Worrall Moss Martin News

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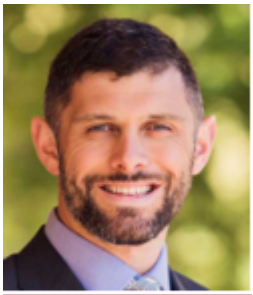
Expert advice and solutions

WORRALL MOSS MARTIN LAWYERS

Secret Relationship Recognised, and 'De Facto' Spouse Given Entire Estate



Robert Meredith
Senior Associate

When is a person your 'spouse'? What are the factors that will be relevant in determining who is a spouse? Do they need to live with you? Does the relationship need to be public? In the recent case of *Estate of the late Shirley Joan Violet Gardner; Bernengo v Leaney* [2019] NSWSC 1324, the Supreme Court of New South Wales was required to consider each of these questions in order to determine who was entitled to the assets of the deceased.

The Facts: The deceased died on 19 June 2017 without leaving a valid Will (meaning that she died intestate). A dispute arose between the deceased's nephew and Mr Juan Bernengo ('Juan') about how the estate should be distributed.

Thomas Slatyer
Lawyer

Juan claimed that, as the de facto spouse of the deceased, he was entitled to the entirety of the estate. The nephew claimed that Juan and the deceased were not in a de facto relationship, and that he (as the next of kin of the deceased) was entitled to the entirety of the estate.

Juan provided significant evidence in support of the existence of his ten-year relationship with the deceased, which he acknowledged had been kept largely secret from the outside world, including their respective families, as a result of their fear of judgment given the age difference and that Juan was the widower of the deceased's daughter.

Key evidence included:

- frequent overnight visits to the deceased's home;
- regular (almost daily) telephone calls between Juan and the deceased;
- Juan's clothes and belongings being stored at the deceased's home;
- evidence of a sexual relationship between Juan and the deceased; and
- evidence of shared finances and purchases.

Eve Hickey
Lawyer

Juan's evidence was corroborated by the deceased's step-daughter and the deceased's neighbour, who were both relatively close to the deceased and gave evidence as to the nature and duration of the relationship.

The nephew provided evidence, based on his observations, that Juan and the deceased never displayed any affection to one another and there was nothing to suggest that they were anything more than friends. He also provided evidence that Juan and the deceased had completed government documents (including hospital and Centrelink documentation) that indicated they were 'single' and 'lived alone'.

The Law: Under section 111 of the *Succession Act 2006* (NSW) if Juan was recognised as the 'spouse' of the deceased (including as a de facto spouse), he was entitled to the whole of the estate. If Juan was not recognised as the spouse of the deceased (including as a 'de facto' spouse), then the nephew was entitled to the whole of the estate.

In order for a de facto partner to be a spouse for the purpose of the law of intestacy, they must have been in 'a relationship as a couple living together' at the time of the death and that relationship must either have been in existence for a continuous period of at least 2 years, or have resulted in the birth of a child.

It is well established that two people do not need to share the same residence all of the time in order to be considered to be 'living together'. Case law supports the position that the concept of living together is more concerned with the nature of the relationship, and the extent to which there has been a 'merger of two lives', than the quantities of time that the couple spent together.

Section 21(c) of the *Interpretation Act 1987* (NSW) lists the following as factors that are relevant to the question of whether two people have a relationship as a couple:

- the length of the relationship;
- whether and for how long the two people had lived together;
- whether a sexual relationship existed;
- the degree of financial dependence or interdependence, and any arrangements of financial support between them;
- the ownership, use, and acquisition of property;
- whether there was a mutual commitment to a shared life;
- any care and support of children;
- the performance of household duties; and
- the public aspect of the relationship.

The Decision: The Court considered the factors in section 21(c) of the *Interpretation Act 1987* (NSW) and held that Juan was the surviving spouse of the deceased, and was therefore entitled to the whole of her estate. The Court noted that Juan presented as a credible witness and provided highly detailed evidence to support the existence of his relationship with the deceased. In contrast, it was noted that the nephew provided highly generalised evidence.

