KR HEWLETT & CO's
WILLS NEWSLETTER
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to the first edition of our firm's *Wills* Newsletter. **Please feel free to start reading at any part you like**. All of Vanessa, Kim and Keith wish you well and hope you enjoy!

Proposed new Will laws 

In a new Act of NSW Parliament which has passed, *but has not yet commenced*, the law relating to wills in NSW has been updated. The proposed new law is part of a project to make wills laws uniform across Australia, the initiative for which came from Queensland. The new updated laws will not apply until the Act commences (which could be from about July this year).

There are a few interesting points in the new law.

The Act provides for a wide range of persons (including any persons named or referred to in the will or any person named or referred to *as a beneficiary* in an earlier will) to be able to inspect or be given copies of the will.

A NSW court shall be able to authorize a will to be made, altered or cancelled for a person without testamentary capacity. This reform follows, but maybe potentially wider, than current Victorian laws that allow such "court-made" wills.

Under the proposed NSW will making provisions, it may even be possible for a minor (ie a child) without capacity to have a will made for them.

On a different point, the current law that allows the Court to give approval for some minors, who have capacity, to themselves make wills will be made a little stricter. One of the attesting witnesses to the signing of such a will (if approved) will need to be the Registrar of the Court.

There is a "saving" provision which provides that where a will disposes of property, and after making the will but before his or her death, the will maker disposes of an interest in that property, the will may still operate in respect of any *remaining* interest the will maker had in the property.

There are new laws about the validity of a will signed overseas. Also, when the new law comes in, a spouse of a beneficiary, who currently cannot witness wills, may thereafter be able to witness them. The new law may also likely state that a person who cannot at the time physically see (such as a then blind person) will not be able to witness a will.

Intestacy

Where a resident living in NSW dies in NSW, without leaving a last will, they are considered to have died “intestate”. The NSW laws of intestacy may apply to their estate.

These laws of intestacy contain “formulas” as to who benefits. Obviously, those general formulas cannot be fair in application to all specific situations, and they are sometimes complex in their application as well.

An example of unfairness may be where one of a young couple dies, the couple, both previously unmarried, having just commenced a de facto relationship less than 2 years previous. In that situation, the surviving de facto partner will receive all/much of the estate at the expense of the parents of the deceased partner.

Another example of unfairness is where both of a young married couple die not leaving children, but leaving all their parents still living. The parents of the partner who died first (or who is found to have died first if the order of death is not clear) will likely not benefit at all, while the parents of the other partner may well receive all of the estate.

It has also been said that intestate estates are in many cases more vulnerable to Family Provision Act challenge claims too.

Another complexity in Australia is that the rules as to who benefits from intestacies is currently different in different states in Australia. I understand that as part of the laws to bring uniformity to succession laws in Australia, that this will be looked at, but to bring uniformity in this area maybe a difficult task that may take a few years.

The lesson – have a will (and possibly a binding co-habitation agreement or financial agreement), especially before you move in to live with anybody.

BANK Accounts

Some general information - If you wish to compare the costs and fees of bank or other financial institution accounts, you can go to the relevant part of the Choice website at www.choice.com.au. I have tried it for one type of account, and it seems reasonably comprehensive.

Informal wills

Over the years, you will have read in the newspapers about some cases where the Court has found that an informal will shall be probated, even though it has some formal defect. There have however also been many unsuccessful applications to have the court find that such a will should be probated.

Whether successful or unsuccessful, the monetary, emotional and time cost of such an application can be high.

One of the keys of this area to me is that although such a document may appear to be a will, it should be shown to have been intended to be the last will of the deceased person "*without more..*" - for example, that the document was not just a preparatory document or memo.

Another key has been to make a careful thorough analysis of the informal document itself and of events and circumstances surrounding, leading up to (and even after) the informal document came into existence.

In the event of discovery of an informal will like document or of an irregularity in respect of a will, the document or irregularity and all the circumstances surrounding it should be quickly (and fully) advised to the estate solicitor. If the person who made out the informal document is still alive, please encourage them to obtain legal advice immediately.

