



## Claiming against an estate - who is eligible?

**Families are complex social constructions. Today the concept of "family" is far more fluid than what was previously accepted, even only a few decades ago. In the area of Wills and Estates, clients often contact us to assist them in determining whether they have a valid claim for further provision against a deceased estate.**

### What has changed?

Under the new law, the Justice Legislation Amendment (Succession and Surrogacy) Act 2014, which comes into effect on 1 January 2015, only an "eligible person" may make a claim for further provision.

### Can you claim for further provision from a deceased estate?

The short answer is yes. Under the existing law, a person is not required to be related by blood or family relationship to a deceased person to make a challenge against the deceased's estate.

Part IV of the Administration and Probate Act 1958 (Vic) ("APA") provides that a

Court may order provision to be made out of the estate of a deceased person for the proper maintenance and support of a person for whom the deceased had a responsibility.

### Who will be deemed under the new law to be an "eligible person"?

In broad terms, an eligible person includes:

- a spouse or domestic partner
- a former spouse or domestic partner, who would have been able to commence proceedings under the Family Law Act 1975 (Cth)
- a child, adopted child, step child or a person who believes he or she is a child of the deceased provided that person:
  - is under 18 years; or
  - is a full time student between 18 and 25 years; or
  - has a disability.

### Can anyone else be an eligible person?

Other eligible people include a child, stepchild, or person who believes he or she is a child who are not included in the above definition. A grandchild, a registered caring partner, a spouse or domestic partner

of a child of the deceased, and a member of the deceased's household may also be eligible.

A valid claim must show:

- that the claimant was wholly or partly dependant on the deceased for his or her proper maintenance and support at the time of the deceased's death; and
- the deceased had a moral obligation to provide for his or her proper maintenance and support; and
- distribution of the deceased's estate fails to make adequate provision for him or her.

### What should you do?

It is important that you promptly seek our professional advice if you believe you have a claim for further provision against a deceased estate. We will work with you to determine your claim, ensuring it is pursued with appropriate vigour through the Courts.

## GST and the sale of “going concerns” & farming land



**For the past 12 months there has been some uncertainty arising from a proposed change to the GST exemption for "going concerns" (i.e. commercial property) and farming land.**

### The current situation

Under current legislation, the majority of commercial and farming land sales enjoy a GST-free status. Late last year, the Australian Treasury raised the possibility of a change to the GST treatment of these types of land sales. Under the proposed "reverse charging" mechanism the purchaser, and not the vendor, would be liable to pay the GST.

### The proposed changes

If the proposed changes are implemented, the GST will be treated as part of the purchase price. This will increase the amount of stamp duty to be paid on the majority of commercial and rural property sales. Purchasers will then pay more in stamp duty - and in turn, many hundreds

of millions of dollars in additional stamp duty will be paid to the government.

### The industry takes action

Earlier this year, a delegation of property sector officials and leading tax advisers made a formal deputation to Treasury. This resulted in senior Treasury officials reviewing the proposal. It is now hoped that changes to GST collection will not have any adverse effects for the property sector. However, this may not be resolved until 2015.

### What should you do?

If implemented, the proposal will have significant financial ramifications for our clients who purchase going concerns or farming land - or who are property developers.

Until the situation is resolved, purchasers should seek our advice. We look forward to keeping you informed about further developments in this area.

### Case Study A

Under the current legislation, a purchaser buys a commercial property subject to a lease for \$1 million. The transaction qualifies for the GST "going concerns" exemption and no GST is payable. The stamp duty payable is \$55,000.

### Case Study B

Under the floated "reverse charging" arrangements for the same transaction, the obligation to pay the GST would be passed on to the purchaser. Although the purchaser would be able to claim a credit for the GST paid in his or her next BAS statement, the GST would be added to the amount on which the stamp duty is payable. This would increase the charge for stamp duty to \$60,500.

*For further information on this topic, please contact Paul Webster on [PWebster@tde.com.au](mailto:PWebster@tde.com.au)*



## Proprietary Estoppel -

**How to protect a claim on property which you have been induced or encouraged into believing you will receive**

**We are sometimes contacted by clients who believe that they have a claim on property which is registered in the name of someone else. This legal situation can sometimes be characterised as a claim based upon proprietary estoppel.**

Proprietary estoppel may arise when a property owner induces or encourages another person to expect that they will acquire an interest in their property. In those circumstances there can arise a belief by the claimant that the interest will be conferred on them at some future time. If in relying on that inducement the claimant may suffer financial detriment giving rise to the claim.

