

## Private Client

As lawyers who practice in the area of succession law, we are constantly stressing the importance of doing all we can to ensure a client's estate planning wishes are met when they pass away. Unfortunately, this can sometimes be a difficult message to communicate because of a perception that all that is required is a valid Will. I say to clients that just about anyone can prepare a Will (whether you are legally trained or not), but preparing an estate plan that will achieve a client's goals requires some specialist knowledge, some co-operation on the part of accountants, lawyers and financial advisors, and a client who understands the importance of the job at hand.

The May 29-30 Weekend Australian magazine contained an article by Richard Guillatt titled *Wishful thinking*. The article talks about the ability to challenge the deceased's Will. Two case studies are discussed, both of which illustrate the time, expense and emotional anguish endured by the people involved in resolving the disputes. While there is no guarantee a legal challenge can be avoided, there is no doubt using an experienced succession lawyer can help clients reduce the risk of an estate plan coming unstuck. When reading the article by Guillatt, it is very easy to form the view the only winners out of the estate litigation process are the lawyers. While this is unfortunate, it is probably true. Litigation is expensive, emotionally draining and, where family members are involved on opposite sides, often results in permanent damage to relationships. Clearly, we should all be doing what we can to avoid it.

This edition of *Private Client*, as always, is designed to give you and your clients an understanding of some of the issues that need to be addressed in building an effective estate plan so that the risk of dispute is minimised. The following articles are contained in this edition:

1. Mutual Wills – Sean McMahon looks at an estate planning strategy which overcomes some of the difficulties associated with making provisions for blended families.
2. The importance of getting it right—enduring powers of attorney – A properly drafted EPA appointing the right people is a crucial element of a client's estate plan. Laura Hanrahan has some tips.
3. The cost of claiming from an estate – Brit Ibanez looks at the circumstances in which parties to family provision litigation may lose the right to have their costs paid out of the estate.
4. Government announces SMSF licensing exemption for accountants, GONE!!
5. Capital protected trusts – One option for addressing the estate planning needs of people in blended families is to establish a capital protected trust. Evelyn Abadines has the details.
6. McMahon Clarke Legal debt recovery services
7. Staff promotions

I hope you enjoy this edition of our *Private Client*. As always, if there is anything you would like to discuss further, then please call one of the Private Client team.

Regards

**Sean McMahon**

*Partner—Private Client & Business Succession  
McMahon Clarke Legal*



**Sean McMahon**

Partner

07 3239 2915

sean.mcmahon@mcmahonclarke.com

## Mutual Wills

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### Blended families

In the previous issue of *Private Client*, we talked about the difficulties that arise when formulating an estate planning strategy for blended families. In this issue of *Private Client*, we are exploring a couple of estate planning options available to clients to overcome those difficulties. This article will consider the concept of mutual Wills.

### What is a mutual Will?

A 'mutual Will' is essentially a contract (which can be oral but is preferably written) between two or more people to ensure that certain mutually agreed testamentary intentions are given effect. As with any contract, the terms of the mutual Will can be altered or revoked by agreement between the parties. This means upon the death or incapacity of one of the parties to a mutual Will, the terms of the mutual Will can no longer be revoked or altered.

A mutual Will must be distinguished from mirror or similar Wills. Two people can have similar or mirror Wills, that are intended to benefit the same people, without having made a contractual promise.

In a blended family context, appropriately drafted mutual Wills can be useful for providing benefits to the surviving spouse during their lifetime but ultimately benefiting children from the first marriages of one or both of the parties.

### Proceed with caution

Mutual Wills are a restrictive estate planning strategy primarily because the terms cannot be altered upon the death or incapacity of a party to the mutual Will.

Mutual Wills should always be in writing and be appropriately drafted to meet the client's circumstances in order to reduce the potential for conflict regarding the existence or the terms of a mutual Will.

In the case of *Bigg v Queensland Trustees Limited*,<sup>1</sup> a husband and wife orally agreed to leave their assets to each other and on the death of the survivor of them, then equally to their respective children from previous marriages. On the wife's death, the husband discovered his wife had made a new Will leaving all her assets only to her children. The Court held there was a constructive trust over the assets which were the subject of their agreement. The Court reached this conclusion because the husband had relied on the agreement and arranged his assets and affairs around the basis of the agreement.

It is likely the litigation in this case could have been avoided if the husband and wife had entered into a properly drafted written mutual Will agreement.

### The effectiveness of mutual Wills

*Barns v Barns*,<sup>2</sup> a High Court decision, questioned the effectiveness of mutual Wills. This case placed some doubt about the effectiveness of mutual Wills and whether they are watertight against attack.

In *Barns*, a husband and wife agreed to leave their entire estate to each other. The couple had two children, a son and a daughter. On the death of the survivor of them, they agreed to leave their entire estate to their son. Their daughter was deliberately excluded from their Wills.