Life estates – a general opinion comment

A "life estate" could be when a person, in a will, leaves a property to another person for that other person to live in that property, but not to be able to sell it, for the rest of the other person's life. Having recently had cause to again review the topic, it would continue to appear to me that using life estates in wills are often much less than satisfactory.

One good development in this area however has been the release of ATO Taxation Ruling 2006/14 which deals with CGT and life estates (the ruling being released about 21 years after CGT came in!) - a 28 page ruling.

The topic of life estates is complex. One important thing to note however is that if a life estate is left in a will, the time for all beneficiaries to (if possible) co-operate and together consider the ramifications is *before the initial administration of the deceased estate is complete*. If this is done, and good advice is then obtained, some problems "down the track" maybe avoided. This comment could also apply to other types of unusual dispositions in wills.

Challenges to wills under NSW family provision laws

You may be aware that in NSW, it is usual for a challenge to a will to be by the "Family Provision" laws. If a claim is successful, a court may sometimes order that the estate pay some or all of the claimant's legal costs of the claim.

Over the last few years, there have continued to be some interesting developments and trends in this relatively new area of law. In this article, we summarize some of those developments (which we note are in some instances are still a little unsettled).

In NSW, a wide category of persons can potentially challenge a will. The categories of persons extends to people *dependent* (financially or otherwise) on the deceased, who at some stage lived with the deceased.

Recent laws changes also allow some *carers*, who were "living together" with the deceased at the time of the deceased's death, and who provided both personal care and domestic support to the deceased, to make a claim.

Currently, for "*disentitling conduct*" to stop a person claiming, it would not usually be sufficient to show just estrangement (ie no contact) between the claimant and the deceased person for a few years before death in my view. Currently, such conduct may have to be fairly severe before it stops a close relative from being able to claim anything.

If a person fits into one of categories of persons that can claim, then their future *needs* (and comparing with those that they are in dispute with) become important.

A 2003 appellant court decision indicates that an assessment of needs should take into account the possibilities of change of circumstances (such as the possibility of onset of poor health) of the claimant.

This may in some cases lead to the court towards making an award for a "*buffer*" amount in favour of the claimant to have regard to such possibilities.

In this area, a married spouse's claim may still be regarded as even better than a strong claim of a de facto spouse.

An adult child left out of a will, who was estranged from their parent for several years before the parent's death, may currently often succeed in obtaining some provision from the estate.

A former spouse who received a matrimonial property settlement at the time of divorce may well find it hard to successfully claim against the estate of their ex-spouse, even if needy, …

but any clearly provable deceit by the other spouse in the matrimonial property settlement process will certainly improve their chances.

More distant relatives and other dependants, such as grandchildren and non-relative dependants, are in a "lower" category of claimants. They can claim, but their claim may well be risky and should be very carefully assessed before taking any court action.

Also, it is noted that a wide range of property, not just the property being part of a deceased's formal estate, may be "notionally" considered as part of the estate for the purpose of Family Provision Act adjustment.

There has been some criticism of existing laws. For example, a step child who was dependent on a deceased person but who never lived with the deceased person may not have a claim, compared with a dependent grandchild who never lived with the deceased who may claim.

The laws relating to will challenges are different in different states in Australia. As part of making the laws relating to wills in Australia consistent, the laws relating to family provision challenges to wills may also be made consistent. Some of concerns of some critics of parts of the NSW laws may then be dealt with, and there are some drafted proposals in respect of such matters.

In conclusion, currently a wide range of persons can claim against a will or estate using these laws, but not all claims succeed. People making wills, and potential claimants also, need to obtain good and prompt advice.

Land Tax changes

A new change to land tax is to address concerns about what happened if a person had to leave their principal residence to permanently enter into aged care accommodation because of illness. Previously, if certain conditions were met, the principal residence exemption continued for the person's ex-residence for just 6 years after they left their home.

Now, the exemption period *may* be indefinite, *if* the person meets all relevant criteria and enters into care in a hospital, mental hospital, aged care establishment or lives with their own carer. It is not that simple to obtain the exemption, and you should seek advice to see if you qualify.

Another change is for estates. There is just a 12 month exemption from land tax for ex-principal place of residence properties. Now, in certain situations, the Commissioner may exercise a discretion to extend the period of exemption. To obtain the extension, it may help if the property has not been used for income producing purposes since death and if a beneficiary resides there.

