TOLHURST DRUCE & EMMERSON
LAWYERS

news

Lawyers for Families
Expertise for the individual, family & business

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Our areas of expertise

- Business Law
- Conveyancing
- Family Law
- Litigation
- Property Law
- Wills & Estates

Estates: Overriding the will

The good news is that it can be done but the bad news is that it can be expensive and time-consuming and may have adverse revenue consequences.

It can only be done by agreement of all concerned or by a legal proceeding under either the Wills Act 1997 or the Administration and Probate Act 1958.

If there is an error in the drafting of the will so that the court can be satisfied that the will as drawn fails to give effect to the instruction of the will-maker, a court order can be obtained to rectify the will. An example is where an examination of the solicitor's file shows that he missed out a beneficiary or named a wrong one, contrary to the instructions of the will-maker, and the will-maker failed to spot the error when signing.

If assets are distributed strictly in accordance with the will, there is "rollover relief" from CGT, and no Victorian transfer duty is charged on what would otherwise be dutiable property. If the will is modified by a court order, whether by way of rectification or following a contest by a disappointed beneficiary, those revenue concessions are preserved.

In limited circumstances, those concessions can be preserved without a court order.

First, rollover relief can be preserved where the beneficiaries and executors can agree, by a deed of family arrangement, to a distribution other than in accordance with the will. That deed would normally contain a scheme of distribution showing in a table what assets are to be taken by each beneficiary, but the deed must be signed within 6 months of the grant of probate.

Secondly, in Victoria transfer duty on otherwise dutiable property, that is to say land, is not payable if there is a scheme of distribution in which the land, or a share in it, is allocated to satisfy the share of a beneficiary other than the one it was left to by the will. The value of the land taken by that beneficiary must not exceed the total value of what that beneficiary would have got if the strict terms of the will had been followed.

In Victoria, to override a will when agreement cannot be reached, application must be made to the Supreme Court or the County Court by the disappointed beneficiary, naming the executors as defendants. The application is made under Part 4 of the Administration and Probate Act 1958, hence its often being called a Part 4 application. It used to be called a Testator's Family Maintenance (or TFM) application.

The contesting of wills is governed by State legislation. This legislation varies between States in sometimes significant ways, so what follows is good only for the Victorian assets of an estate.

To succeed the applicant (or plaintiff) must first show the court that the will-maker had a responsibility to provide for the applicant and secondly that the will-maker then failed to make adequate and proper provision for the applicant. The Act sets out a string of factors that the court must take into account in reaching its decision.

Part 4 applications are different from most cases fought in court in that it does not necessarily follow that the losing party pays the costs of the winning party. As long as the losing party's case was not so weak as to be doomed from the start, the judge may decide to exercise a discretionary power to order that all costs be paid out of the estate.

There is no way that a will-maker can absolutely prevent a person from contesting the will. Even a signed agreement not to do so is not binding The best the will-maker can do is to include what he or she considers is adequate provision for proper maintenance and support, and avoid making a will in terms that unnecessarily provoke some person into contesting it.

If you are faced with a need, or demand for departure from the terms of a will, please contact Peter Weller or John Henry.

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Personal Property Securities Reform

There has, up till the passage of the Personal Property Securities legislation by the Commonwealth Government, been patchwork coverage in Australia of securities over personal property (being all property other than real estate). In Victoria, for example, the only registered charges over personal property owned by individuals were in relation to motor vehicles and boats. Company charges were, of course, registered with ASIC.

The new legislation, however, introduces an Australia wide regime that applies to all securities granted over personal property both for individuals and companies. It will affect how many people do business.

The date of implementation of the new legislation is May 2011.

What Securities will be covered?

The legislation will cover a wide range of securities, including those types of securities where there is no change of ownership such as:

1. Chattel mortgages;
2. Hire purchase agreements;
3. Retention of title clauses;
4. Consignment sales;
5. Fixed and floating charges.

What are the obligations of the lender?

In order to complete their security, the lender will have to register the personal security on the online register to be set up by the Commonwealth. There is a period of 10 days within which the security interest must be lodged. It will be necessary to lodge a Financing Statement but not the security document itself. It will be possible to register before the transaction occurs.

The Register will not notify anybody of a security interest. Rather it will alert persons to the possibility that there may be a security interest in existence.

The legislation is based on New Zealand legislation and one of the interesting aspects of the New Zealand legislation is that there is no provision for removal of the security interest.

Company Charges

Company charges, both fixed and floating, which have formerly been dealt with under the Corporations Act 2001 will, under this legislation, be dealt with under the new legislation.

Accordingly there will no longer be a requirement for debentures and other securities to be registered with ASIC.

Romalpa Clauses/Retention of Title clauses

As indicated above, such securities will be covered by the legislation. It is unclear as yet as to whether it will be necessary to lodge particulars of all transactions on the website as this could be a massive administrative burden on an ongoing basis.

Personal Property

The legislation covers all forms of personal property and includes:

1. Intangible assets such as receivables and royalty arrangements;
2. Bank accounts;
3. Shares;
4. Crops;
5. Intellectual property;
6. Plant and equipment;
7. Motor vehicles;
8. Stock.

The legislation will no doubt prove a challenge to many business owners. To assist you with all aspects of these changes, please contact Peter Moore.

Need a will? Need a lawyer

In a judgment handed down on 9 April 2010 in the New South Wales Supreme Court in the case of Application of Russell-Smith; Estate of Plumwood, Justice White said:

"It is a great pity that in a misguided effort to save costs, Dr Plumwood should have put the estate to the delay and expense of obtaining evidence to throw light on which of either of the later documents she intended to constitute her will. It is also unfortunate that the author of the will kit should have instructed potential testators to execute and have attested what was intended only to be a draft. If the kit is still available for purchase I trust that the proprietor of the kit will correct the text".

