Worrall Moss Martin News

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Expert advice and solutions

WORRALL MOSS MARTIN LAWYERS

Dying to Know - Your Questions Answered

With the recent proclamation of the *Burial and Cremation Act 2019* (Tasmania), and at the request of one of our readers, we provide the following Q&A of commonly asked questions about procedures, notifications, funerals and related matters after a person has died.

Who must be notified of a person's death? If a person reasonably believes that another person has died, they must notify at least one of the following persons of the death as soon as practicable: a medical practitioner; a police officer; a nurse; a midwife; or an ambulance officer.

The determination of who else must be notified of a person's death depends on a number of matters, including the deceased's personal circumstances. An Executor (or Administrator) may be required to notify certain institutions and individuals as part of the administration of the estate. There are however no other laws or legal rules about who (including immediate family and friends) must be notified about a death and who is required to attend to those notifications. Nor is there a requirement to publish a death notice in a local newspaper.

Who has the right and responsibility for the disposal and interment of the deceased person's body? The legal principles about who has the right and responsibility for the disposal and interment of the deceased person's body are set out in *Smith v Tamworth City Council* (1997) 41 NSWLR 680 as follows:

- if a person has named an Executor in their Will and that person is ready, willing and able to arrange for the disposal of the deceased's body, the named Executor has the right to do so;

- where no Executor is named, the person with the 'highest right' to take out administration holds the rights to arrange the disposal. The order of priority is the spouse (including a de facto partner), then the child or children of the deceased, then the parents, and finally the siblings;

- 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 is 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 their body.

The *Burial and Cremation Act 2019* (Tasmania) reinforces the law set out in *Smith v Tamworth* with the amended definition of *Senior Next of Kin* in section 6 of the Act. This represents a change to the previous position in Tasmania.

What happens if a person dies overseas? Can their body be repatriated? A deceased person's body can be brought into Australia, however there are strict requirements for doing so. The cause of death (or at least, whether or not the deceased showed signs of certain diseases before death) must be appropriately documented or certified, and the agricultural office at the point of entry to Australia must be given at least 48 hours' notice. The requirements can be onerous, and we recommend that an experienced funeral director or customs broker be engaged to assist. Repatriation of a body is an expensive exercise, and costs on average between $10,000.00 and $18,000.00.

Are there regulations/laws about transporting human ashes? There are no legislative requirements for bringing human ashes into Australia (or exporting ashes out of Australia), or transporting them interstate. Passengers on international and domestic flights are ordinarily permitted to transport ashes, and the specific carrier can clarify their policies, including whether the ashes must be in checked or hand luggage. To comply with Australian and state biosecurity measures, it is recommended that the container holding the ashes be free from biological contaminants (soil, sand etc), and if arriving internationally, and the container or urn is made from wood, that item must be declared on arrival (the ashes themselves do not need to be declared on an arrival card).

Is it compulsory to have a funeral or memorial service? No. The law does not require a formal funeral, memorial or cremation ceremony.

Does a funeral director/organisation need to be involved post-death? Is it possible to have a home-based funeral? Once a medical practitioner has certified the particulars and cause of death, and issued a medical certificate of cause of death, government websites advise that a funeral director 'should' be engaged to collect the body for storage and preparation for the funeral. However, engaging a funeral director is not required by law and it is possible for a friend or family member to handle the arrangements provided that certain laws and procedures (including death certificate notifications and storage and transportation regulations) are followed.

If there is any question as to the cause of death, the body will usually need to be taken to the local coroner to have an autopsy performed. In these cases, home funerals are not usually possible.

Importantly, a home funeral requires significant preparation and education, including familiarisation with: the laws of the relevant state or territory; the hygiene, storage and preservation procedures/regulations; transportation procedures/regulations; and paperwork requirements.

