on 6223 8899 or by email at [maggie.keeling@pwl.com.au](mailto:maggie.keeling@pwl.com.au).



Maggie Keeling





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## Self Managed Super Funds Statistics

**The ATO has recently published updated statistics on Self Managed Super Funds ("SMSF"), which provide some insight into the importance of expert advice and planning around the control and taxation of superannuation death benefits, and the control of funds after the death of one or all members.**

From an Estate Planning perspective, the statistics raise issues including the following:

- 963,852 Australians are now members of SMSF, with on average more than 64,000 new funds being established each year in recent years. SMSF have several advantages for Estate Planning purposes, however members must be more proactive in providing for what happens to their superannuation on death or incapacity than those with a public offer funds;
- In excess of 8% of SMSF assets consist of non-residential and residential real estate. Because direct property owned in SMSF can represent a significant percentage of the fund assets, have unrealised capital gains, can include business real property, and can commonly be part of a pooled investment between members, these types of investments require greater care for Estate Planning purposes than more "liquid" assets like equities and cash equivalent investments;
- 22.7% of funds have only one member, which can raise more planning issues than where there is at least another one member of the fund (being 69.2%) of funds; and
- 25.9% of SMSF members are aged over 64 years of age, and 58.2% more than 55 years of age. As members of SMSF age, the need to provide in the best possible way for what should happen to their superannuation held in SMSF if a tragedy event (death or loss of capacity) occurs to them becomes increasingly important.

Worrall Lawyers provides a full range of advice and documents relating to SMSF, with a particular focus on tailored legal advice on death benefit nominations and legal advice about how death benefits and the control of SMSF on incapacity or death of a member should be provided for, in the particular circumstances of the individual.



**Sam McCullough**

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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](http://www.pwl.com.au)

**Contributions:** Contributions and suggestions from Estate Planning News readers are always appreciated. Email us at [sam.mccullough@pwl.com.au](mailto:sam.mccullough@pwl.com.au)

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