Key Points: This case highlights the importance of:

- ensuring that your estate planning documents are regularly updated to avoid leaving your loved ones and family members in a position where they need to rely on the relevant intestacy provisions (or a Court) to determine how your estate is to be distributed. In this case, significant legal costs were incurred by both parties, to the detriment of the estate; and

- seeking legal advice if you are concerned about the estate of a family member or loved one that has died intestate, or if you are concerned that someone intends to make a claim against a family member or a loved one's estate.

It is likely that this case would have had the same result if it had been heard in Tasmania because the *Relationships Act 2003* (Tas), the applicable legislation in Tasmania, contains similar factors that the Court must consider when determining whether two people have a relationship as a couple.

Worrall Moss Martin Lawyers has specialist skills and experience in estate planning, estate administration and estate litigation. Please contact Robert Meredith, Thomas Slatyer or Eve Hickey if you, or your client, need expert advice and guidance about the eligibility and merits of an actual, anticipated or potential claim against an estate. Please contact Peter Worrall, Kimberley Martin or Ashleigh Furminger if you, or your client, need expert advice and guidance about estate planning.

Can I sign my Will Electronically or Online?

Kimberley Martin
Director

From booking accommodation, to ordering groceries, communicating with others and entering into binding agreements, today with the click of a button, each of these things and **almost** everything else can now be done remotely.

Not too long ago, the concept of signing (and witnessing) estate planning documents electronically was absurd. Nowadays, Millennials find the process of executing a Will practically medieval(1) and will regularly ask: '*Can I sign my Will electronically or online?*'. The legal answer, in almost all countries around the world, is 'no' or 'not without creating a lot of expensive legal work to prove it'.

Kate Moss
Director

With the exception of certain States in the United States of America ('USA'), the execution of Wills remains a very formal (pen-and-ink and physically present witnesses) process.

But a new era is dawning. Academics, legal practitioners, tech companies, legislative bodies and other professionals around the world are all beginning to engage in formal consultations about legislation and policies regulating 'electronic Wills . Legislation, that formally recognises and regulates Wills signed (and witnessed) electronically, now exists in four States in the USA and in the USA's *Uniform Electronic Wills Act*. It is also being considered in many other jurisdictions.

What are Electronic Wills? There is no universally accepted definition of an 'electronic Will'.(2) The term itself is imprecise due to the fact that a Will could be called electronic due to the use of technology in the preparation and drafting of the Will, the execution of the Will and/or the storage and admission to probate of a Will.

A simple definition of an electronic Will, which does not take into account the formal legal requirements to make a valid Will, is: 'a will that exists solely in a computer (or on a computer diskette), and exists only in the form of electronic impulses, albeit of which a printout can be made'. (3)

Developments and Law Relating to Electronic Wills Across the World: As of 2019, the USA is the only country with jurisdictions that have introduced electronic Wills legislation:

- Arizona, Indiana, Florida and Nevada have enacted new electronic Wills legislation; and
- bills have been considered in California, (4) the District of Columbia, (5) New Hampshire, (6) Texas, (7) and Virginia. (8)

The United States Uniform Law Commission approved the *Uniform Electronic Wills Act* in July 2019. (9) Under the model law, a Will-maker is able to create an electronic document recording their testamentary wishes. The Will-maker must gather their witnesses, access a remote online notary, and then in person (or via a real-time audio-visual meeting as a group) execute their last Will and testament electronically.

There have also been developments in other jurisdictions in the area of electronic Wills:

- the United Kingdom is actively looking into the topic of electronic Wills. The 2017 public consultation by the Law Commission (10) provisionally proposes the enactment of a power by regulation to create a regime that provides for the recognition of electronic Wills and, as well, the inclusion in the Wills Act of a dispensation power that includes the validation of electronic Wills; and
- Canada has been extremely active in discussions and debates about the introduction of electronic Wills, (11) however to date no Canadian jurisdiction has introduced, or is on the verge of introducing, electronic Wills legislation.

To date there have been no formal discussions about the introduction of electronic Wills legislation in any Australian jurisdiction.