Does a funeral director/organisation need to be involved in the burial or cremation? Although a deceased person's Executor and family have discretion about the types of arrangements that can be made, certain things cannot be arranged without the involvement of an authorised person or organisation. Multiple offences can arise out of improper transportation of, and preparation of, human remains (including requirements about vehicle specifications, hygiene and disinfecting, and availability of personal protective equipment). A body can only be cremated at a crematorium approved under the *Burial and Cremation Act 2019* (Tasmania), and (subject to a private land exception discussed below) a body can only be buried at an approved cemetery. Special regulations apply to an Aboriginal cremation performed in accordance with Aboriginal custom on Aboriginal land.

Provided all statutory requirements are met, it may be possible to engage a crematorium directly without involving a funeral director/organisation.

Who pays for the funeral? The person who arranges the funeral usually has to sign a contract with the funeral director. The person who signed the contract is legally responsible to pay for the funeral.

If there is enough money in the estate, it may be possible to arrange for a bank to release funds to pay for the funeral from the funds in the deceased's bank account. It may also be possible for the person arranging the funeral to recover these costs from the estate.

If there is no funeral fund, insurance policy or money in the deceased's bank accounts and the deceased had no other property, the person arranging the funeral may not be able to recover the funeral expenses from the estate, and will likely be out of pocket for the funeral expenses.

Is it possible to pre-purchase or make a coffin? Yes, as long as the coffin satisfies all legal requirements. A 'coffin' is defined as '*a box, case, or other receptacle, designed for, and into which, human remains are placed for storage, movement, cremation or interment*'. There is flexibility about the materials used in construction, but the coffin must be:

- impervious (leak-proof), so as to prevent the escape of bodily discharges, contaminants or infectious materials;

- of sufficiently robust construction, and able to be safely moved to the burial site/crematorium; and

- have a nameplate, inscription, or marking, stating the family name; and at least one given name of the deceased person that corresponds with the names shown on the identification tag for those human remains.

Importantly, a funeral director or crematorium may charge handling fees or may refuse to accept the pre-purchased/homemade coffin.

Can more than one person be cremated at the same time? No. Only one person is cremated at a time. The only exception is in the case of a mother and baby or twin children. It may also be acceptable for both a mother and baby or twin children to be in the same coffin. In these instances, approval must be sought from the Health Department.

Can a body be buried on private land? Human remains can be buried in a place other than a cemetery, but to do so will require the written permission of all of the landholders, the Director of Public Health, and the general manager of the relevant local council.

Private land burials must still comply with all of the relevant requirements for preparation and transportation of remains, and must use a compliant coffin.

Can a body be cryogenically frozen in Australia? Provided all statutory requirements are met, it is possible for the body of a deceased person to be cryogenically frozen. Although the first cryogenics facility is due to open in NSW later in 2020, presently there are no facilities in Australia capable of cryogenically freezing or storing bodies. Facilities do however exist in Russia and the USA.

Can a body/ashes be disposed of at sea? Macabre as it sounds, burials at sea require a 'sea dumping permit' issued by the Commonwealth Department of Environment. Permits are typically only granted for the sea burial of people with a demonstrable connection to the sea (for example, fishers or navy personnel). Permits cannot be obtained during a person's life, and take approximately a month after their death to organise. Arranging a sea dumping permit is costly - current estimates are between $10,000.00 and $15,000.00 (the application fee for the permit alone is $1,675.00 - and there are strict requirements about the shroud containing the remains, choosing the 'burial' site, and the vessel carrying the remains to that site).

There are no restrictions on, or permits required to, scatter ashes at sea.

How Can We Help? Worrall Moss Martin Lawyers has specialist skills and experience in estate planning and succession law, and can help you to document your wishes about your funeral/memorial and related wishes (including organ donation, body bequests, burial and cremation).

Please contact our Estate Planning & Trusts lawyers (**Peter Worrall**, **Kimberley Martin**, **Casey Goodman** or **Ashleigh Furminger**) if you, or your client, need expert advice and guidance about preparing a comprehensive estate plan.

