

# Worrall Moss Martin News

Issue 17, April 2020



Expert advice  
and solutions



WORRALL  
MOSS MARTIN  
LAWYERS

## Thank you to Our Clients and Staff

Worrall Moss Martin Lawyers remains fully operational and able to continue to assist you with your legal needs.

We remain mindful and responsive to matters arising from COVID-19. Details about the changes we have implemented can be found [here](#).

We thank our clients and staff for their ongoing patience, support and adaptability in these unprecedented times.

**Peter Worrall, Kate Moss and Kimberley Martin**

## Congratulations to Peter Worrall - Recognised in Best Lawyers' 2021 Edition of the Best Lawyers in Australia

Peter Worrall has been recognised in Best Lawyers' 2021 Edition of the 'Best Lawyers in Australia' under the category 'Trusts and Estates'.

Best Lawyers' 2021 Edition was published on Friday 24 April 2020 in the Australian Financial Review at page 33 in the Legal Affairs column. The list can be found online [here](#).

Best Lawyers is an important, and well respected, peer review publication for the legal profession across Australia. Inclusion in the list is made on the basis of experience, knowledge and specialist skills in specific areas of legal practice.

Peter Worrall's inclusion in the list is regarded as a proper tribute to his work, influence and contribution in this area of the law, and is a significant honour. Peter Worrall is the only Tasmanian lawyer recognised under the Trust and Estates category for 2021.

Kate Moss, Kimberley Martin and the staff of Worrall Moss Martin Lawyers congratulate Peter Worrall for this outstanding achievement.



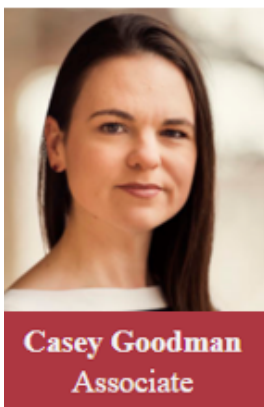
## Can Someone with Dementia make a Will?



Dementia is the second leading cause of death for Australians, and there are an estimated 459,000 Australians currently living with dementia.

Once a person reaches the age of 65, the chances of developing dementia significantly increase. Right now, 15.9% of Australians are over 65, and it is anticipated that this percentage will increase over the next decade

**Making a Will:** A person's 'testamentary capacity' (or lack thereof) dictates whether that person can make a Will. Simplified, the legal tests for determining testamentary capacity involve examining whether, at the time of making the Will, the person:



- understands what they are doing by making the Will, including that they are preparing a legally binding document that disposes of their assets after their death;
- can recall the nature and extent of their property, and communicate who they wish to gift that property to;
- knows and appreciates the people who (at law) are able to make a claim against their estate; and
- is not suffering from a disorder of the mind or an insane delusion that is influencing, or has influenced, their testamentary wishes or ability to make rational decisions about their Will.

**What is Dementia?** Dementia is broadly a group of cognitive and social symptoms that interfere with a person's ability to function. It is not a 'disease' that can be cured (although treatment can be helpful), but a number of conditions characterised by the impairment of at least two brain functions, such as memory and judgement. Some common symptoms are forgetfulness and memory loss, mental decline, confusion (particularly in the evening), disorientation, irritability, anxiety or depression, mood swings, hallucinations, and paranoia.

**Does Dementia Affect Willmaking?** Knowing the common symptoms of dementia, it is easy to assume that a person with dementia will not have testamentary capacity to make a Will. However, a diagnosis of dementia does not necessarily mean that the person affected is unable to make a Will.

**The Case of *Sanders*:** Whether a Willmaker's diagnosed dementia affected his testamentary capacity at the time of making his last Will was recently considered by the Supreme Court of New South Wales in *Croft v Sanders* [2019] NSWCA 303 ("*Sanders*").

**Facts:** The deceased, who had six daughters, made his last Will on 11 October 2013 ("**the 2013 Will**"), and died on 4 January 2016 aged 85. Prior to making **the 2013 Will**, a family feud had erupted, with significant mutual antagonism between the deceased and one daughter on one side, and two of his daughters and his wife on the other. The gifts made in **the 2013 Will** reflected the feud, with the deceased leaving \$40,000.00 to each of his five daughters, and the balance of his estate (valued at around \$3,000,000.00) to the 'supportive' daughter.

