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As specialists in the area of estate planning, we are passionate about ensuring our clients implement an appropriate estate plan to lessen the burden on their loved ones. Unfortunately, for all sorts of reasons, many people will pass away without an appropriate estate plan. Clients might have a Will, however, as we have said many times before, it may not be enough to just have a Will; an appropriately drafted Will needs to form part of an overall estate plan.

When someone dies without an appropriate estate plan, it leaves grieving loved ones burdened by a more complex estate administration.

This edition of *Private Client* deals with some of the difficulties that can be easily avoided with a well-structured estate plan.

We trust you find this edition of *Private Client* useful. If there is any matter you would like to discuss, then please contact us.

Regards

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Removal of a personal representative

Duties of a personal representative

In the administration of a deceased estate, an executor appointed under a Will or an administrator appointed by the Court (personal representative) has certain duties and obligations to complete.

Broadly the duties of a personal representative include—

1. arranging the deceased's funeral
2. calling in the assets of the deceased
3. arranging for the payment of the deceased's liabilities (including tax, legal fees and interest on cash gifts)
4. administering the estate in accordance with the law, and
5. distributing the assets in accordance with the deceased's Will or the rules of intestacy.

When problems arise

A Willmaker, in most cases, appoints a family member or trusted associate to be his/her executor.

In our experience, the majority of estate administration matters run smoothly however, there are instances where this isn't the case. In those cases, problems usually arise because the Willmaker has made an uninformed choice about who to appoint as executor(s). Typically, this will manifest itself in the form of unreasonable delays due to the executors being incompetent or generally unfit to be an executor, disputes among executors or, in the worst cases, executors acting improperly. In such cases, it may be necessary to have a personal representative removed from office.

Example

We recently had to deal with a case which highlights these issues. In that case, the deceased appointed all three of his adult children as executors. Two of the children had not spoken to the third child for many years prior to the deceased drafting the Will.

Not surprisingly, the relationship between the children didn't improve after their father's death and there was a complete communication breakdown among the executors to the point where two of the children refused to have any direct communication with the third child throughout the estate administration. All correspondence was made through solicitors. The administration of the estate was in limbo for more than a year and probate was not granted until some 18 months after their father's death, when one of the children agreed to renounce their executorship.

Options to remove a personal representative

An executor can voluntarily renounce their right to administer the estate but, typically, 'rogue' executors are not agreeable to renouncing their executorships. If an executor will not voluntarily renounce, then the only other option is to have them removed by Court order.

The Supreme Court of Queensland has power specifically to remove a personal representative in certain limited circumstances set out in *Uniform Civil Procedure Rules 1999* and the *Public Trustee Act 1978*. The circumstances in which these powers will apply are very limited and the Court will not exercise its powers simply to resolve a personal dispute among executors.

Succession Act 1981

The *Succession Act 1981* however, gives the Supreme Court power to hear and determine all matters relating to the estate and the administration of the estate of any deceased person. This power includes the power for the Court to remove a personal representative. The Court has used its power to remove an executor who had not taken out probate and to appoint an administrator in their place.

The power can also extend to removal of a personal representative due to his or her mismanagement of the deceased's affairs and misconduct during the deceased's lifetime.

Careful consideration

A decision to make an application for the removal of a personal representative should be considered carefully. Even though the Courts have wide powers to remove a personal representative, it is at their discretion to do so. Feuding executors should not assume they can rely on this process to have a judge settle what is essentially a long-running family dispute and therefore allow one party to continue as executor.

It can be a delicate and sensitive situation when one is seeking to remove a personal representative from office, especially if the personal representative is a family member. Exploration of the different dispute resolution options available should be carefully considered. The best way to avoid the situation is to encourage your clients to think carefully about who they appoint as an executor when preparing their Will, especially where they are appointing joint executors. It is very important for clients to make a frank assessment of how well the executors are going to be able to work together. Sometimes clients can nominate several executors out of concern for hurting someone's feelings by excluding them. This is not a good reason to include someone as executor. When this happens, we recommend clients be reminded about the potential delays and unnecessary costs that can be incurred when executors don't work well together.



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A Will without testamentary trusts—there are still options in administration

Testamentary trusts

When asked to advise on estate planning matters, we do, in appropriate circumstances, recommend Wills containing discretionary testamentary trusts. One of the reasons for our recommendation is the tax concessions a testamentary trust provides where there are beneficiaries who are minors.

