

# Worrall Moss Martin News

Issue 5, September 2019



Expert advice  
and solutions



WORRALL  
MOSS MARTIN  
LAWYERS

## Can Facebook Really be Used to Prove that I was "in a relationship" After I Die?

A person's relationship status can be an important factor when they die.

In *Dragarski v Dunn* [2019] NSWSC 300, the Supreme Court of New South Wales, in determining who had the right and responsibility for the disposal and interment of the deceased person's body, considered (as part of the evidence in the case) the deceased person's Facebook and Messenger accounts to ascertain whether she was "in a relationship" when she died.

**The Facts:** The deceased died in March 2019 without a valid Will (meaning that she died intestate). A dispute arose between the deceased's mother and Mr Dragarski (the father of the deceased's child), about whether the deceased's body should be cremated or buried.

There was no dispute that the deceased and Mr Dragarski were previously in a *de facto* relationship. However, they had separated in March 2016. Mr Dragarski claimed that the relationship had recommenced and that he and the deceased **were in a *de facto* relationship** at the time of her death, and accordingly he had the right to decide. The deceased's mother claimed that they **were not in a *de facto* relationship**, and accordingly she had the right to decide. Mr Dragarski made an application to the Court.

Mr Dragarski provided the following evidence in support of his position:

- they had a sexual relationship up until her death;



- they lived together up until her death;
- they had a child together;
- the neighbours considered them to be in a relationship; and
- the deceased had messaged Mr Dragarski's sister on 10 January 2019 stating, "*Yes I am staying with [Mr Dragarski]. We have worked a lot of things out. We are happy where we are at the moment. He has been great*".



The deceased's mother provided the following evidence to support her position that the deceased was not in a *de facto* relationship with Mr Dragarski at the time of her death:

- the deceased's Facebook profile recorded her relationship status as 'single';
- the deceased had an active profile on a dating website;
- evidence suggested she only lived with Mr Dragarski to increase her access to their child;
- the deceased did not share a bank account with Mr Dragarski;
- the deceased received single parenting payments from Centrelink; and
- the deceased posted on her Facebook profile on 9 January 2019, "*I am still at [Mr Dragarski's] house we still not together though. Kids are great*".

**The Law:** The legal principles about who has the right and responsibility for the disposal and interment of the deceased person's body was set out in *Smith v Tamworth City Council* (1997) 41 NSWLR 680. In that case, the Court stated that:

- if a person has named an Executor in his or her Will and that person is ready, willing and able to arrange for the burial of the deceased's body, the person named as Executor has the right to do so;
- where no Executor is named, the person with the highest right to take out administration will have the same privilege as an Executor. The usual application is the spouse (including a *de facto* partner), then the child or children of the deceased, then the parents, and finally the siblings. The right of a spouse (or *de facto* partner) will be preferred to the right of children and parents;
- where two or more persons have an equal ranking privilege, the practicalities of burial without unreasonable delay will decide the issue;
- a person with the privilege of choosing how to bury a body is expected to consult with other stakeholders, but it not legally bound to do so; and
- other than appointing an Executor, and the application of any legislation dealing with the disposal of bodies, a person has no right to dictate what will happen to his or her body.

**The Decision:** The Court observed that one party can be of the view that a *de facto* relationship exists, especially when it is advantageous in the circumstances, when in reality the *de facto* relationship does not exist.

The Court considered the evidence adduced by both parties, including Facebook and the dating site evidence, and was ultimately not persuaded that the deceased and Mr Dragarski were in a *de facto* relationship at the time of the deceased's death.

The Court dismissed Mr Dragarski's application.

**Key Points:** This case highlights the importance of:

- having a valid Will in place;
- choosing the right person to appoint as your Executor;
- ensuring your Will (and other estate planning documents) are updated when your relationship status changes; and
- seeking advice following death at the earliest possible opportunity.

Worrall Moss Martin Lawyers has specialist skills and experience in estate planning, estate administration and estate litigation. We can assist clients with completing proper estate planning, including urgent estate planning documents where a person has recently separated. We can also assist in circumstances where a person has died and a dispute arises, including disputes about whether they were in a relationship when they died. Please contact Kate Moss, Hannah Boxall or Kimberley Martin if you have any questions about the matters set out in this article.