The disappointed daughters challenged **the 2013 Will**, claiming the deceased lacked testamentary capacity.

Medical evidence showed that the deceased suffered from a 'dementing illness', that he had suffered psychotic symptoms from late 2012 onwards, and that there was variability in his cognitive ability at various times, particularly during the course of 2013. From around 2010 or 2011, the deceased suffered from hallucinations or delusions, including that his (adversarial) daughters:

- had taken his paperwork;
- were either running a brothel, or were working in one, and were sending prostitutes to his house at all hours of the night;
- had kidnapped his wife (who had, in fact, moved out because of the 400 racing pigeons kept by the deceased in their home, causing both of them to suffer from the unusual condition known as 'pigeon fancier's lung');
- were possessed by demons; and
- were scheming against him.

He also reported having seen:

- a black panther, either in his yard or in the street;
- one of his (adversarial) daughters running down the top of his fence; and
- huge owls, as big as a small person sitting in a tree in the front yard.

The records of the of the medical practice which the deceased attended corroborated his reports of these delusions. The deceased's lawyer, an experienced practitioner that had prepared over 2,000 Wills and had previously acted for the deceased, gave evidence that he had determined that the deceased had the requisite testamentary capacity to make **the 2013 Will**. The lawyer said that if he had any doubt as to his client's capacity, he would have required their medical practitioner to provide an assessment of testamentary capacity.

**Decision:** The deceased had testamentary capacity when he made **the 2013 Will**.

- When considering the deceased's understanding and appreciation of the nature of the gifts, the Court held that it was relevant (but not conclusive) that the terms of the Will were rational from the deceased's perspective, particularly in circumstances where the 'supportive' daughter had worked full-time in the family business since 1992, and had shown a commitment to maintaining and continuing the business. She also happened to like pigeons. It was also noted that he had significantly fallen out with his other daughters.
- Importantly, both the medical evidence, and the evidence of the deceased's daughters and neighbour, confirmed that the deceased's underlying dementia did not deprive him of testamentary capacity, because his hallucinatory or delusional beliefs about his (adversarial)

daughters were "*episodic rather than continuous*", and were not present when he gave instructions to his lawyer to prepare **the 2013 Will**.

**Do the Principles in *Sanders* apply in Tasmania?** *Sanders* is a recent case in a long line of precedent decisions, which stretch back to 1870. The legal principles about what is required for a person to have testamentary capacity, including how to assess whether delusions or medical diagnoses deprive a person of testamentary capacity, apply throughout Australia.

**How Can We Help?** Worrall Moss Martin Lawyers' has specialist skills and experience in estate planning, including acting for clients whose circumstances may call their testamentary capacity into question. Our Estate Planning & Trusts practice area regularly work with clients and their medical practitioners to confirm their testamentary capacity, and maintain extensive records to ensure (to the greatest extent possible) our clients' estates are in the best position to defend a challenge to a Will on the grounds of capacity.

Please contact us if you, or your client, need expert advice and guidance about testamentary capacity, including in estate planning, or making claims against an estate.

### Who Pays the Costs of Challenging a Will?

One of the first questions we are often asked by new clients who want to challenge a Will is, "*What will it cost?*" Usually the next question is "*Who pays for it?*".

**What Are the Costs?** It is important to know that there is a difference between the "costs" that a party to court proceedings might be required to pay (called "party/party costs"), and the legal fees that you incur by engaging a lawyer to act on your behalf (called "solicitor/client costs").

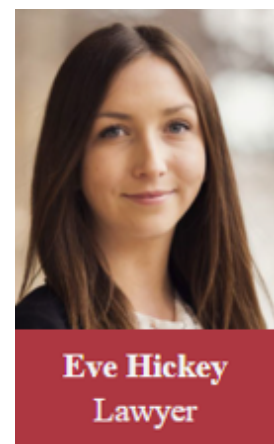
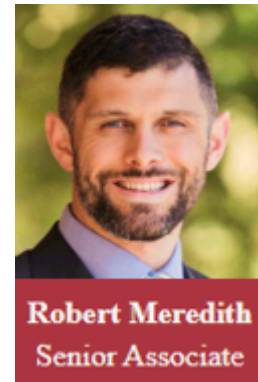
**Solicitor/Client Costs:** Just like when you hire a plumber to fix your sink, you are responsible for the bill if you ask a lawyer to give you advice, or to conduct court proceedings on your behalf.