Please contact our Estate Administration lawyers (**Kate Moss**, **Thomas Slatyer** or **Megan Bird**) if you, or your client, need expert advice and guidance after a person has died.

Will my Tinder Date Receive my Assets when I Die? When is a Relationship a 'Significant Relationship'?

In previous issues of Worrall Moss Martin News, we have discussed the topic of when a de facto partner is a 'spouse' for the purposes of the law of intestacy.

Two recent cases, one from Victoria and one from Tasmania, provide fresh examples of the importance of proper estate planning, and an insight into how Australian Courts are dealing with the question of when a romantic relationship evolves to the point where one partner is entitled to the other's estate on intestacy (or if they have not been adequately provided for by Will, being eligible to make a claim for provision from their estate).

Tasmanian Example - *Wiggins v Public Trustee* [2020] TASSC 3 (27 February 2020): In this case, the deceased died in March 2015 without leaving a valid Will (meaning he died intestate). The deceased had never been married and had no children. Ms Wiggins claimed that she was entitled to the whole of the estate because she was in a 'significant relationship' with the deceased at the time of his death.

The Supreme Court of Tasmania was asked to determine the next of kin, and whether Ms Wiggins was entitled to the estate, or whether the deceased's blood relatives (who were his cousins) were entitled to the estate. The value of the estate was $530,000.00.

- **The Relevant 'Relationship' Facts:** Ms Wiggins presented the following as evidence supporting her claim:
    - Ms Wiggins and the deceased met in about 2004, and after around 12 months they became a couple. By 2005, so far as Ms Wiggins was concerned, the deceased was the love of her life, he was her only sexual partner, and she would not be seeing anyone else;
    - the deceased and Ms Wiggins separated in 2008, because of the deceased's alcoholism and because he had an affair. They remained on friendly terms, and resumed their relationship in early 2010 until the deceased's death in 2015;
    - Ms Wiggins and the deceased maintained separate residences, however between 2005 and 2008 the deceased's house was a second home to Ms Wiggins. She often slept at his residence, ate with him and kept clothes there. In much the same way, between 2010 and the date of the deceased's death, her home was like a second home to the deceased. They had keys to each other's home;
    - the relationship was public. The deceased described Ms Wiggins' family as 'his family' and Ms Wiggins as his 'lady friend'. He was close with Ms Wiggins' daughter and her husband, and prior to the deceased's mother's death, Ms Wiggins was close to her. They travelled together, and nominated each other as their 'next of kin' on

medical documents. The deceased suggested marriage and cohabitation however Ms Wiggins resisted as she had been married previously to an alcoholic; and

- although the deceased and Ms Wiggins kept separate bank accounts, they on occasion assisted each other with financial matters. Ms Wiggins had loaned money to the deceased, but it was repaid, and neither party was sufficiently wealthy to support the other.

- **The Decision of the Court:** Associate Justice Holt, whilst finding that Ms Wiggins' evidence was honest and not exaggerated, was nonetheless persuaded to find against her. He concluded:

'*Having regard to the lack of commitment by Ms Wiggins and [the deceased] to take on any financial responsibility for each other in life or in death when neither was independently wealthy and having regard to the fact that there was no cohabitation, I am unpersuaded that the relationship amounted to a significant relationship within the meaning of the legislation*'.

Victorian Example - *Re Gunn; Thomas v Gunn* [2019] VSC 772: Similarly, in *Re Gunn* the Supreme Court of Victoria was asked to determine whether the deceased's partner, Gavin Thomas ('Mr Thomas'), was her 'unregistered domestic partner'. The deceased died intestate on 28 March 2019, and if Mr Thomas was found to be her 'unregistered domestic partner' as at that date, he was entitled to her entire estate. The value of the estate was around $390,000.00.

Under the relevant Victorian legislation, an 'unregistered domestic partner' is a person living with that person at the time of their death, as a couple on a genuine domestic basis, having done so continuously for a period of at least two years immediately before the person's death.

