Worrall Moss Martin News

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Expert advice and solutions

WORRALL MOSS MARTIN LAWYERS

Important Announcement - COVID-19

Worrall Moss Martin Lawyers remains fully operational and able to continue to service your legal needs and provide the high standard of service for which we are known. In an effort to minimise the risk of exposure to COVID-19 and to ensure our ability to continue to serve you, many of our staff are now working remotely.

From 1 April 2020, appointments and attendances at our office are available by appointment only. We are being vigilant and proactive by taking all necessary precautions to ensure your safety, and the safety of our staff. Where possible, all meetings will be conducted by video conferencing and telephone, and we continue to be available via email or telephone should you need to contact us.

We wish you, your family and your associates continued health and resilience. We thank you for your ongoing support and patience in these unprecedented times.

Peter Worrall, Kate Moss and Kimberley Martin

What do you mean my Will is not valid? I signed it in front of a Justice of the Peace...

Kimberley Martin
Director

Now, more than ever, it is important that your estate planning documents are valid and effective so that your wishes can be carried out. An important aspect of ensuring that your estate planning documents are valid is to ensure that they comply with the formal signing and witnessing requirements.

What is a formally valid Will? Across Australia,(1) for your Will to be valid it must be:

- made in writing;
- intended by you to be a Will; and

Ashleigh Furminger
Lawyer

- signed by you (or by a person at your direction, and in your presence) in front of two or more witnesses, who must also sign the Will in your presence.

There are restrictions on who can act as a witness:

- a witness must be over 18, they must have capacity, and they must sign voluntarily;
- a witness cannot be a beneficiary under the Will; and
- ideally, a witness should not be an Executor or person otherwise named in the Will.

Casey Goodman
Associate

What if the formal requirements are not met? Where a document, purported to be a Will, does not meet the formal requirements, Australian courts have a discretionary power (called a 'dispensing power') to recognise the Will as an informal Will, provided certain conditions are met. However, this requires an application to a court, which can be a difficult, stressful, time consuming and costly exercise. Each case is considered by a court on its own unique facts and circumstances. Not every application is successful.

Two recent Cases of failure to comply with the formal requirements: Two recent cases highlight some of the difficulties that can arise where a Will is not properly witnessed.

- ***In the Estate of Grimm*** **[2020] NTSC 5** ("*Grimm*"), the deceased handwrote a document that provided:

  "*My last Will*

  I Wolfgang Grimm born on the 31st July 1940 in Berlin Germany. I am the sole owner of my property at 61 Britomart Gardens, Alawa Darwin N.T

My partner Nieves C. Edwards of five years will live at the property till she diceids [sic] to sell the property. After the sale, should receives [sic] 175,000 dollars from the sale of the property. Nieves my daughter Judy Ann Wright and my stepson Roy James Dudgeon. The rest of the money shall be split between my siblings. My ashes shall be split evenly".

The deceased told his partner, Ms Edwards, that the document was his Will, and that he wrote it himself because he did not want to pay a legal practitioner to prepare his Will. The deceased then took the document to a Justice of the Peace to have it witnessed. After the deceased died, Ms Edwards encountered difficulties in obtaining a grant to administer the deceased's estate because the 'Will' had only been signed in the presence of one witness, the Justice of the Peace.

The Court in *Grimm* determined that before it could make a grant to Ms Edwards, a separate application needed to be made to determine the validity of the Will, as well as an application for a Court to interpret the 'intentions' of the deceased set out in the Will. A decision on that application has not yet been published.

Notably, the deceased's estate was valued at approximately $460,000.00. His reluctance to bear the expense of a properly prepared Will has resulted in the need for expensive litigation to validate and interpret his 'Will'.

- In ***Crisp v Australian Rotary Health Research Fund*** **[2019] WASC 486** ("*Crisp*"), the deceased engaged a lawyer to prepare his Will. The lawyer posted the unsigned Will to the deceased, who signed it in the presence of only one witness - his accountant. The deceased was estranged from his family, and the purported Will left his estate to charity. Members of his family (who would have received his estate on intestacy if the Will was determined to be invalid) opposed the application to establish the document as a valid Will.

  The Court in *Crisp* considered the circumstances of the case, and dispensed with the formal requirements, determining the deceased's improperly witnessed Will to be a valid informal Will. The Court relied heavily on evidence that the document "*embodied the deceased's testamentary intentions*", and that he clearly intended it to be his last Will.

Witnessing Wills in the time of social distancing: On Sunday 29 March 2020, the Australian Government restricted both public and private gatherings to two people (excluding family and household members). In addition, many professional workplaces are now only open to clients by appointment, to limit the spread of COVID-19. This may make it difficult for Willmakers to assemble the two necessary witnesses.