Benefits to minor beneficiaries

A discretionary trust established by a Will (a testamentary trust), if drafted correctly, will allow income from that trust, distributed to a minor, to be subject to the adult tax free threshold and taxed at ordinary adult marginal tax rates (excepted trust income) instead of the penalty tax rates usually imposed on trust income distributed to minors. This means testamentary trusts allow you to access a minimum of \$6,000 tax free per minor beneficiary every year for the duration of the trust. This tax free amount will be greater if you take into account low income off-set. A trust can have a life of up to 80 years, therefore a properly drafted testamentary trust is potentially a very tax efficient legacy to leave your beneficiaries.

Even in the absence of a properly drafted testamentary trust, there are a range of other circumstances arising from the death of a person where income distributed to minor beneficiaries qualifies as excepted trust income.

No Will

If a deceased dies intestate, that is, without a valid Will, and pursuant to the relevant intestacy rules, an amount from the estate is held on trust for a minor beneficiary, then income generated and paid for the benefit of the minor will be excepted trust income and be subject to the adult tax free threshold and marginal tax rates.

Life insurance, superannuation and employee benefits

Excepted trust income may also be derived from the investment of property transferred to a trustee for the benefit of a minor beneficiary directly as a result of—

1. the death of a person and under the terms of a life insurance policy
2. payment of a superannuation death benefit, or
3. the death of a person and paid by the employer of the deceased.

In these circumstances, the property transferred, that is, the capital of the trust, must be received by the minor beneficiary when the trust ends for the income generated to qualify as excepted trust income. That is, the trust cannot continue to benefit future generations. This limitation does not apply to properly drafted discretionary testamentary trusts.

Passing of gifts to minor beneficiaries

The excepted trust income provisions may also apply to income generated from a trust created where a beneficiary of a deceased estate chooses to transfer part or all of their benefit to a trustee for the benefit of a minor.

The following restrictions are imposed on such a trust before the income will qualify as excepted trust income of a minor beneficiary:

1. The trust must be established within three years of the date of death.
2. The minor beneficiary must receive the capital of the trust when the trust ends.
3. The amount of income which the Commissioner will allow as excepted trust income will be limited to the amount of assessable income which could have been derived from property that would have devolved upon the minor beneficiary directly if the deceased had died intestate.

Conclusion

The greatest tax flexibility for minor beneficiaries is offered by a Will containing discretionary testamentary trusts and you should seek specialist advice to ensure the testamentary trusts are drafted appropriately to take advantage of the excepted trust income provisions. However, where someone has died without a comprehensive Will, there are still options available to provide for minors in a more tax effective way, and you should seek advice to ensure the best possible outcome for the beneficiaries.



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Urgent probate applications

What is a grant?

A grant of probate is the recognition by the Supreme Court that the last Will of the deceased is valid and confirms the executor's appointment to act in the administration of the estate.

Generally, a grant of letters of administration is the Court appointment of an administrator to act in the administration of the deceased estate where the deceased person died without a valid Will. However, there are circumstances where a grant of letters of administration will be made by the Supreme Court where the deceased left a valid Will.

Due to the formal requirements, applications for a grant of probate or grant of letters of administration (collectively referred to as a grant of representation) take several weeks to complete.

Usually, asset holders, including banks and other financial institutions, upon being notified of the death, will freeze savings or transactional accounts where the deceased was a signatory until a grant of representation is provided to the asset holder. Banks and financial institutions may also request immediate repayment of outstanding loans where the deceased was a borrower.

The delay in obtaining a grant of representation can often mean the deceased's assets are frozen for several weeks or, possibly, months.

Urgent applications

Where the deceased was the owner or operator of a business at their death, urgent action must be taken by the executor to ensure the business can continue to run despite the death of the owner or operator. There may be an urgent need to pay staff and other liabilities of the business. The freezing of business assets for several weeks until a grant of representation is obtained would most certainly have a significant and negative impact on the business. Any negative impact on the business may ultimately mean a reduction in the value of the business and therefore a reduction in the benefit received by the beneficiaries.

However, the Court has the power to issue a limited or special grant. For example, a grant can be limited to deal with the business assets and only for a period necessary to obtain a full grant of representation.

