Worrall Moss Martin News

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Expert advice and solutions

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The First Home Loan Deposit Scheme

David Bailey
Senior Associate

With Hobart concluding its 24th straight month at the top of CoreLogic's Capital City Home Value Index (with a year to date increase of 2.56%), some Tasmanian first home buyers may despair at the seemingly endless increases in the financial barriers to property ownership.

Fortunately, the implementation of the *National Housing Finance and Investment Corporation Amendment Act 2019* (Commonwealth) ("the Act") on 18 October 2019 by the Federal Parliament, provides some welcome news.

The Act creates the First Home Loan Deposit Scheme ("FHLDS"), a scheme which allows first home buyers to purchase a home with a smaller deposit than what is usually required by lenders, without incurring the additional cost of lenders mortgage insurance ("LMI").

Vincent Ertl
Lawyer

FHLDS supplements the existing First Home Super Saving Scheme ("FHSSS"), which enables first home buyers to take advantage of tax savings in allowing them to make voluntary contributions into their superannuation funds in saving for a deposit. Under the FHSSS, a deposit for a first home can be more quickly saved by accessing the tax benefits attaching to funds voluntarily paid into superannuation, and then by taking advantage of the tax offsets when the monies are later withdrawn from superannuation to fund a deposit.

FHLDS meanwhile, from 1 January 2020, allows potential first home buyers to purchase a property (noting the restrictions discussed below) with less than a 20% deposit, and also enables borrowers to avoid the extra repayments as a result of LMI.

How Does FHLDS Assist Potential First Home Buyers?

Many first home owners saving for a deposit will be aware of the issues associated with not having a 20% deposit saved when making a loan application through a lender. Most notably, a lower deposit will not only make it more difficult to identify a lender willing to provide a home loan, but also result in borrowers being subject to LMI. LMI is typically required by lenders as, from their perspective, buyers with less than a 20% deposit represent a higher risk, and LMI provides greater protection to lenders if the borrower defaults on the loan.

For a borrower, however, the cost of the LMI policy is added to the loan amount, which results in borrowers repaying a higher amount (which can be significant) over the life of the loan.

FHLDS allows borrowers to avoid LMI and obtain a loan where they have a deposit of at least 5%, with the Commonwealth Government acting as guarantor for the remaining 15%. This potentially enables more first home buyers to enter into the housing market sooner than anticipated, and for some it may remove an impediment to ever purchasing property.

Are There Restrictions on Potential First Home Buyers Applying?

Yes.

The first threshold that must be met is an earning threshold. In order to be eligible to apply for FHLDS, an individual must have an annual income of $125,000.00 or less, while a couple must earn less than $200,000.00 per annum between them.

Although the earning threshold is favourable to many potential applicants, the home value thresholds are the most restrictive conditions upon making an application.

Each State and Territory is treated differently in terms of the maximum property price a first home buyer can agree to pay and still apply for FHLDS. Currently, a Tasmanian first home buyer can only utilise the FHLDS where they are purchasing a property in a capital city or a regional centre for $400,000.00 or less. If they wish to purchase a property in other areas of Tasmania, then the threshold is further decreased to $300,000.00.

The current median home value in Hobart is $460,033.00, with Hobart property values continuing to grow. By imposing a low home value threshold, the FHLDS only captures a relatively limited area of the Tasmanian market.

It will take some time to establish how successful FHLDS will ultimately be in assisting first home buyers, or whether, at least for Tasmanians, the low home value threshold will increase competition (and therefore prices) of lower valued real estate to which FHLDS is restricted.

Worrall Moss Martin Lawyers has specialist skills and experience in commercial and property matters. We can assist clients with all property transactions, including advising on and assisting with FHLDS applications once the scheme has come into operation on 1 January 2020. Please contact David Bailey or Vincent Ertl if you have any questions about buying or selling property.

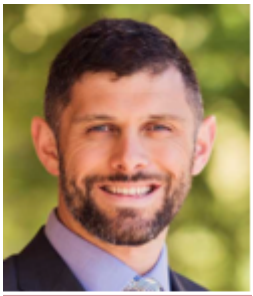
Experienced Solicitor versus Medical Practitioner: Whose Evidence of Testamentary Capacity Will a Court Prefer in Contested Wills?

In the recent New South Wales Court of Appeal case of *Drivas v Jakopavic* [2019] NSWCA 218, the Court (upholding the decision of the trial judge) gave little, or no, weight to evidence of a medical practitioner in circumstances where the opinion was not based on the practitioner's expertise.