What about electronic signatures or digital Wills? In *Worrall Moss Martin News Issue 10 - Can I sign my Will Electronically or Online?* we reviewed the progress that has been made to move away from the strict formal requirements for Wills in the digital age. In the wake of the COVID-19 outbreak, both Tasmania and New South Wales have passed legislation with a **potential** to allow for documents (which could include Wills, Enduring Powers of Attorney, Instruments Appointing Enduring Guardians, and other estate planning documents and conveyancing and commercial documents) to be validly executed by way of electronic signature.(2)

In both jurisdictions, the Ministerial authorisation that would expressly allow for a Will to be validly executed by way of electronic signature has not yet been made. This means that **it is still not possible to sign your Will using electronic means in a way that will be formally recognised as a Will**.

How can we help? Worrall Moss Martin Lawyers can assist you with all aspects of your estate planning, including preparing Wills, Enduring Powers of Attorney and Instruments Appointing Enduring Guardians, and assisting you to navigate the execution requirements to ensure those documents are valid. Peter Worrall and Kate Moss are also experienced Notaries, who are able to witness, authenticate, and provide certificates for overseas documents.

We are monitoring government updates about gathering and distancing requirements, and reviewing all legislative and Ministerial updates that may impact on the legislative requirements for estate planning documents. Our lawyers can provide you with specialist advice to give you peace of mind about your testamentary arrangements.

Please contact us if you wish to discuss any matters relating to Estate Planning, including how to arrange to make and execute Wills during these difficult times.

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(1) *Succession Act 2006* (New South Wales); *Wills Act 1997* (Victoria); *Wills Act 2008* (Tasmania); *Wills Act 1970* (Western Australia); *Wills Act 2000* (Northern Territory); *Succession Act 1981* (Queensland); *Wills Act 1936* (South Australia); and *Wills Act 1968* (Australian Capital Territory).

(2) See *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (New South Wales) Schedule 2 s2.8; *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* (Tasmania) s17.

Forfeiture of Inheritance: The Cost of Assisting a Loved One to Take Their Own Life

Eve Hickey
Lawyer

Recent polls indicate that 80% to 85% of the Tasmanian community are in favour of legalising voluntary euthanasia and assisted suicide,(1) however, three attempts to pass the *Voluntary Assisted Dying Bill 2016* (Tasmania) have been unsuccessful.

Contemporary debate about voluntary euthanasia and assisted dying usually centres on the ethical and moral arguments - the compulsion to preserve life, weighed against the right to end suffering and to die with dignity. As a result, discussions about the legality of voluntary euthanasia and assisted suicide concentrate on the criminal law consequences of assisted suicide (criminal offences being "moral wrongs").

Kimberley Martin
Director

But in addition to the criminal penalties, the act of assisting another person to die can intersect the laws of succession, and adversely affect a claim to a deceased person's estate.

What is Euthanasia? "Euthanasia" is an intentional act by one person to end of the life of another, for the purpose of ending their suffering. Euthanasia may be:

- "voluntary", where a person is competent to independently make decisions about their medical treatment, and requests euthanasia;

Kate Moss
Director

- "non-voluntary", where the person being euthanised is not competent to make medical decisions; or
- "involuntary", where a person is competent to make medical decisions, but has not requested euthanasia.

What is Assisted Suicide? "Assisted suicide" is different to euthanasia, in that the person's death is aided in some way by another person (commonly a loved one), but the final act, that causes the person' s death, is an act by the person themselves.

Criminal Consequences: Despite evolving social attitudes favouring voluntary euthanasia and assisted suicide, in most states and territories in Australia it continues to be unlawful to assist a

person to end their life. Victoria is the only Australian jurisdiction with operational lawful euthanasia legislation (Western Australia legalised voluntary euthanasia in December 2019, but the laws are yet to be implemented), and there are strict eligibility criteria for persons seeking access to lawful voluntary assisted dying.(2) It is unlawful to assist in the death of a person who is ineligible under the legislation.

On 15 July 2019, a Victorian woman suffering from terminal cancer became the first person to lawfully receive voluntary euthanasia.

In Tasmania, assisting another person to die is a criminal offence, irrespective of the circumstances. However, lenient sentencing trends in Tasmania tend to reflect, if not an acceptance of the practice of assisted suicide, then a perception of the act as a less severe offence. In 2004, although a Tasmanian man was convicted and sentenced to two years in prison for the assisted suicide of his elderly mother, the sentence was wholly suspended. Similarly, in 2005, a Tasmanian nurse was convicted of both the attempted murder of her mother (who was suffering from advanced dementia), and assisting her unwell father to die. For these convictions, she received a two-and-a-half year prison sentence, also wholly suspended.

