Estate Planning Tasmania News

Issue 41 April 2014

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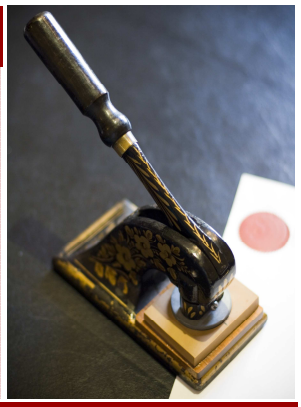

Our Firm News

Peter Worrall, who has been a Notary Public since 1993, has recently been appointed as a Non-Executive Governor of The Australian and New Zealand College of Notaries (ANZCN) for Tasmania, the Australian Capital Territory and the Northern Territory.

Case Note - *Ioppolo & Hesford v Conti* [2013] WASC 389

A recent case *Ioppolo & Hesford v Conti* illustrates how important it is to get things right where superannuation is concerned. Superannuation death benefits are only controlled by a Will when the superannuation death benefits are paid to the estate — and that is not always the case.

The key points coming out of *Ioppolo* are:

(a) there is no requirement in the *Superannuation Industry (Supervision) Act* (the "SIS Act") that the executor/ administrator of a deceased Trustee member be appointed as a Trustee of a self managed superannuation fund ("SMSF"). The SIS Act is the Act that regulates superannuation;

(b) a Trustee of an SMSF with a discretion on how, and whom, to make payment to, may decide not to follow a direction in the deceased member's Will about how payment of their superannuation death benefits should be made after death;

(c) where a surviving Trustee of a SMSF is not intended to receive the benefits in their personal capacity, there is a need to carefully control payment by binding nomination, and by ensuring the appropriate appointment of Trustees of the SMSF to carry out payment;

(d) in *Ioppolo*, the surviving Trustee of the SMSF, who was the husband of the deceased member, obtained specialist legal advice. The obtaining of this advice was a key factor in him being able to successfully defend and defeat the claim made by the children of his late wife's from an earlier relationship, that he had not acted "bona fide". The husband (through a corporate trustee that he appointed and controlled) decided not to follow the wishes in his late wife's Will, exercised the trustee's discretion and **paid all of the superannuation death benefits directly to himself and not to the estate. The estate would have paid the superannuation death benefits to his late wife's children.** The legal advice that the husband obtained was openly disclosed in the proceedings;

(e) the Courts are usually very reluctant to review a discretionary payment decision;

(f) the Courts are usually very reluctant to replace a Trustee on the grounds of an alleged conflict of interest.

Note that the Trust Deed in this case, as many do, expressly authorised a payment in favour of the Trustee or an office holder of the Trustee;

(g) there is a strong indication in *Ioppolo* that an adverse costs order would have been made against the children challenging the Trustee. **So the children did not receive the superannuation death benefits and probably paid not only their own legal cost, but also a substantial amount of legal cost of the husband**; and

(h) the SMSF member who died received poor Estate Planning advice, and a Will which was substantially ineffective. This can be said for two reasons: First, she did not take steps to control payment of her superannuation death benefits in a binding way; and secondly, the direction in her Will conflicted with a binding nomination in favour of the husband that later lapsed and thus was ineffective.

Sam McCullough

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Making an Application for a Grant of Probate in Solemn Form

We were recently successful in making an application to the Supreme Court of Tasmania to have a document pronounced as a valid Will, and that Probate of the Will be granted to the Executor in Solemn Form.

The document was drafted and handwritten during a conference whilst the person was in hospital. The person died a couple of days after signing the handwritten notes but without a typed version of the Will being executed.

On the face of it, the handwritten notes formed a properly executed Will under the *Wills Act 2008* (Tasmania) ("the Act"). However, given the circumstances surrounding the preparation of the document, we advised the Executor appointed under the Will that it would be prudent to make an application to the Supreme Court to have the validity of the Will confirmed, and to obtain a Grant of Probate in Solemn Form.

When applying to the Probate Registry for a Grant of Probate, the Executor is making an application for a **Grant of Probate in common form**. This is different from when an application is made to the Supreme Court where a Judge pronounces the validity of a Will and that Probate be granted, the **Grant of Probate is in Solemn Form**.

A **Grant of Probate made in common form** can later be revoked for reasons such as the existence or discovery of a later Will; the Willmaker lacked testamentary capacity at the time they made the Will; the Willmaker made the Will under undue influence; or the Willmaker did not know and approve of the contents of the Will.

When **Probate is granted in Solemn Form** it is irrevocable with limited exceptions. As part of the application for a Solemn Form grant, the applicant must show and the Court must find that all interested parties have been identified and given notice of the application; the Willmaker had testamentary capacity; they knew and approved of the contents in the Will; they intended to revoke all previous Wills; the testator was not subject to undue influence; and where the Will has not been executed in accordance with the formal requirements of the Act, that the testator intended the document to be their Will.

Every Executor has a right to seek an Order from the Court that the Will be proved in Solemn Form, and in circumstances where the Willmaker's testamentary capacity is in question, or where the Will does not meet the formal requirements under the Act, a Solemn Form application will be necessary.