Joint bank accounts

While jointly held real estate, bank accounts and other property is often a great way to own the property with another person, when something unusual happens, its lack of flexibility can lead to odd results. Here is an example.

Normally, joint bank accounts pass on death to the survivor. In an interesting recent decision however, an older woman's written notice attached to her last will instructing a daughter, who was the executor, about distribution (to several people of various proportions) of a considerable sum held in a joint account was held to over-ride the right of the joint account holder (the executor daughter) to receive that the money in that joint account.

In that case, it seems that no money in the account had been contributed to by the executor daughter.

While the result of that case may seem just, it indicates that care should be taken when depositing a large sum into a joint bank account, as to who owns that money, and what would happen in the event of death of one or more of the account holders.

Transferring your property before you die

In a recent case, a parent transferred their home to their adult child who lived with them in the expectation that the child and spouse would care for the parent.

If a parent transfers a property to a child like that, the law may make a "presumption of advancement" – that the property transfer was a gift to improve the situation of a dependant.

In the case, there was disagreement, the parent had to leave the home and commenced court action to try and regain the ownership of it.

The parent was successful in the court action, as the court found that the "presumption of advancement" was on the basis that the parent would continue to live there and be cared for. When this did not occur, the presumption was negated and the court ordered that the home was to belong to the parent again.

Although the parent won the case, it does illustrate the risks of a person transferring their home out of their name before their death. Again, good legal advice should be obtained before doing so and perhaps a formal agreement should be drawn up about matters such as rights to reside, care, payment of rates, insurance and repairs and sale of the property.

SUPERANNUATION

Superannuation and Investment – a recent opinion

Recently the *Sydney Morning Herald* attributed former Reserve Bank governor Ian Macfarlane indicating that superannuation will now become the most important tax shelter. In his *Boyer Lectures*, Mr. McFarlane also apparently proffered opinions that Australia is now without an effective economic lever to deal with what has become the biggest danger to the economy – booms and busts in the price of assets such as property and shares, that in the past, the banking sector has been shaken by recessions but that next time around the household sector could be the most vulnerable and that as a result, the downturn could be more pronounced because consumers could slash spending.

Mr. McFarlane makes detailed comments about such matters and Australia's economic history since World War II as part of the 2006 Boyer Lectures. If interested, you can obtain a copy of his Lectures at the ABC Radio National website at http://www.abc.net.au/rn/boyerlectures/

Superannuation Death benefits

As you are probably aware, death benefits payable by a superannuation fund do not form part of a deceased's members estate.

In different funds, benefits will be paid in different ways. Of course, you should therefore be careful to check with the administrator of your fund as to how it is proposed that any benefit would be paid upon your death.

Death benefits would normally be paid to "dependant/s" for *superannuation* purposes ("dependants" is fairly widely defined) OR to the estate via the executor (or administrator). The trustee of some super funds however can restrict the categories of "dependant" to whom a payment could be made.

Normally, you would not talk about superannuation in your will. If however you wanted the superannuation death benefit to be paid to somebody other than a "dependant" OR if, for example, you have a conflict in your family situation, then you may wish to state something in the will about what your wishes are as to your superannuation.

Please note that while an *adult* child is likely to be a "dependant" for superannuation purposes, a payment to such an adult child is likely attract different (higher) tax to payment to a child under eighteen….

Step-children could be superannuation "dependants", but only if the child's natural parent was living and married to the deceased at the time of death (if that is not satisfied, they may still be considered a financial dependant).

Some case examples, in my view, have resulted in decisions that not everyone might expect. Such decisions indicate to me that the law in this area is complex, developing and legal advice should normally be obtained in relation to how death benefits shall be paid on death, and in respect of making a claim a death benefit after death. An example:-

- a wife and children were separated for *two years* from the husband before his death. The wife had tried to obtain child support from the husband, but could not obtain much. So, by the time of the husband's death, the wife and child relied on other means of support.

Yet, as the wife was considered to *still have a legal right of support* from the husband, she and the children were still considered financial dependants of the husband, although they had not relied on him while he was alive during the two year separation. The wife and children were therefore entitled to claim on the superannuation death benefit.