- **The Relevant 'Relationship' Facts:** Mr Thomas presented the following as evidence supporting his claim:

  - the deceased and Mr Thomas met in February 2017, and by March 2017 they were in an exclusive relationship (which included sexual activity), spent every night together, had declared their love for one another, and had commenced making arrangements to live together;

  - within two months, after initially keeping their relationship private (due to concerns about the deceased's work as a prison security guard), they made their relationship public and introduced each other to their families and friends, and there was no dispute about the nature of their relationship;

  - for several months, the deceased and Mr Thomas faced logistical difficulties about combining their households, and contemplated building a property together, before Mr Thomas moved into the deceased's home in October 2017. Once they commenced cohabitation, their finances became intermingled;

  - the deceased was a cancer survivor, in remission when she met Mr Thomas. She suffered a relapse in late 2017, and then died in hospital on 28 March 2019 shortly after receiving radiation therapy treatment. Prior to her death, the couple attended counselling to discuss the impact of her illness on them both;

  - Mr Thomas had planned to propose marriage in April 2019, and had already given the deceased a ring that he intended to be her wedding ring. The couple had been discussing marriage before the deceased's death; and

  - the deceased had made an appointment to give instructions to prepare a Will benefiting Mr Thomas (the appointment however was due to take place on the date of her death, and had been postponed to allow for her treatment).

- **The Decision of the Court:** Justice McMillan considered the language of the legislation as '*tolerably clear*', and that although the evidence indicated that Mr Thomas and the deceased were living together as a couple on a genuine domestic basis at the date of her death, they had not been doing so for the requisite two year period. Although conceding that non-cohabiting couples could satisfy this definition, her Honour found this was not the case between the deceased and Mr Thomas. The qualifying period began in October 2017 and, unfortunately, the deceased died 17 months later.

What About my Tinder Date? The Courts are showing a greater willingness to look beyond conventional romantic arrangements. In **Issue 10**, we discussed the Court recognising a 'secret' relationship in *Estate of the late Shirley Joan Violet Gardner; Bernengo v Leaney* [2019] NSWSC 1324. Earlier in **Issue 5**, we considered how, in *Dragarski v Dunn* [2019] NSWSC 300, the Court took notice of the deceased's Facebook status and social media posts to conclude that she was not in a relationship with the father of her child, with whom she was cohabiting.

However, the decisions in both *Wiggins v Public Trustee* and *Re Gunn* show that, although the law has taken steps in terms of recognising more contemporary arrangements between couples, there remain barriers for unmarried partners to access their deceased partner's estate, if they are not provided for by Will. In both cases, whether (or when) the parties to the relationship entered into a form of joint financial support or responsibility was a key consideration, in holding that neither partner was entitled to receive their deceased partner's estate on intestacy.

So, although legally recognisable relationships have evolved considerably beyond the traditional marriage structure, and although a Tinder date might be considered a contemporary form of 'relationship', at least for the time being, your Tinder date is unlikely to be entitled to your estate when you die.

How Can We Help? If you are concerned about whether the law will recognise your partner's entitlement to your estate, Worrall Moss Martin Lawyers has specialist skills and experience in estate planning and succession law, and can help you to structure your estate plan to ensure that your wishes are carried out.

Please contact our Estate Planning & Trusts lawyers (**Peter Worrall**, **Kimberley Martin**, **Casey Goodman** or **Ashleigh Furminger**) if you, or your client, need expert advice and guidance about preparing a comprehensive estate plan.

Please contact our Estate Litigation lawyers (**Robert Meredith** or **Eve Hickey**) if you, or your client, need expert advice and guidance about the estate litigation process, including making a claim on intestacy, or challenging the provisions of a Will.

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

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

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

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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

Telephone: 03 6223 8899
Email: info@pwl.com.au
Ausdoc: DX 259 Hobart
Facsimile: 03 6223 6322