



Estate Planning Tasmania News

Issue 27 May 2012

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Our Firm News

Worrall Lawyers welcomes Edmund Gale.

We recently appointed Edmund Gale as an Associate Lawyer working in Estate Planning and Estate Litigation and advice. He comes to us with good interstate and local experience in these areas.

Kate Hanslow, our Senior Associate Lawyer in the Estate Practice Group, has recently had a baby 'Gus' and we are pleased to say that both are well. Kate will continue to work with us and will be returning to work in the near future on a part time basis.

We are pleased to appoint **Maggie Keeling**, who works in our Commercial and Property Practice Group as an Associate Lawyer. Maggie has been working for Worrall Lawyers for 3 years.

Her appointment is a reflection of her experience and aptitude for all aspects of property law, and specialised areas of commercial law including commercial leasing and commercial sales and purchases. She hopes in the future to continue to develop her practice into Agrilaw, commercial subdivisions and other complex commercial transactions.

Peter Worrall has been invited to speak at a estate planning seminar in Queensland in August to senior members of the legal profession from across Australia who are involved in estate planning. The topic is about declining capacity—that is the capacity of a person to make a will. This is a particularly important area of the law with increasing levels of Alzheimers and other forms of dementia. One in 5 people over the age of 85 have one form or another of dementia.

The importance of knowing the location of your Will

Do your Executors know where your Will is located? What if the Executors of your Will are unable to locate your original Will?

It is important that the Executor, or Executors, of your Will are aware of the location of your original Will, so that it can easily be located when you die.

A Will is a private document, and although its terms do not need to be disclosed until after your death, it is important that the location of your original Will is disclosed to your Executor. It is also important that your family know where your original Will is kept, as it safe guards against the distress of looking for it after your death.

If your Executor is unable to find your original Will, he or she needs to carry out enquiries and searches in order to determine the existence of a Will, and location of the original document. There is no "Wills Register" in Tasmania, and it can be difficult for Executors and family to locate original Wills. This avoidable situation can be stressful for your family and often causes a delay in the administration of your estate and the time taken to distribute your estate to beneficiaries.

If, after making enquiries about the location of your original Will, and based on information available to them, the Executor is satisfied, that the original Will is not available (that is, because it is lost, or there is evidence that it has been destroyed), **Rule 20A(1)** of the *Probate Rules 1936* (Tasmania) allows an application to be made to the Court to admit to proof (what this means in plain language is obtaining an order from the court for a grant of probate of the secondary documents) either:

1. a copy of a Will (for example, a photocopy of the original Will);
2. a completed draft of a Will (for example, a printed copy held by a lawyer that has not been executed by the Willmaker but is known to have been executed);
3. a reconstruction of a Will (for example, based on instructions provided by you to your Executor); or
4. a Will by other evidence of its contents (for example, clear and satisfactory oral evidence supported by affidavit).

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A note from our Commercial Practice Group

Tax - People with business interests in Aruba, the Cook Islands or Guernsey should take note of the tax information exchange agreements recently reached between Australia and these countries.

Superannuation Age Limits - From 1 July 2013 the age limit for the payment of the superannuation guarantee will be removed, and employers will be required to contribute superannuation for employees aged seventy (70) and older.

Superannuation Rates for Employees - Between 1 July 2013 and 1 July 2019 the superannuation guarantee rate will increase from the nine percent (9%) rate to twelve percent (12%).



Alex Bobbi



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Advanced Care Directives and Living Wills

We often deal with clients who raise questions about advanced care directives and living wills. The reason for putting a note in this issue of Estate Planning Tasmania News is to remove some of the folk law that is evident around this topic.

First it is necessary to comment on the folk law:

Living Wills

There is no document at law in Tasmania which is a 'Living Will'. It is generally a United States term that refers to the wishes of a person prior to death. It is not any form of will at all, but in the United States it is a document that many people use to set down how they wish to be treated in their dying days.