If the business of the deceased needs to continue in order to preserve the value of the business as an asset of the estate, then an urgent application for a limited grant should be made to protect and preserve the business until a full grant of representation can be obtained.

Generally, if a person dies without a Will (that is, they die intestate), then the Court must not issue a grant within 30 days after the death of the deceased. However, the Court may make a grant if it considers there are urgent circumstances that exist, such as those described above.

Action

Where a deceased was the owner or operator of a business at their death, the executor must take urgent action to ensure the value of the business is preserved as an asset of the estate. We can provide specialist advice to executors with respect to administration of deceased estates and, in particular, we can assist with any urgent application for grant of representation.



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“Taking advantage” is taken to new extremes

Which is the valid Will?

There are extraordinary lengths to which some people will go in order to benefit from a deceased estate.

Mr Jumikis was appointed the executor and trustee of his friend, Mr Raymond Archer's Will dated 23 October 2007. Mr Archer died on 26 August 2008. Most of Mr Archer's estate was left to his daughter.

Following his death, Mr Archer's son Gary, produced a Will dated 8 August 2008 (18 days before the deceased's death) that appointed Gary as the executor and left, after some paltry gifts to Mr Archer's daughter and defacto spouse, the residue of the estate to Gary.

Mr Jumikis commenced proceedings in the New South Wales Supreme Court for declarations that the October 2007 Will was the valid Will.

Mr Jumikis was successful as it was obvious to the court that Gary's conduct was improper and that the Will proposed by Gary was an invalid testamentary instrument.

Gary's behaviour

The deceased was diagnosed with lung cancer in August 2006. The Will was made in October 2007. By 2008, the cancer had metastasised to his brain and his liver. He was admitted to hospital and was assessed as having severe impairment of his reasoning. He was confused, disoriented

and needed assistance with daily activities.

On 11 July 2008, Mr Archer was admitted to a nursing home for palliative care. On 18 July 2008, his conversation was assessed as nonsensical and on 24 July 2008, the physiotherapy assessment recorded dementia.

On 26 July 2008, Gary physically removed the deceased from the nursing home without taking his medications. The police were notified. The judgement does not reveal why the police did not return Mr Archer to the nursing home.

Between 26 July and 14 August 2008, Gary took Mr Archer to a hotel and then to serviced apartments. During this period, Mr Archer allegedly executed new powers of attorney and a new Will.

It is perhaps unsurprising that the court so easily found that the Will of 8 August 2008 was not valid. The original Will was never lodged with the court. The copy revealed the document to be invalidly executed, in that Mr Archer had not actually signed the page disposing of his estate.

The decision

Leaving aside the irregularity of the document, it was clear Mr Archer could not have had capacity to make a Will on 8 August 2008. The 2008 Will was brought about as a result of the unconscientious use by Gary of the special opportunity available to him arising from Mr Archer's absence of sound judgement. Gary contrived to bring about that situation by forcibly removing an elderly, disoriented man from his nursing home and then attempting to take advantage of him.

We do not often see such a clear case of abuse by family members or a contradicting document that is so obviously invalid. Unfortunately, we do quite often see handwritten documents that purport to amend a valid Will without a new Will being drafted. As circumstances change, it is imperative that Wills are reviewed to ensure they reflect the accurate wishes of the Willmaker.



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Promotion to partner—Sarah Davies

On 1 July 2010, Sarah rejoined the McMahon Clarke Legal partnership, having previously been a partner from 2002 to 2005. Sarah has been with the firm since 2001.

Sarah has over 20 years' experience as a commercial litigator. She manages the firm's litigation and risk management practice. In this role, Sarah works closely with clients and their business advisers on any transactions where litigation expertise is required.

Sarah's areas of expertise include the following:

- Commercial contract disputes.
- Advising directors about their duties and responsibilities, particularly in the face of an attack on the company's business, or when restructuring or merger issues arise.
- Advising trustee clients about trust governance issues, and applying to the courts for orders in relation to trusts and managed investment schemes.
- Conducting shareholder oppression actions and derivative actions.
- Advising clients about corporate insolvency issues.
- Representing clients at contested hearings before regulators and in the court.
- Representing companies and their directors in class actions brought by disgruntled investors.
- Acting for parties in partnership, shareholder and joint venture disputes.

- Property-related litigation involving leases, development agreements and mortgages.
- Land resumption cases.



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