## Time Limits on Challenging Wills in Tasmania. Can Claims Still be Made Once the Time Limits Have Passed?



When a person dies in Tasmania, whether with or without a valid Will, certain classes of people have the right to make an application to the Court for provision or further provision from the deceased's estate.

Applications of this type are made under the *Testator's Family Maintenance Act 1912* (Tasmania) ("**the Act**"). For the Court to consider a claim under **the Act**, the claim must be made within **three** months of a grant of representation being issued in the estate ("**the TFM Claim Period**"). However, the Court has a discretion to extend **the TFM Claim Period** for making a claim in appropriate circumstances.



Two recent decisions of the Supreme Court of Tasmania demonstrate the circumstances in which the Court may consider an application to be made outside of **the TFM Claim Period**.

In both *Williams v Williams* [2018] TASSC 19 and *Burdon v Burdon* [2019] TASSC 31, an application for further provision was made by the wife of the deceased after the expiry of **the TFM Claim Period**. In *Williams* the claim was made seven months after the expiry of **the TFM Claim Period**, and in *Burdon* the claim was made five months after the expiry of **the TFM Claim Period**.

**The Law:** The following considerations are relevant to the Court in deciding whether to exercise its discretion to extend **the TFM Claim Period**:

- the length of the delay;
- the reasonableness of the applicant's explanation for the delay;
- any prejudice that would be caused to the respondent(s) as a result of the delay;
- the strength of the applicant's claim; and
- any unconscionable conduct on the part of the applicant.

However, this list of factors is not exhaustive, and each case will be considered on its own facts.

**The Decisions:** In both *Williams* and *Burdon*, the Court found that the justice of the case rested with extending the **TFM Claim Period** and allowing the applications to be heard.

In *Williams*, the Court found that the applicant had an arguable case, and the delay was partly due to failed negotiation attempts, and partly the fault of the applicant's former solicitors. The beneficiaries suffered no substantial prejudice as a result of the delay, and there was no unconscionable conduct on the part of the applicant.

In *Burdon*, the Court commented that the applicant was of advanced age, had suffered depression following the loss of her husband, and was unaware of the time limit for making an application under **the Act**. The applicant also had a strong case (which was ultimately successful), and no prejudice was caused to the respondent as a result of the delay.

**Key Points:** These cases demonstrate some of the circumstances in which the Court will exercise its discretion to allow a claim for provision from an estate to be made after the expiry of **the TFM Claim Period**. They also show the willingness of the Court to accept that, in many cases, **the TFM Claim Period** expires before a claim is made through no fault of the applicant.

Worrall Moss Martin Lawyers have specialist skills and experience in estate litigation including claims under **the Act**. If you, or your client, need expert advice and guidance about the eligibility and merits of an actual, anticipated or potential claim under **the Act** please contact Robert Meredith, Eve Hickey or Thomas Slatyer.

## Our Lawyers



**Peter Worrall**  
Director



**Kate Moss**  
Director



**Kimberley Martin**  
Director



**Robert Meredith**  
Senior Associate



**David Bailey**  
Senior Associate



**Casey Goodman**  
Associate



**Hannah Boxall**  
Lawyer



**Thomas Slatyer**  
Lawyer



**Eve Hickey**  
Lawyer



**Ashleigh Furminger**  
Lawyer



**Vincent Ertl**  
Lawyer



**Megan Bird**  
Lawyer

## 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 Worrall Moss Martin News readers

are always appreciated. Email us at [info@pwl.com.au](mailto:info@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.

**Subscribe or Unsubscribe:**

To introduce or subscribe a client or colleague to the subscription list for Worrall Moss Martin News please email us at [info@pwl.com.au](mailto:info@pwl.com.au), or to unsubscribe from this service, please click [unsubscribe](#).

WORRALL  
MOSS MARTIN  
LAWYERS PTY LTD  
ABN 48 624 888 348

133 Macquarie Street, Hobart  
Tasmania 7000 Australia  
GPO Box 1134 Hobart TAS 7001  
[www.pwl.com.au](http://www.pwl.com.au)

Telephone: 03 6223 8899  
Email: [info@pwl.com.au](mailto:info@pwl.com.au)  
Ausdoc: DX 259 Hobart  
Facsimile: 03 6223 6322

---

*Copyright @ 2019 Worrall Moss Martin Lawyers. All rights reserved.*