

Worrall Moss Martin News

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**Expert advice
and solutions**



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MOSS MARTIN**
LAWYERS

Important Announcement - COVID-19

Worrall Moss Martin Lawyers take the safety and wellbeing of our staff, clients, referrers and business contacts seriously.

In response to the risks arising from coronavirus (COVID-19), we have implemented our business continuity plan, and are monitoring Government and Law Society updates, to ensure that we can continue to service your legal needs and provide the high standard of service for which we are known.

For the safety of our staff, and your safety and the safety of others, we ask that you not attend our office if:

- you are unwell in any way, including experiencing a fever, cough, sore throat, fatigue, or shortness of breath;
- have travelled overseas or interstate in the last 14 days, or live with someone who has done so; or
- have had close contact with a person diagnosed with, or is suspected of having contracted, COVID-19.

We ask that you contact us by telephone or email to discuss appropriate arrangements for appointments, which can include telephone appointments, video conferencing and face-to-face appointments in our office.

As part of our new measures, we are practising social distancing. We have also implemented increased hygiene measures across the office, are limiting all out of office meetings, and have ceased attendances at the homes of our clients, at hospitals, and at other business premises.

If you require our assistance, or have any enquiries about our policies and procedures during these

difficult times, please contact us.

We look forward to continuing to work with you.

Peter Worrall, Kate Moss and Kimberley Martin

Protecting Family Assets: What Happens After Separation and Divorce?



Kate Moss
Director

Thirty percent (30%) of first-time marriages, and up to sixty percent (60%) of second marriages, end in divorce. With this in mind an important question that is often asked is: how can I protect family assets from a family law dispute if, after my death, a beneficiary of my estate separates from, or divorces, their partner?

Can I protect family assets after I die? The good news is, there are some measures that you, as a Willmaker, can put in place to protect family assets after your death. One proactive step you can take is to include Will Trusts (also called Testamentary Trusts) in your Will. Will Trusts can be simple or complex, depending on your wishes, and the amount of control over assets you wish to exercise "beyond the grave".



Kimberley Martin
Director

What are the benefits of Will Trusts? Will Trusts serve many purposes, including maximising taxation benefits, providing for flexibility in how an inheritance is managed and, importantly, asset protection. However, these benefits do not operate in a vacuum, and in order to increase one benefit, others may be reduced as a result. When it comes to protecting your assets against a future divorce or separation of your beneficiaries, this may only be possible by curtailing access to their inheritance.

It is also important to understand that only the family assets *owned* by a Willmaker can potentially be protected in a Will Trust. If the family wealth is already held in a family trust, or another entity or structure, then additional considerations will apply.

How effective are Will Trusts in protecting family assets in a beneficiary's separation or divorce? In *Bernard v Bernard* [2019] FAMCA 421, the Family Court of Australia recently considered whether a particular Will Trust formed part of the "matrimonial asset pool" for the purposes of a property settlement between a divorcing couple.

- **Facts:** Mr Bernard's father died in 2012, after making his last valid Will earlier that year. The terms of the Will established two Will Trusts, one to benefit each of his children (Mr Bernard, and Mr Bernard's sister). The estate was valued at approximately \$3,500,000.00.

Mr Bernard and his wife separated in 2015, and they divorced in 2017. The wife argued that the assets in the Will Trust for Mr Bernard ("Mr Bernard's Trust") should form part of the asset pool for the purposes of resolving their property dispute.

Mr Bernard's Trust had been established to benefit Mr Bernard and his family but, importantly, the way that the Will Trust had been drafted deprived Mr Bernard of the *control* over the trust property. Mr Bernard's sister was the Trustee, and a third person had the power to change the Trustee. It was the Trustee who had full control over which of the beneficiaries - including Mr Bernard, his wife and their descendants - would receive any distributions from the trust, when they would receive them, and how much they would

receive.

- **Decision:** The Court held that Mr Bernard's entitlement to the Will Trust was merely as a 'discretionary beneficiary'. He had no outright entitlement to the assets of Mr Bernard's Trust, and did not have direct or indirect control over how the assets were distributed. Accordingly, the assets in Mr Bernard's Trust (being the family assets inherited from his father) were not Mr Bernard's assets, or part of the "matrimonial asset pool" to be divided between Mr Bernard and his wife, and were a mere "financial resource" for Mr Bernard.

When should I act to protect my assets? Relationship difficulties are often kept private, so it is difficult to predict which (if any) of your intended beneficiaries will go through a separation or divorce after your death. We recommend that you fully review your estate planning arrangements, in the context of your family circumstances, at least every five years, and as soon as possible after any significant life event.

No Will Trust is "water tight" against the powers of the Family Court. The facts of each individual case, including the way the Will Trust is drafted, will determine whether assets are part of the matrimonial pool.

Asset protection in the context of estate planning is a complex area of law, and every person's circumstances are different. There is no "one size fits all" approach to asset protection, and it is important that competing considerations are balanced according to each Willmaker's wishes. If protecting family assets against a beneficiary's separation or divorce is a key consideration, it is vital that a Willmaker considers who is the most suitable person (and not the beneficiary) to assume control over those assets.

How can we help? Our lawyers can assist you to prepare the most appropriate estate plan for you, including individually tailoring Will Trusts to best implement your wishes for your assets after death. Our advice will assist you to understand the possible and likely outcomes of all options available to you so that you can make a fully informed decision about your estate plan. Additionally, we can help you to navigate the benefits and disadvantages of long-term planning, and the nature of the assets you wish to protect, as these factors will be considered if a dispute arises.