Advanced Care Directives

An Advanced Care Directive is a document sometimes promoted by the medical profession and sometimes promoted in hospitals and eldercare institutions. They are not recognised by the law of Tasmania as a legally valid document and there are risks in entering into them due to the confusion that commonly arises. Confusion can arise because of their lack of validity in Tasmania.

They can conflict with a document that is lawful in Tasmania that a person has signed. Other ways in which confusion is caused is if the Advanced Care Directive appoints one person and the lawful documentation appoints another person. A conflict can arise between those people, or where there are two documents, what is in the two documents may be stated in different language and thus cause confusion because of the different directions.

It is also our view that an Advanced Care Directive gives rise to liability issues to those doctors, hospital employees and eldercare institution employees who promote them, and this liability issues arises because of their lack of legal validity in Tasmania.

Another reason to avoid using this informal document (although a number of the versions that we have seen are framed in what are apparently quite formal terms) is that where a person has completed an Instrument Appointing an Enduring Guardian, there is commonly a conflict between the two documents, which apart from the legal problems that this causes, will cause practical problems for the family and the medical advisors in working out exactly what it was the person wanted their treatment to be.

It is unfortunately common for Advanced Care Directives to be referred to as living wills: they are not living wills. They are also not a substitute for medical powers of attorney which are documents that only exist in Victoria as an independent document. If you do not live in Victoria then it is almost certainly inappropriate to sign a medical power of attorney.

Instrument Appointing an Enduring Guardian

The appropriate form of documentation in Tasmania is an Instrument Appointing an Enduring Guardian, commonly called an Enduring Guardian Form. This is the appropriate document which allows for all of the things that can be set out in an Advanced Care Directive to be set up properly and lawfully in an Instrument Appointing an Enduring Guardian. Commonly our clients set out in quite extensive detail, their wishes for how they be treated in that period of time where they are unwell, and have commenced the dying process or are likely to die in the near future. An Instrument Appointing an Enduring Guardian once prepared and executed is registered with the Guardianship and Administration Board.

Those contemplating completing a 'Living Will' often obtained from the internet or an advanced care directive, should consider completing a well drafted Instrument Appointing an Enduring Guardian so that they know that what they are completing is recognised by the laws of Tasmania.



Peter Worrall

Glossary

Will

A document created by a person with the intention of appointing an Executor to administer that person's estate in the way that is provided for in the document. It only takes effect on death. It may be changed before death if the Willmaker has mental capacity to do so. Only the last Will is effective. Other things that may be mentioned in Wills include funeral wishes, testamentary guardians and the exercising of a power of appointment on death.

Willable Assets

An expression that distinguishes assets that pass under a Will. They are distinguished from assets that a person might regard as their own that cannot be given under a Will. See also Non-Willable Assets.

Willmaker

A term for a Testator, a male Willmaker or a Testatrix, a female Willmaker. It has the benefit of being both modern and gender neutral.

Witness

A person who acknowledges, by their signature to a document, that they have been present when another person has signed that document. By their signature they are confirming that the other person signed in their presence. Note that there are technical requirements about witnessing Wills that must be complied with.

Will Tips

Be reflective about your circumstances and what you want to achieve before giving instructions for your will to your estate planning lawyer. This will better enable the estate planning lawyer to take instructions that reflect what you want.





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The Importance of Knowing the Location of Your Will (continued)

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The Court must be satisfied that on the evidence the Will should be admitted to Probate, that is that the document given in the application to the Court, is a true reflection of your final Will. In making their decision, the Court will consider evidence of:

1. the existence of a copy of the Will;
2. the accuracy of the copy or other evidence of the contents of the Will;
3. the terms of the original Will;
4. the Will being properly executed or satisfying the requirements of an informal Will;
5. the original Will revoking any pre-existing Will;
6. searches that have been conducted to find the original Will, including publishing advertisements regarding the missing original Will;
7. what happened to the original Will after the death of the Willmaker and any circumstances surrounding its absence, including any disputes with beneficiaries;
8. the consent, in writing, of all persons who could be adversely affected by the application and proof that those persons are not under disability (or in the alternative that the Court makes an order after hearing from these people and rules against them); and
9. the Willmaker intending to revoke the original Will.