On the death of the husband, the daughter successfully applied for further provision from his estate. In defending the claim, it was argued the existence of the contract of mutual Wills effectively reduced the husband's estate to nothing because the entire estate had to pass to his wife. The High Court held the contractual arrangements entered into by the husband and wife were a right that could be attacked by a family provision application. It is important to note the family provision application was brought on the death of the first party. The Court held that, at that time, no consideration had passed from Mrs Barns to Mr Barns to form a binding contract and she had therefore not relied on the deed of mutual Wills.

This case does raise a question about the effectiveness of a mutual Wills arrangement against a family provision application upon the death of the first party. However, the *Barns* case was unusual in that both husband and wife had intended to exclude their daughter from both their Wills. This is uncommon and so the *Barns* case should not, of itself, diminish the effectiveness of mutual Wills.

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<sup>1</sup> [1990] 2 Qd R 11

<sup>2</sup> [2003] HCA 9

## Our recommendations

Mutual Wills can be effective in a blended family context. However, their use requires the proper advice and implementation in order to achieve the client's estate planning objectives.



**Sean McMahon**  
Partner  
07 3239 2915  
sean.mcmahon@mcmahonclarke.com

## The importance of getting it right—enduring powers of attorney

### Baby boomers

Given the unprecedented levels of wealth accumulated by the baby boomers, the aging population and the increase in blended families, there is no doubt over the next 10 to 15 years we will experience an increase in the numbers of families in conflict. Not only challenges to deceased estates, but conflicts regarding the use of enduring powers of attorney (EPA).

A properly drafted EPA appointing the right people is a crucial element of a client's estate plan however, an ill-conceived or poorly drafted EPA can be as disastrous as having no EPA at all.

### Standard forms

The standard form of the Queensland EPA generally leads people to believe establishing an EPA is as easy as obtaining the form, writing your name and address, ticking the boxes and having your signature witnessed (please see the [February 2009 edition of Private Client](#) where we discussed the issue of capacity of a principal and the witnessing requirements for EPAs).

While completing the form correctly is all that is required to legally appoint an EPA, we recommend clients give further thought to the practical application of their EPA because a 'standard' EPA will often not serve the client's purposes.

### The traps

Some examples of the common problems encountered when using a 'standard' enduring power of attorney are as follows:

1. There is no uniform interstate recognition of EPAs.

If a client resides in Queensland and executes a Queensland EPA, but owns a property in Western Australia, then the attorney appointed pursuant to the Queensland EPA would need to apply to the State Administrative Tribunal of Western Australia to have the Queensland EPA approved in order to deal with the property in Western Australia. If the attorney has not sought this endorsement prior to acting under the power of attorney, then any delay experienced in seeking the approval might cause significant detriment to the principal.

2. There are no disclosure obligations on attorneys.

A client appoints two of her four children jointly as her attorneys and, based on discussions with their mother at the time they were appointed, the attorneys are under the impression all their travel and accommodation costs of visiting their mother will be paid from their mother's bank account. Unless the EPA specifically authorises the attorney's travel and accommodation costs to be paid by the principal, this is an illegitimate use of the attorney's powers. However, this illegitimate use is unlikely to be discovered as attorneys are not obligated to disclose the transactions.

3. Attorneys' actions can significantly impact on the principal's estate and thus the inheritance of the beneficiaries.

A husband and wife own a house together and have appointed each other as their attorneys. The wife needs to move into a nursing home which requires a bond of \$200,000 to be paid. Using the EPA, the husband sells the home for \$500,000 and applies \$200,000 towards payment of the nursing home bond in the wife's name. The husband applies the balance (\$300,000) towards the purchase of a home in his sole name. Unless the EPA specifically authorises the attorney to enter into conflict transactions without limitation, this type of transaction is an illegitimate use of the attorney's power as the husband has illegitimately received \$50,000 from the principal's funds.

## The tips

In order to prepare an appropriate EPA, the following matters should be considered:

1. The client's circumstances, including financial position, health and family structure.
2. Given the client's circumstances, how is the EPA likely to be used?
3. How can the EPA be drafted to facilitate its likely use?

Careful consideration needs to be given as to who should be appointed as attorney. It is not always appropriate to have husbands and wives act as each other's sole attorney, particularly in a second marriage.

Not only is it important for clients to obtain legal advice when preparing an EPA, clients should also obtain appropriate advice if they are appointed and required to act as an attorney to ensure they act in accordance with the terms of the EPA and the relevant state legislation.



**Laura Hanrahan**  
Associate

07 3239 2927  
laura.hanrahan@mcmahonclarke.com

## The cost of claiming from an estate

### Unsuccessful applicants and their legal costs

It is a commonly held view that both parties to family provision litigation may have their costs paid out of the estate, but this is not necessarily the case.