In our recent case before the Supreme Court of Tasmania, the Judge commented that the lawyer also of our firm, when taking instructions for the Willmaker's estate planning, had taken the prudent step of having the Willmaker sign the handwritten notes in conference in anticipation of a typed Will later being prepared, and that this action proved prudent as the Willmaker died without a substitute typed Will being prepared. The judgment in the case notes that the lawyer from our firm "... *took the prudent precaution of asking the client to sign the notes of instructions as a will with a view to a typed document being prepared and substituted. That proved to have been a very prudent thing to do because the testator's health deteriorated and she died without there having been an opportunity to substitute a typed version of the will.*"

Importantly, in proving that the handwritten notes were a valid Will, the Willmaker's estate was distributed in accordance with their wishes. We avoided the Willmaker's estate being distributed on intestacy to distant family members with whom the Willmaker had not had any relationship during their life (as the Willmaker did not have an existing Will).

This raises an important issue: What happens to the estate, the assets and liabilities and the estate administration process during this time? The Executor appointed under a Will or an interested party should make an application to the Supreme Court for a grant of representation to give them the power to deal with the estate in the interim. This will be the subject of an article in a future Estate Planning News.

It is rarely too late to complete your estate planning to ensure that your estate is dealt with in accordance with your wishes, and good planning will help to ensure that the administration of your estate has limited complications.

We have a number of lawyers in our Estate Practice Group who can provide you with advice about your role as an Executor; the validity of a Will; your rights and obligations in an estate dispute; or if you need to complete your estate planning. Telephone our office to make an appointment with one of our Estate Practice Group.

Hayley Mitchell

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Privacy Law – What Changed on 12 March 2014?

1. What do I need to know?

(a) Changes to the *Privacy Act 1988* (Commonwealth) (**Privacy Act**) commenced on 12 March 2014.

(b) For private sector organisations, there will be significant penalties for breaches of the Privacy Act.

(c) The existing National Privacy Principles (**NPPs**) and Information Privacy Principles (**IPPs**) are being replaced by a single set of Australian Privacy Principles (**APPs**).

(d) For private sector organisations, you should revise your policies, practises and systems to ensure compliance with the new regime.

(e) For individuals, be aware of the changes, your new rights and the expanded powers of the Australian Information Commissioner (**Information Commissioner**) to protect your privacy interests.

2. What is the Privacy Act?

The Privacy Act provides protection to individuals against the mishandling of personal information by Federal Government agencies and certain private sector organisations.

3. What changed?

A new set of APPs are replacing the existing NPPs for private sector organisations and IPPs for Federal Government agencies. While most of what was contained in the NPPs and IPPs are reflected in the APPs, a number of the APPs are significantly different from the existing principles. These include greater restrictions on the use and disclosure of personal information for direct marketing, and cross-border disclosure of personal information.

The Information Commissioner will also have enhanced enforcement and assessment powers. For example, the Information Commissioner can apply to the Federal Court to enforce its determinations, including seeking penalty orders. Significantly, there are new penalties of up to $1.7 million for corporations if it engages in serious or repeated breaches of the APPs.

This article only provides a high level summary of some of the more significant changes to be introduced. If you would like any further information or advice about your privacy obligations or rights, please contact us.

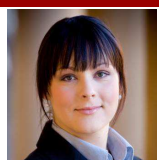
Todd Riley

Kate Moss - more firm news

We are pleased to announce, and congratulate Kate Moss on the arrival of her newborn son, Felix Kiss. Kate, Felix, and father Mik Kiss are doing well.

Kate, an Associate Lawyer with our firm is known to many of our clients as one of our two probate lawyers.

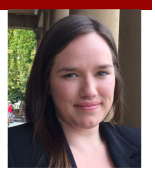
She expects to be returning to work in July this year.



Kate Moss

Bridget Caplice - more firm news

Bridget Caplice completed a combined Bachelor of Business and Bachelor of Laws degree from the University of Tasmania and is working as a Graduate Clerk with Maggie Keeling in the Property and Commercial areas.



Bridget Caplice

Company Shares in Long Term Trusts — Keeping Proper Accounts

Company shares in long term trusts give rise to a number of problems for trustees and beneficiaries. These tips about things to watch out for may help avoid mistakes and possible litigation.

Trustees have a duty to keep proper accounts. Where there is a life interest, they have a duty to hold the trust fund properly balanced between the interest of the life tenant (the person who enjoys the income during their life), and the person holding the remainder interest (the person who receives the capital on the death of the life tenant). Company shares give rise to some particular difficulties, and more especially so when the company shares are held in closely held companies (those companies where the trust owns the majority of the shares or otherwise is able to exercise control), and where the trust owns all of the shares in the company.

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Some tips for Trustees gleaned from an article by John Harper TEP in the March 2014 STEP journal are:

1. keep accurate, full and comprehensive accounts showing the trail of dividends from the relevant companies;
2. keep the beneficiaries fully and regularly informed;
3. ensure that dividends are paid, and if not, make enquires on why they are not being paid;
4. do not allow the companies to make payment direct to the trust beneficiaries, even if the company is capable of getting that correct. Make sure the dividends are paid to the bank account managed and controlled by the trustees of the trust solely for the purposes of having a bank account for the trust;
5. take care to balance the interest of life estate beneficiaries against the interest of the remainder beneficiaries;
6. take care to balance the interest of beneficiaries who have different rights from other beneficiaries;
7. request company accounts regularly, and when received, analyse them thoroughly - including the distribution policy when compared to retained profits; and
8. if the trustees are not on the board of the company, they or a representative should attend annual general meetings and maintain a proper interest as shareholders.

Peter Worrall

All of these points seem to be common sense. However, regularly enough, trustees do not do things as well as they should do. This leaves trustees open to the risk of being sued by the beneficiaries. It also is more likely that different classes of beneficiaries will have disputes amongst themselves.

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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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