Key Issues/Concerns Relating to Electronic Wills: The concept and topic of electronic Wills is one that has, and continues to, divide judges, academics, legal practitioners, legislative bodies and societies generally around the world. Although many appear to agree in principle that electronic Wills are desirable, there remain competing concerns about reliability, safekeeping and identity verification that are being heavily debated.

Key issues that are currently being debated include:

- what the witnessing requirements should be;
- what the accepted electronic methods of signatures should be. Four key potential methods that have been considered include: typed names and digital images of handwritten signatures, passwords, pins and keys, biometrics, and digital signatures;
- what the storage and access requirements should be;
- what protection measures will be required to maintain the integrity and security of electronic Wills, including: the risk of obsolescence, compatibility, hacking, and fraud; and
- what protection measures will be required to protect vulnerable people, including issues relating to: testamentary capacity, knowledge and approval, and undue influence.

Caution and Conclusion: Electronic Wills are here. It is inevitable that use of, and the trend for recognising, electronic documents will only increase in the future. However, they are not yet legal in Australia, and are unlikely to be formally and legally recognised as a 'valid Will' for some time.

As previously set out in *Worrall Moss Martin News Issue 4 - Can a Text Message and Video*

Recording Really be Accepted as a Will? digital documents that do not meet the formal requirements under the legislation can be complex, expensive and result in prolonged litigation and administration of a deceased person's estate.

The pitfalls of informal 'do-it-yourself' estate planning, and the importance of obtaining professional assistance that gives proper consideration to all the issues, including the importance of language, default provisions, the application of family provision legislation, and the benefits of proper tax and asset-protection planning cannot be underestimated.

Worrall Moss Martin Lawyers has specialist skills and experience in estate planning, estate administration and estate litigation. Please contact Kimberley Martin or Kate Moss if you have any questions about the matters set out in this article.

This material is taken from a detailed paper by Director, Kimberley Martin titled '*Technology and Wills - The Dawn of a New Era*' which she presented at the STEP SIG Spotlight Event in London on Friday 22 November 2019.

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(1) Christine Fletcher, 'The Pros and Cons of Electronic Wills', *Forbes* (Web Page, 2019) <https://www.forbes.com/sites/christinefletcher/2019/10/25/the-pros-and-cons-of-electronic-wills/#2baac2595457>.

(2) Manitoba Law Reform Commission, *Reform of The Wills Act Revisited* (Consultation Report, 2019), 10.

(3) Manitoba Law Reform Commission, *Wills and Succession Legislation* (Report 108, March 2003), 13.

(4) AB-1667 Electronic wills, (2019-2020).

(5) B22-0169, the Electronic Signature Authorization Act (2017). SB 40: An Act relative to electronic wills, N.H. Legis., (2017).

(6) SB 40: An Act relative to electronic wills, N.H. Legis., (2017).

(7) TX HB3848; Relating to adoption of the Electronic Wills Act.

(8) HB 1643: Electronic Wills, V.A. Legis., (2017).

(9) American Bar Association, 'Ready or Not, Here They Come: Electronic Wills Are Coming to a Probate Court Near You', *Probate & Property Magazine* (33:05) (2019).

(10) See *England and Wales Law Commission* (Web Page) <https://www.lawcom.gov.uk/project/wills/>.

(11) See W.L. Hurlburt, 'Electronic Wills and Powers of Attorney: Has Their Day Come?, Proceedings of The Uniform Law Conference of Canada, 2001; Law Reform Commission of Saskatchewan, *Report on Electronic Wills* (2004); Manitoba Law Reform Commission, *Reform of The Wills Act Revisited* (2019); British Columbia Law Institute, *Wills, Estates and Succession: A Modern Legal Framework* (2006); and Uniform Law Conference of Canada Working Group on Electronic-Wills, 'Electronic Wills' (Progress Report, August 2019).

Compliments of the Season

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Our office closes at 12.00 noon on Tuesday 24 December 2019 for the Christmas/ New Year period.
We re-open at 9.00am on Monday 6 January 2020.

All of us at Worrall Moss Martin Lawyers extend to you the
Compliments of the Season.
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Further Information

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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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