If you are a beneficiary of a Will containing a Will Trust, our lawyers can also provide advice on what can or should be implemented after the Willmaker's death, to best protect your interests as a beneficiary.

Worrall Moss Martin Lawyers has specialist knowledge in all areas of Estate Planning & Trusts, including preparing and administering Will Trusts. Please contact us if you wish to discuss any matters relating to Estate Planning, Will Trusts or Estate Administration.

Easy Come, Easement Go - Farmers at War

Any person dealing in real property, from first time home buyers to experienced investors, has likely heard of an "easement".

Important, but often forgotten, questions to consider when purchasing property include: does the property have any easements? If yes, what are the terms of the easement? How will the terms of the easement impact the planned use for the property? Is expert advice about the easement necessary?

What is an easement? An easement is defined in law as "*A right enjoyed by a person with regard to the land of another person, the exercise of which interferes with the normal rights of the owner or occupier of that land*".



David Bailey
Senior Associate

There are two categories of easements: positive easements and negative easements.

- **Positive easement:** A positive easement permits one party to enter or otherwise do something on the property of another party. Without the easement, this would normally be considered a trespass or a nuisance. For example, a positive easement might give you the right to use the driveway on your neighbour's property, in order to access your property.
- **Negative easement:** A negative easement stops one party from doing something that would be considered acceptable in their enjoyment of their estate under normal circumstances. Most common negative easements are related to water or light. For example, a negative easement may prohibit someone from changing the course of a river or from building a structure in a particular way.

How can an easement affect you? Easements (both positive and negative) can have major consequences for property values and the use of property by owners. Examples include that:

- you may be restricted in your ability to develop land;
- you may have positive obligations in relation to maintenance or access;
- you may be exposed to liability due to third parties being permitted to enter upon your land;
- the value of your land or property may be impacted by service easements; and
- the practical use of your land and property (including access to the land) may be affected.

Farmers at war over easements - *Barrett-Lennard v Wind River Pty Ltd*: Issues concerning easements arose recently in the Western Australian case of [*Barrett-Lennard v Wind River Pty Ltd*](#) [2019] WASCA 119, which supports the adage that, sometimes, common sense and the law are not perfectly aligned.

- **Facts:** *Barrett-Lennard*, an appeal from the Supreme Court of Western Australia, involved a falling out between two cattle farmers with adjacent farms. Their dispute led to litigation over the proper interpretation of the terms of an easement over one farmer's land for the benefit of the other.

The Respondent (Farmer B)'s property was adjacent to a sealed highway, with the Appellant (Farmer A)'s farm - made up of five separately titled but connected properties - beside it. A right of carriageway easement ran through the southern part of Farmer B's land, and into Lot 200 of Farmer A's land. Built over the easement was a substantial gravel track, which continued through Lot 200 into Lot 192, where Farmer A's farmhouse was located. The easement was Farmer A's main, and only convenient, access to her farmhouse (and indeed all of her farming operations) from the sealed highway. The only alternate access was by an unsealed road, and across boggy farmland. Farmer A's employees, agents, workmen and visitors also used the easement to access not only Lot 200 but the other lots owned by her.

- **Decision about the interpretation of the wording of the easement:** On appeal, the Court agreed with the judge in the first instance that the interpretation of the wording of the easement only permitted Farmer A access to Lot 200 from the highway, and not use Lot 200 as a means of access for the other titles. The Court carefully interpreted the wording of the easement, and determined that it was not drafted in a way intended to grant rights of access to any land beyond Lot 200. In reaching this conclusion, the Court rejected Farmer A's reliance on:
 - particular physical characteristics of the land (relevantly, the presence of the single gravel track from the highway, through Lot 200 to the farmhouse);
 - the surrounding circumstances at the time the easement was drafted - specifically that the adjacent properties had been owned by brothers, and an easement was likely needed to ensure an abiding right of access to the farmhouse in order to sell the titles that ultimately became Farmer A's land;
 - a right of access to other parts of her farm as an "ancillary" right necessary for her to enjoy the right of access to granted specifically to Lot 200; and

- a "prescriptive" (long continued use) easement had arisen, extending the rights under the easement as drafted to allow Farmer A to access parts of her farm beyond Lot 200 although, importantly, this argument was rejected on a point of procedural law, not on its merits which were not litigated.
- **Decision about additional arguments:** On appeal, the Court rejected Farmer A's additional arguments that Farmer B had caused a "real or substantial interference" to her use of the easement by placing a gate over a cattle grid adjacent to the highway, and a further gate and fence posts midway along the easement (narrowing but not obstructing the track). The only good news for Farmer A was the Court's reversal of an order that she pay \$5,000.00 damages to Farmer B as compensation for her "excessive use of the carriageway", replacing it with a requirement that she pay a mere \$100.00.
- **Key implications:** Although it seems a strange result - surely once on their property a person could then move freely between the separate titles comprising it? - ultimately, because of the way the easement was drafted, Farmer A (and her employees, agents, workmen and visitors) could not use the easement to access any part of her farm beyond Lot 200.

If you are contemplating or negotiating an easement over property, this case highlights the importance of careful and precise drafting, allowing for all relevant uses of the easement, to avoid future litigation.

Worrall Moss Martin Lawyers has specialist knowledge in all areas of Commercial and Property Law, including interpreting existing easements, and preparing new easement documents. Please contact us if you wish to discuss any matters relating to Commercial and Property Law.

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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 Worrall Moss Martin News readers are always appreciated. Email us at info@pwl.com.au

Caution

This newsletter contains material for general educational purposes and is not designed to be advice to any particular person about 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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