### **What is required for a Proprietary Estoppel to exist?**

For proprietary estoppel to exist the following elements must be established.

- Assurance - someone is given an assurance that they will acquire a right over property.
- Reliance - they reasonably rely on the assurance.
- Detriment - on the basis of the assurance they act in a way which causes financial detriment.

### **What can be legally achieved?**

The legal remedies can include injunctions or declarations being made. This may impact adversely upon the sale of the property by the registered owner. Compensation may also be awarded by the Court, depending upon the extent of reliance and the financial detriment suffered.

### **Proprietary Estoppel - What should you do?**

If you consider that you have a claim based upon proprietary estoppel, it is essential that you seek legal advice as soon as possible. Delay or equivocation in taking action could adversely affect your legal rights.

*For further information on this topic, please contact Faten Awad on [FAwad@tde.com.au](mailto:FAwad@tde.com.au)*

### **Proprietary Estoppel - a case study**

Retired school teachers, Les and Lois purchased a small hobby farm in Bendigo. Located on the 15 hectare property was a cosy one bedroom dwelling and an established vineyard. Their adult daughter Maria and her husband Mark enjoyed visiting on weekends and assisted with tending the vines.

It soon became apparent that the house required another bedroom to accommodate the regular visits from Maria and Mark. Encouraged by Les and Lois, Maria and Mark funded an extension, building a second bedroom and bathroom. This was in the expectation that they would receive the property in the future. As a result of the renovation, Maria and Mark also made certain professional and financial sacrifices.

As they got older, Les and Lois decided to return to Melbourne. To fund the move, Les and Lois began to think about selling the hobby farm. Maria and Mark objected to the proposed sale. They obtained legal advice that they had acquired a right or interest in the property based upon proprietary estoppel. The legal advice also recommended that they lodge a caveat over the property to protect their rights and give notice to any other party or purchaser of such right or interest claimed by them.



## TDE welcomes new Partner - David Phelan

On July 1, David Phelan was admitted to the TDE partnership. Known to many of our clients, David practices in the Litigation & Dispute Resolution department of the firm.

David assists clients with their contentious commercial and business-related matters through to litigation, if necessary. David understands the needs of his clients and balances this against the commercial realities and costs associated with legal proceedings.

David also practices in estate litigation, where he assists clients with a broad range of estate-related issues with a combination of skill and sensitivity.

He conducts litigation in all state jurisdictions, including VCAT and the Federal Court of Australia.

We are delighted to announce this exciting development in the life of our firm and warmly welcome David to the partnership.

## Tolhurst Druce & Emmerson - Working with individuals, families and business

**Tolhurst Druce & Emmerson is a city-based law firm with a proud history of working with individuals, families and business.**

In business for over 100 years, we are large enough to offer you the depth of expertise you desire – but small enough to ensure that you experience the personalised service that is the hallmark of our firm.

Our partners offer many decades of experience. Our team includes lawyers who are Accredited Specialists in their field of expertise. All our lawyers are appointed for their ability to work with our clients, offering a combination of excellent legal expertise, high-level interpersonal skills and a professional yet caring manner. Our professional support staff assist in the provision of high level service to our clients.

Our aim is to build long-term relationships with our clients. We take the time to listen

to your needs. We then work with you to develop a legal strategy for today with an eye to an outcome that will serve you into the future.

Our range of services includes:

- Conveyancing and property law
- Wills, probate and the administration of estates and trusts
- Family law
- Commercial and business law
- Litigation and dispute resolution
- Not for profit law
- Notary and taxation services

*Pictured above from left: David Phelan, Eilish Cooke, Peter Weller & Faten Awad.*

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Lawyers

## Seek early advice upon relationship breakdown

**Christmas and the holiday season are often times when relationship breakdowns occur. For many couples, the stress of spending time together outside of normal day to day routines creates an opportunity for simmering tensions to come to a head.**



Whenever a relationship breaks down - one of the most important first actions is to make immediate contact with your family lawyer. In fact, it is best to seek advice before you undertake to separate.

As the following scenarios illustrate, it is important to seek early advice. In only a matter of weeks or months, any of the following situations can occur. These can have major consequences for the value of your future property settlement.