If a testator has failed to make adequate provision for a relative or dependent in their Will, then the argument follows that the relative or dependent should not have to bear the costs of running litigation to ensure adequate provision is made for them.

This rule can apply even if the applicant is unsuccessful provided the claim is well founded and genuine. If the applicant had a reasonable belief that further provision ought to be made, then they are entitled to have the estate bear the costs of running that action, even if the court ultimately does not find in their favour.

### Beware, it is not always the case!

Instead of ordering that both parties' costs be borne by the estate, the court may order that the parties bear their own costs of proceeding, or in some cases, that the applicants pay the estate's costs of the litigation.

In a recent issue of *Private Client*, we discussed the case of *Underwood v Underwood*. In that case, the deceased's daughter, his two sons and his de facto wife all applied for further provision from the estate. The daughter and the de facto wife were awarded small further amounts from the estate but the two sons' applications were dismissed. In making the costs order, the court ordered the two sons to pay the estate's costs fixed at \$10,304.70 each to be deducted from their entitlement under the Will.

In the recent New South Wales case of *Carey v Robson*, the New South Wales Supreme Court ordered the unsuccessful applicants to pay the estate's costs which, together with their own legal costs, brought one sister's legal bill to \$312,000 and the other sister's to \$212,000.

### How does the court decide?

A court may order an unsuccessful applicant to pay the estate's costs of the litigation where the claim is frivolous, vexatious, made with no reasonable prospect of success or where there has been some improper conduct in the course of the proceedings.

The courts are concerned to ensure family provision claims are run as expeditiously as possible, with a minimum of expense to the estate (and in reality, the residuary beneficiaries). The Queensland court's practice direction requires the parties to exhaust all possibilities of settling the matter before asking the court for a trial date.

If applicants proceed against an estate with a weak case and refuse all efforts to settle the matter before a trial, there is a significant risk the court will order the applicant to pay the legal costs incurred by the estate in defending the application.

Potential applicants should keep this in mind when considering making a claim.



**Brit Ibanez**  
Associate  
07 3239 2960  
brit.ibanez@mcmahonclarke.com

## Government announces SMSF licensing exemption for accountants, GONE!!

### Reforms

In response to the Parliamentary Joint Committee inquiry into Financial Products and Services in Australia, Chris Bowen, MP Minister for Financial Services, Superannuation and Corporate Law, released an information package on 26 April 2010, announcing significant reforms to the financial services industry.

Included in the mooted reforms is the removal of the current exemption which allows accountants to provide advice on the establishment and closing of self-managed superannuation funds (SMSFs) without holding an Australian financial services licence (AFSL).

### Possible alternative

Having announced this change, the government will now consult with the industry to provide a suitable alternative to allow accountants to continue to provide advice in respect of establishing and closing SMSFs.

A possible alternative which has been floated is a simplified form of AFSL for accountants who wish to provide advice in respect of establishing and closing SMSFs.

The Minister's press release states the majority of the proposed reforms will not commence until 1 July 2012. McMahon Clarke Legal will provide regular updates on these proposed changes and their impact on accountants as the government makes further announcements.



**Sean McMahon**  
Partner  
07 3239 2915  
sean.mcmahon@mcmahonclarke.com

## Capital protected trusts

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### Blended families

In the last issue of *Private Client*, we talked about the complexities that arise when considering estate planning issues for clients in a blended family.

One option of addressing the estate planning for a client in a blended family is to establish a capital protected trust during their lifetime or to provide for a capital protected testamentary trust to be included in their Will.

## What is a capital protected trust?

A capital protected trust is a trust which allows for the income of the trust to be distributed to a primary beneficiary or class of beneficiaries (e.g., income beneficiaries), whilst the capital of the trust is reserved or protected for another class of beneficiaries (e.g., capital beneficiaries).

A capital protected trust would be useful for a client who wants to benefit his/her second spouse for their spouse's lifetime but intends to protect the capital or assets for the children of his/her first marriage.

In a capital protected trust, the income beneficiaries are similar to beneficiaries of a family trust in that the trustee has the discretion to choose amongst the income beneficiaries to whom the income is distributed each year. Capital beneficiaries, on the other hand, are not discretionary beneficiaries of the capital protected trust. However, capital beneficiaries do not usually have access to the capital of the trust until the death of the primary income beneficiary.

## Control over the capital

Although there are capital protected trusts established where the trustees have no control over the capital and only have access to the income, there is a possibility to allow the trustees to have some discretion to access part of the capital (a residual capital protected trust). For example, a residual capital protected testamentary trust would be useful to maintain the lifestyle to which your client's second spouse has become accustomed. In this instance, the testator can make an express allowance for some capital to be distributed to the surviving spouse if the trust income in any financial year does not meet a specified amount. Any restrictions, qualifications or even percentages on the distribution of the capital can be included.