In case of a *partial* dependency, it is not necessarily the case that the amount of benefit paid to the partial dependant will be limited to the same proportion as the extent of the partial dependency.

Superannuation "dependants" could also include people who come in a "*inter*dependency" category – for example, two elderly siblings living together or a live-in adult child who cares for elderly parents. Of course, certain requirements must be satisfied to prove interdependency.

An aspect of "interdependency" is that the requirement for "financial support" can be met by the deceased being financially supported *by* the person claiming, not just the other way around. The test to prove an interdependent relationship may become less difficult to satisfy if one or both of the persons living in that relationship suffers from a disability.

If you are dissatisfied with a decision about payment of the death benefit, a complaint can be lodged to the Superannuation Complaints Tribunal. If you are also later dissatisfied with the Tribunal's decision, the matter can be taken to the Supreme Court BUT the grounds for the court to be able to overturn a Tribunal decision are limited (as is often the case).

A handy source of information on superannuation terms and law is the website of the Superannuation Complaints Tribunal at http://www.sct.gov.au/

TRUSTS

General introductory comments What is a trust? Perhaps a private trust, of the types that you maybe interested in, could be defined by saying:-

"A trust is an equitable obligation, binding a person to deal with property, over which he has control, for the benefit of persons of whom he may himself be one, and any one of whom may enforce the obligation." *(Underhill, Laws of Trusts and Trustees (12th Edition) 1970)*.

In that definition, the person dealing with the property is the "trustee", the persons benefited are "beneficiaries" and the property (which could be personal property or real property or both) could be called "trust property". The obligations that bind the person could be called "duties".

So, to be a trust, there usually needs to be a trustee, beneficiaries, trust property AND duties that link the three (trustee, beneficiaries, trust property) together.

A trust maybe set up while you are alive by a written document, normally called a trust deed. A trust maybe set up in a will, often called a testamentary trust. There are other types of trust too. We intend to talk more about trusts in future newsletters. As a general statement, the life of a private trust may generally not exceed 80 years due to legal restrictions.

Testamentary trusts and "de facto" testamentary trusts

A testamentary trust is basically a trust set up by a will. Many clients I have spoken to do not wish to set up a testamentary trust in their will.

Sometimes however, what has been called a "defacto" testamentary trust can be set up for children within three years of a person's death and, if set up correctly, the income of such a trust will be taxed in the trustee's hands as "excepted trust income" (a tax effective way such trust income could be taxed).

Due to the restrictions on it, many estates will *not* qualify to set up such a trust. If the estate qualifies, the trust has to be set up carefully to comply with legislation requirements, care would have to be taken in relation to transfer of non-cash assets into the trust and how the trust will end.

A de-facto testamentary trust maybe most useful in specific cases, based on current laws, such as where one of a young couple dies leaving children and reasonably substantial estate cash amounts, but the will does not set up a testamentary trust.

In such a case for example, based on current laws, where total estate benefits were $800,000.00, in NSW, currently $300,000.00 could potentially be transferred to such a trust to be set up for the children, as the income earned on that amount may attract “excepted trust income” tax treatment.

The main point of this article, is that if you or someone you know is executor of an estate, you or they should mention to the estate solicitor “defacto testamentary trust” to see if that is an available and suitable alternative for the estate to consider.

Special disability trusts

The latest Law Society Journal reports that:-

> “it is now possible effective 20 September 2006 to set up a special disability trust for accommodation and care either intervivos (*Author’s note - ie while the person is still alive*) or by will for *persons with severe disability*, with provision not exceeding $500,000.00.
>
> If such a trust is set up, the severely disabled person *will not be affected by social security means test or gifting rules*. Before embarking on the process, regard should be had to whether the person falls within the rules defining “person with a severe disability”. There are certain compulsory clauses which are required to obtain the social security concessions.. existing wills may need amendment.” (emphasis added)

In the test of “severe disability”, several categories of person qualify. There is some information on the government website of the department of family and community services. Copies of their booklets can be obtained by phone 1800 050 009 and quoting the product number FaCSIA 0161.

Willing a good way for you now and always

Keith Hewlett