### Scenario 1 - Death of a spouse

If one party dies, this can leave the surviving party to seek a settlement with the executors of the deceased's estate. This can be further complicated if there is a dispute between beneficiaries over the deceased's will. This can result in Supreme Court proceedings. If this occurs, legal costs for the estranged spouse will increase significantly.

### Scenario 2 - Re-partnering of a spouse

If one party quickly re-partners, it is possible that a child may result. If a property settlement includes provision for child maintenance, the fact that one party now has to support another child will be taken into account. This will significantly impact the amount of child maintenance provided to the children of the first relationship.

### Scenario 3 - Breakdown of a second relationship

A party may have a breakdown of a second relationship before finalising property matters with a previous spouse. In this situation, the "first wife" could intervene in proceedings between the husband and the "second wife". Should this occur, the asset pool available for distribution between the husband and the second wife would be reduced. Legal costs would also be increased as the Court attempts to reconstruct and divide the matrimonial pool between the "first wife" and her former husband.

### Scenario 4 - Fluctuating financial fortunes

The value of asset pools can alter quickly through a range of unforeseen circumstances. There are many ways that this can occur, but may include sudden changes to the share market, a compulsory acquisition or re-zoning of land or even a bush or house fire destroying assets that may not be fully insured.

### Scenario 5 - Take care of the housekeeping

In some relationships one party takes control of the finance and business affairs. If separation is imminent the other party should:

- Check that all insurances are paid and up to date. If not, you should pay the costs and include the expenses as a debt of the marriage at the final settlement.
- Check that mortgage payments are up to date to avoid a default. If not, ask the bank to either suspend payments for a period of time or reduce payments to "interest only." This is important for the party living in the mortgaged property.
- Check that car payments are up to date to avoid re-possession.
- If the children attend private schools, the parent with the care of the children should advise the school of the separation and ask to be advised if the fees are not paid on time.

These are only a few of the issues that can arise following separation. We advise our clients to preferably contact us before or immediately after relationship breakdown. Knowing that you have taken measures to safeguard your legal and financial affairs can provide comfort in a time of great emotional turmoil.

*For further information on this topic, please contact Elish Cooke on [ECooke@tde.com.au](mailto:ECooke@tde.com.au)*

## Christmas wishes from us to you

The Partners and staff of Tolhurst Druce & Emmerson extend our very best wishes to all our clients for a happy Christmas and a safe and relaxing holiday season.

## Christmas and New Year office hours

Our office will close for the Christmas holidays on Tuesday December 23rd, 2014 at 5pm. We will reopen again for business on Monday January 12th, 2015 at 9am.

We look forward to assisting you with your legal needs in 2015.



## LIV Legal Fun Run & Walk

**Tolhurst Druce & Emmerson was proud to field a team in the LIV Legal Fun Run & Walk on Monday November 10.**

The Tan Track at the Royal Botanic Gardens hosted nearly 1,000 entrants from the Victorian legal community. Participants had the choice of an 8km run (2 laps of the Tan) or a 4 km walk (1 lap of the Tan.)

Our running team comprised John Henry, Faten Awad, Emily O'Bree and Janette Vlahovich. Our walkers included Moira Ryan and Rebecca Hutchinson. Congratulations all!

*Pictured above from left: John Henry, Rebecca Hutchinson, Janette Vlahovich, Emily O'Bree, Faten Awad and Moira Ryan.*

## Business & Commercial Law

### Paul Webster answers your legal questions.

**Q** I have been invited to join the Board of a commercial organisation. What should I do?

**A** Directors must be active in the life of their organisation. This means attending meetings, asking questions and scrutinising commercial, financial and legal issues. If you are not sure that you are able to take an active and informed role, you should think twice before committing to a directorship. It is now a fact that if a problem arises, you as a Director could be held personally responsible.

**Tolhurst Druce & Emmerson Working with individuals, families & business.**



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Tolhurst Druce & Emmerson incorporates the firms of Gavan Duffy & King, Doyle & Kerr, Puglisi, Heffey & Pavlidi, Louis S Lazarus, and D Condon & Co. If you wish to change your contact details or no longer wish to receive this publication, please contact our office on (03) 9670 0700.

The information in this newsletter is not intended to be a complete statement of the law relating to the issues raised. Accordingly, no person should rely on this information without obtaining specific advice from lawyers.

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