As discussed above, capital beneficiaries do not have access to the capital of the trust until the death of the primary income beneficiary. You therefore need to consider the age of the ultimate capital beneficiaries (e.g., children) relative to the income beneficiary (e.g., step-parent). If the step-parent is significantly younger than the testator, then the testator's children may need to wait some years before they can access the capital. So although a testator has provided for his/her children, there is still the potential for conflict if this is not managed well.

## Estate planning

There are many estate planning strategies available to clients however, care must be taken so that each situation is assessed in accordance with the client's individual circumstances and the appropriate estate planning strategy applied accordingly.



**Evelyn Abadines**

Paralegal

07 3239 2912

evelyn.abadines@mcmahonclarke.com

## McMahon Clarke Legal debt recovery services

One of the most common difficulties businesses face is managing cash flow. Too often, late payment from customers or clients cripples the ability of a business to pay its own debts.

McMahon Clarke Legal (MCL) has developed a fast, cost effective debt recovery system that can help you manage your receivables and cashflow.

### Our focus

At MCL, we focus on—

- certainty of fees
- speed of delivery
- competitive rates, and
- quality of service.

### Our services

If you engage our services, then—

- you will know what our fees will be before they are incurred
- your instructions will be acted on immediately, and
- you will have a solicitor in control of your matter at all times.

### Our fees

We offer fixed fee arrangements with volume discounts for all recoveries where the debtor does not dispute the debt. Our fixed fees apply from sending a letter of demand to completing bankruptcy or winding up proceedings so that you know what you will pay throughout the process. We actively encourage debtors to be open about their financial capacity and we are available to you to offer sound commercial advice to assist you in your decision making in circumstances where debtors wish to enter into some form of payment plan.

Our fees (excluding GST and outlays) for sending a letter of demand start at \$40 per demand and our fees for commencing court proceedings start at \$200.

For a copy of our complete fee schedule or to discuss our services in more detail, please contact Nathan Shaw.



**Nathan Shaw**

Associate

07 3239 2947

[nathan.shaw@mcmahonclarke.com](mailto:nathan.shaw@mcmahonclarke.com)

## Staff promotions

We are proud to announce the following solicitors have received promotions in recognition of their skills, experience and achievements:

### Laura Hanrahan

Laura Hanrahan has been promoted to the position of associate in the private client and business succession team. Laura specialises in estate planning, business succession and the administration of deceased estates. Laura regularly advises clients in relation to Wills, enduring powers of attorney, business succession agreements and probate applications.

For more information, email [Laura Hanrahan](mailto:Laura.Hanrahan@mcmahonclarke.com) or call 07 3239 2924.

### Brit Ibanez

Brit Ibanez has been promoted to the position of associate in the litigation and risk management team. Brit has considerable experience in corporations law matters, (including shareholders' disputes), as well as contractual and joint venture disputes, and estate litigation.

For more information, email [Brit Ibanez](mailto:Brit.Ibanez@mcmahonclarke.com) or call 07 3239 2960.

### Nathan Shaw

Nathan Shaw has been promoted to the position of associate in the litigation and risk management team. Nathan heads up our debt recovery team, and has a broad range of experience in property and leasing matters, managed investment scheme disputes, insolvency and trade practices disputes.

For more information, email [Nathan Shaw](mailto:Nathan.Shaw@mcmahonclarke.com) or call 07 3239 2947.

### John Lane-Mullins

John Lane-Mullins has been promoted to the position of associate in the corporate team. John has a broad range of experience in capital raising and corporate advisory transactions, as well as in matters concerning anti money laundering and counter terrorism financing.

For more information, email [John Lane-Mullins](mailto:John.Lane-Mullins@mcmahonclarke.com) or call 07 3239 2926.

**Brendan Ivers**

Brendan Ivers has been promoted to the position of associate in the funds management team. Brendan has specialist expertise in the laws relating to managed investment schemes and also has a particular focus on advising clients in relation to banking and finance issues for managed investment schemes.

For more information, email [Brendan Ivers](mailto:Brendan.Ivers@mcmahonclarke.com) or call 07 3239 2928.

McMahon Clarke Legal specialises in legal services associated with funds management, capital raising and litigation and risk management for listed and unlisted entities. For a full list of our services, please visit the main part of our website at [www.mcmahonclarke.com](http://www.mcmahonclarke.com) or email us at [info@mcmahonclarke.com](mailto:info@mcmahonclarke.com).

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McMahon Clarke Legal  
62 Charlotte Street Brisbane Q 4000  
GPO Box 1279 Brisbane Q 4001  
T 07 3831 8999 F 07 3831 1121