The costs you pay to your lawyer are set out in a costs agreement (sometimes called a "retainer") that your lawyer provides to you at the beginning of your matter. You have the right to negotiate, and seek independent legal advice about, what is in a costs agreement, including how your lawyer proposes to charge their fees, and when they will issue a bill.

**Party/Party Costs:** At the conclusion of most court proceedings, the Court will be asked to make an order for the costs of the proceedings. The general rule in litigation is that "costs follow the event", meaning the successful party is entitled to an order that the unsuccessful party or parties pay their costs.

**Costs in Disputed Estate Matters:** In proceedings challenging a Will, or making a Family Provision claim, the Court generally has a wide discretion about the orders as to who pays the costs, or whether a party's costs should be paid from the estate. The costs of any contentious estate proceedings depend on the facts of each case, but it is not unusual for the Court to order that the costs of one (or more) party be paid from the estate, regardless of the outcome.

**Costs in the Case of *Condon*:** Recently in *The Estate of Blanche Minnie Condon* [2020] NSWSC 19 ("*Condon*"), the Supreme Court of New South Wales considered the question of costs in relation to a challenge brought against the validity of a Will.



*Facts:* The deceased died in December 2016, having made her last Will dated 22 November 2016 (**"the 2016 Will"**). At the time of her death, her estate was valued at around \$7.6 million.

After the deceased's death, her nephew sought a court order that **the 2016 Will** was invalid. If **the 2016 Will** was invalid, then the deceased's earlier 2006 Will would have applied. The nephew argued that the deceased did not have testamentary capacity when she made **the 2016 Will**, and that there were "suspicious circumstances" surrounding the execution of **the 2016 Will**.

*Legal Decision:* The nephew's claim was ultimately unsuccessful. The Court found that **the 2016 Will** was valid and dismissed his application.

*Costs Decision:* The Court considered what costs order should be made, recognising that in unsuccessful probate litigation there are two general exceptions to the usual rule that costs follow the event. Those exceptions are:

- **first**, where the Willmaker is not the cause of the litigation, but "an investigation is reasonably called for", each party may be ordered to pay their own costs regardless of the outcome; and
- **second**, if the Willmaker is "the cause of the litigation", in that something about their actions or situation gives rise to doubts about their testamentary capacity, the unsuccessful party's costs of challenging the validity of the Will may often be paid out of the estate.

In this case, the Court held that neither exception applied. Accordingly, the usual rule in litigation applied, and so because the nephew's claim was unsuccessful, he was ordered to pay the Executors' costs of defending the proceedings.

**The Benefit of Hindsight:** Interestingly, the Executors in this case had (in 2017) successfully obtained an order for security for costs against the nephew, meaning that the nephew had to 'put up' his assets as security in case a costs order was later made against him. Security for costs orders are unusual in the probate jurisdiction. In granting that security order, the Court took into account a number of factors, including that the nephew's case was, although arguable, not particularly strong. In light of this, it is perhaps not surprising that the Court later ordered the nephew to pay the other party's costs on the basis that no "investigation was reasonably called for" into the validity of **the 2016 Will**.

This case highlights the importance of having open and frank discussions about costs with your lawyers, including seeking (and accepting) advice about the costs consequences of pursuing litigation.

**Will the *Condon* decision apply in in Tasmania?** Although New South Wales cases are not binding in Tasmania, this decision of the Supreme Court of New South Wales decision will be very 'persuasive' to a Tasmanian court, and indeed the same general legal principles apply in Tasmania.

**How Can We Help?** Before deciding to commence any proceedings, it is important that you ask your lawyer for advice about their estimate of fees and the possible range of costs outcomes (including the likelihood of a costs order being made against you personally), and factor that advice into your decision making.

Worrall Moss Martin Lawyers has specialist skills and experience in estate planning, estate administration and estate litigation, and can advise you on all aspects of the estate litigation process. Please contact us if you, or your client, need expert advice and guidance about challenging a Will or making a claim against an estate.

## Our Lawyers



**Peter Worrall**  
Director



**Kate Moss**  
Director



**Kimberley Martin**  
Director



**Robert Meredith**  
Senior Associate



**David Bailey**  
Senior Associate



**Casey Goodman**  
Associate



**Thomas Slatyer**  
Lawyer



**Eve Hickey**  
Lawyer



**Ashleigh Furminger**  
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 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.

### 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