If the Court is not satisfied, an earlier Will may be admitted to probate, or your estate may be distributed in accordance with the Rules of Intestacy. This distribution may not reflect your current wishes.

A recent example of a lost Will that went all the way through to a trial is the Garland v Dillon decision of Justice Shan Tennant in 2005, where the circumstances were that following the deceased's death only a photocopy of the original Will could be located. The plaintiff applied to prove the photocopy of the Will. It was decided by the Court that the photocopy was a true and accurate copy of the original Will, that the original Will was properly executed and that the Will revoked prior wills and that the deceased person had not revoked this present Will by destroying it.

All of the trouble and expense of taking this through to a trial in Court could have been avoided had the Willmaker decisively and in a proper way revoked their Will and made a new one. Or alternatively made sure that the original Will was stored somewhere safely and that its location was known by those who were relevant. And as an additional precaution they ought to have stored properly and safely a copy of the original Will taken after its execution.

To avoid what can be an expensive exercise or dispute always ensure that the location of your Will is known to your Executors and family, and that copies of the Will are made after the execution of it.

There are extensive procedures which have to be made if it alleged that there is a Will and it has been lost. Because this search process may be evidence in Court it is best that it is carried out by an estate lawyer or at least at the direction of an estate lawyer.

The authors acknowledge that parts of this article are based on an article *The Case of the Missing Will* written by the Honourable Justice Tom Gray of the Supreme Court of South Australia.



**Peter Worrall
and Kimberley Martin**

Kimberley Martin is a Graduate Clerk who has recently joined us. While she completes her time at the Legal Practice Course (the professional training diploma that Lawyers now complete before being admitted as Lawyers to the Supreme Court) she is working with us one day per week. She graduated from the University of Tasmania with a Bachelor of Arts and Bachelor of Laws with Honours in December 2011.

Consolidation of Superannuation

On 21 September 2011, the then Assistant Treasurer and Minister for Financial Services and Superannuation announced the 'Stronger Super' reforms designed to improve the superannuation system and better safeguard retirement savings.

Under the proposed changes, from July 2012, funds that operate more than one account for the same individual will be required to consolidate those accounts where possible.

These proposed changes have not yet been passed by Parliament or received royal assent.



Alex Bobbi



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Accountant Seminar Series

Worrall Lawyers is offering a series of free seminars to Accountants covering a range of interesting and challenging issues arising in the fields of Private Client legal work, and commercial legal practice.

Seminar 1	Topics	Sale and Purchase of Business Accountants as Executors and Trustees
	Date & Time	Wednesday 30 May 2012, 5.15pm—6.30pm
	RSVP By	Friday 25 May 2012—Limited to 20 seats (only 4 left)
Seminar 2	Topics	Control and Taxation of Superannuation on Death Transactions Involving Farming Properties in Tasmania
	Date & Time	Wednesday 18 July 2012, 5.15pm—6.30pm
	RSVP By	Friday 13 July 2012—Limited to 20 seats (only 5 left)
Seminar 3	Topics	Commercial Leasing—Tips and Traps Farm Succession Planning
	Date & Time	Wednesday 22 August 2012, 5.15pm—6.30pm
	RSVP By	Friday 17 August 2012—Limited to 20 seats (only 7 left)

The seminars will be presented at the offices of Worrall Lawyers. Any Accountant who is interested in attending one or all of the seminars please RSVP to Jackie Jones by telephone on 6223 8899 or by email on jacki.jones@pwl.com.au by the RSVP date.

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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 Estate Planning News readers are always appreciated. Email us at sam.mccullough@pwl.com.au

Caution: This newsletter contains material for general educational purposes and is not designed to be advice to any particular person in relation to 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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