What is the Forfeiture Rule? Buried under the ethical, moral and criminal considerations for assisting a loved one to take their own life, is the fact that these actions can affect the assisting person's right to receive an inheritance from the estate of the dying person.

The "forfeiture rule" is the common law principle that prohibits a person from benefitting from their own wrongful conduct. In the context of succession law, this operates to prevent a person from benefiting from another person's death (whether by Will, the law of Intestacy, or by receiving property owned jointly by survivorship) if they are criminally responsible for the other person's death.

The Case of *Nielsen*: The 2014 Queensland case of *The Public Trustee of Queensland v The Public Trustee of Queensland & Ors*(3) ("*Nielsen*") confirmed that the forfeiture rule applies to cases of assisted suicide.

- **Facts:** The deceased made a Will appointing Mr Nielsen as his Executor, and leaving him his entire estate.

  Nearly two years later, Mr Nielsen helped the deceased obtain drugs from overseas, for the purpose of ending his life. The deceased administered the drugs himself, and died as a consequence of ingesting them.

  Mr Nielsen was later convicted of assisting the deceased to commit suicide, and was sentenced to three years imprisonment, with parole available after six months.

- **Decision:** The Court held that the forfeiture rule applied, and as a consequence Mr Nielsen was not capable of acting as Executor, or benefiting under the Will. In addition, the Court (in Queensland) had no discretion to choose not to apply the rule, regardless of the circumstances in which the assisted suicide took place. It did not matter whether there were acts of violence or threats by Mr Nielsen, or whether Mr Nielsen had any knowledge of the Will, or any intention to benefit from the deceased's estate.

Will the *Nielsen* decision apply in Tasmania? Although Queensland cases are not binding in Tasmania, the Supreme Court of Queensland decision would be 'persuasive' to a Tasmanian court.

Similarly to Queensland, there is no legislation in Tasmania granting a court the discretion to not apply the forfeiture rule. The cases reviewed by the Court in *Nielsen* show that, in the absence of statutory intervention, the forfeiture rule will apply strictly in cases of assisted suicide, preventing the assisting person from benefiting from the deceased's estate.

In the absence of legislation (as has been implemented in the Australian Capital Territory and New South Wales),(4) it is very likely that the same outcome would occur in Tasmania if a case similar to *Nielsen* were to arise.

What does this mean for Willmakers? Assisted suicide remains unlawful in Tasmania. Asking another person to help you end your life can expose them to adverse criminal and financial consequences if they comply with your wishes.

Worrall Moss Martin Lawyers has specialist knowledge in all areas of Estate Planning, Estate Administration and Estate Litigation. We actively monitor the topic of euthanasia and assisted suicide and can discuss the legal issues that arise. Please contact us if you wish to discuss any matters arising from this article.

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(1) Issy Barnet, 'Momentum 2019: Euthanasia and assisted dying debate', *The Examiner* (Tasmania) 27 September 2019.

(2) *Voluntary Assisted Dying Act 2017* (Victoria), *Voluntary Assisted Dying Act 2019* (Western Australia).

(3) [2014] QSC 47.

(4) *Forfeiture Act 1991* (Australian Capital Territory); *Forfeiture Act 1995* (New South Wales).

Accessing Your Superannuation Due to COVID-19 Hardship

David Bailey
Senior Associate

On 22 March 2020, the Australian Government announced that eligible people will be allowed to access their superannuation funds:

- up to $10,000.00 in 2019-20; and
- a further $10,000.00 in 2020-21.

You will meet the eligibility criteria if:

- you are unemployed; or
- you are eligible to receive a job seeker payment, youth allowance for jobseekers, parenting payment (which includes the single and partnered payments), special benefit or farm household allowance; or
- on or after 1 January 2020, you:
    - were made redundant; or
    - had your working hours reduced by 20% or more; or
    - sole traders, and your business was suspended or there was a reduction in your turnover of 20% or more.

Applications to release funds from superannuation can be made "from mid-April 2020" which is when the Australian Government expects the necessary systems will be in place. Separate arrangements will apply if you are a member of a Self-Managed Super Fund.

No tax will be deducted from amounts released from your superannuation funds. In addition, these amounts will not impact any other payments you may be receiving from Centrelink or Veterans' Affairs.

If you plan to access your super, in particular if you wish to access funds from a Self-Managed Super Fund, it is important that you obtain proper legal and financial planning advice prior to doing so. Worrall Moss Martin Lawyers has specialist knowledge in superannuation, and can work with you and your existing financial planners (or refer you to appropriate financial planners) to assist you with these matters. Please contact us if you wish to discuss any matters arising from this government measure.

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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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