The Law: A critical requirement of completing a Will is that a person must have 'testamentary capacity'.

Peter Worrall
Director

Testamentary capacity is the legal test of whether, at the time of completing a Will, the person had the necessary mental capacity to know what they were doing in an appropriate legal way.



Robert Meredith
Senior Associate

Although evidence from medical practitioners is interesting, and will sometimes be relevant, it is not always determinative.

Where there are conflicting views about whether a person had testamentary capacity when they completed their Will, it should not be presumed that medical evidence (or more specifically opinions of a medical practitioner that are not based on medical conclusions) will trump legal evidence.

Thomas Slatyer
Lawyer

The Facts: Marija Jakopavic ("Marija") died in September 2015. After her death, litigation arose over which of her three most recent Wills was to be accepted as her last Will.

The relevant Wills, dated May 2007, September 2007, and 1998 respectively, contained significant differences in who was to receive Marija's assets on her death.

Probate of the September 2007 Will was granted after Marija's death.

Subsequently an application was made to revoke probate of the September 2007 Will, and to accept the 1998 Will as Marija's last Will.

The application was made on the basis that the September 2007 Will and the May 2007 Will were invalid because Marija did not have testamentary capacity at the time those Wills were made.

The Evidence: The September 2007 Will was prepared by a solicitor of considerable experience. The solicitor gave evidence that:

- it was his usual practice of ensuring that an elderly Willmaker had capacity at the time of taking instructions;
- it was his usual practice that if he had any reservations about whether a client had capacity, he would make detailed notes of his discussion with the client and keep them in safe custody; and
- he had not kept notes of his conversation with Marija.

In contrast to the solicitor's evidence, a medical practitioner gave evidence that (on the basis of various medical tests that were carried out in 2006 and 2007) he was of the opinion that:

- Marija was at the time suffering from dementia and that consequently he 'doubted' that Marija had capacity to validly execute the September 2007 Will; and
- Marija "*was not aware of the consequences of her actions with regards to those for whom she cared*". This opinion was formed on the basis of observations of the relationship that Marija had with certain members of her family.

Decision of the Trial Judge: The trial judge held that the medical practitioner's evidence was of no weight in the circumstances of this case, and instead preferred and accepted (and placed significant weight on) the evidence of the solicitor. Ultimately, the trial judge found that Marija had capacity at the time she executed the September 2007 Will.

The trial judge held that the medical practitioner's brief observation of the relationship between Marija and certain members of her family did not provide an adequate foundation for the opinion. The evidence in question demonstrated that, from May 2007, Marija's relationship with the relevant beneficiaries deteriorated as a result of arrangements being made for Marija to be admitted to a nursing home, a circumstance that Marija was demonstrably angry and distressed about.

Decision on Appeal: The Court of Appeal agreed with the trial judge, and found that in the circumstances of this case:

- the medical practitioner's evidence could not be regarded as being of any significant weight; and

- the medical practitioner's opinion was based on "*facts of which he was insufficiently apprised and, in interpreting the facts as he thought they were, he was not drawing on his expertise...*" as a medical practitioner.

Consequently, the Court found that the medical practitioner's evidence did not conform with the legal requirements for expert evidence (as set out in *Dasreef v Hawchar* (2011) 243 CLR 588), and held the trial judge was correct in not giving those opinions any significant weight.

Key Points: This case highlights the importance of:

- having a legal practitioner with expertise and experience in estate planning prepare your Will, particularly if you are concerned about challenges to your estate after your death;

- ensuring that any expert witness is properly briefed and informed of the facts on which their opinion is based. This requires Willmakers to be open and honest with their lawyer about all of their circumstances so the lawyer can brief an appropriate medical practitioner; and

- updating your Will (and other estate planning documents) when a change in family or personal relationship status occurs.

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 change in family relationships has occurred. Please contact our estate planning lawyers Kimberley Martin, Peter Worrall, Casey Goodman or Ashleigh Furminger if you have any questions about your estate planning, including making changes to any estate planning documents.

Worrall Moss Martin Lawyers also has specialist skills and experience in estate litigation including claims against assets held in an estate. If you, or your client, need expert advice and guidance about the eligibility and merits of an actual, anticipated or potential claim against an estate please contact one of our estate litigation lawyers, Robert Meredith, Thomas Slatyer or Eve Hickey.

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Further Information

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A wealth of information in relation to estate and commercial matters can be found at our website www.pwl.com.au

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