In that case the Court had before it three documents signed by Dr Valerie Plumwood over a period of years, first a duly executed will, then a home-made will, then a will made using a will kit. The judge held that the will made using a will kit was invalid, and the home-made will though valid was inadequate to revoke entirely the duly executed will.

If you die without a will, your estate may take longer and be more expensive to administer and people you don't want may share in your estate. So why not do your own will? Any donkey can make an inadequate will that with a bit of luck is valid. But not having a will, or doing it yourself, is a false economy.

When you make a will or review an existing one, you may need to make decisions about any of:-

a. What assets are in fact covered by your will and what to do about the ones that are not, such as superannuation and trusts.

b. Who may contest your will and whether there is anything you can do that reduces or avoids that risk.

c. Who to appoint as your executor, what happens if they die before you, and whether they should be paid and if so, how much.

d. The appointment of guardians of your children while under-age, and how they might be recompensed.

e. What to do about super that may or may not form part of your estate.

f. What to do about jointly owned property which will only form part of the estate of the last proprietor to die.

g. How to balance the competing interests of your second spouse and yours or your spouse's children of the first marriage.

h. Providing for someone you intend to marry, knowing that marriage revokes a will.

i. What to do about trusts that you control but which will not be part of your estate and therefore are not covered by your will.

j. Making sure that if named beneficiaries die before you, their entitlements will devolve suitably on other beneficiaries of your choice.

k. How to best structure your estate so that it will cause the least headaches to those who administer it.

l. Avoiding income tax or capital gains tax in your estate that would otherwise reduce what is left for your beneficiaries.

m. Providing for or against spendthrift or bankrupt or vulnerable beneficiaries.

n. Establishing a charitable trust.

o. Testamentary trusts to enable your adult children to split income with their children.

Every stage in the journey of life is defined by changes and new challenges. At Tolhurst Druce & Emmerson, we help you prepare for the future, protect your assets and meet tomorrow's challenges with proper planning today.

Helping you to plan your will to achieve exactly the result you want is what we do best. We have three highly regarded Accredited Specialists in Wills & Estates, with extensive experience in the administration of estates.

Call John Henry when you wish to prepare a will or manage an uncontested estate. To contest a will or for advice on whether to do so, please contact Peter Weller.

New branch office at Riddells Creek

We have just opened a branch in the township of Riddells Creek, 50km North West of Melbourne CBD. Riddells Creek is 25 minutes drive beyond Melbourne Airport, beyond Sunbury, but is easily accessible by train, being on the Bendigo line. It should be convenient for clients living north or west of the CBD, who prefer not to travel into the city. During the week the office is open all day on Tuesdays only, but for the convenience particularly of commuters, clients can also see us there by appointment on weekends.

The contact details for the Riddells Creek office are:

Address:
Yeaman House, 5A Station Street,
Riddells Creek

Telephone: 5428 6507

Hours: Tuesdays 9am to 5.30pm
Weekends by appointment

Partner Profile:

Paul Webster

Tolhurst Druce & Emmerson are pleased to announce that Paul Webster has been appointed a Partner.

Paul practises in both property law and wills & estates. Paul has substantial experience in conveyancing, leasing, purchase and sale of business, subdivisions, adverse possession, drawing wills and administration of estates.

What is the most rewarding aspect of your job?

Forming long-term relationships with valued clients.

What advice would you offer to junior lawyers?

To try to experience as many different areas of law as possible before deciding on their area of specialisation.

What do you enjoy doing in your spare time?

I enjoy gardening, playing tennis, spending time with friends and family and following Carlton.

What book are you currently reading?

"Suite Française" by Irène Némirovsky, which is a beautifully written series of snapshots of the Nazi invasion of France.

TDE Announcements

Ian Lulham, is a former Partner to our firm, having left us following his appointment as a Member at VCAT. After 16 years of dedicated service, the Partners thank Ian for his contributions during his time at TDE and wish him the best of luck.

Coinciding with Ian's departure, Peter Moore, is the firm's latest acquisition to be handling all commercial matters. Peter is an Accredited Specialist in Business Law with over 30 years' experience, practising in both commercial law and litigation. His areas of commercial practice include intellectual property, joint ventures, partnerships, commercial property & leasing, liquor licensing, employment and legal issues concerning companies and trusts. Peter has joined the firm as a Consultant.

David Phelan was appointed an Associate on 1 March 2010. David's practice focuses on business issues and contractual disputes.

Peter Moore

David Phelan

Land Tax Warning

Measures taken recently to improve the accuracy of Land Tax Office records include the introduction of a legal obligation upon landowners to notify the Land Tax Office, a part of the State Revenue Office, of any error or omission the landowner becomes aware of. Failure to do so can result in fines and penalty interest. For instance, if you own or have a share in land that has a municipal unimproved capital value of $250,000 or more, and you are not entitled to a principal residence or other exemption, you should receive an annual Land Tax assessment. If land is owned by a trust its Land Tax assessment should include the surcharge for trusts. If you are in any doubt as to whether there is some disclosure you are obliged to make, please contact Paul Webster or John Henry of our office.

Perpetual Alliance

The firm has become a member of the Perpetual Alliance, an arrangement offering its members the opportunity, where it may be advantageous to their clients, to refer them to Perpetual Trustees, a Victorian trustee company of long standing. The members of this alliance include firms of accountants, financial planners and a small number of firms of solicitors. The services offered by Perpetual Trustees include accepting appointment as an executor under a will, or appointment under a power of attorney, management of financial affairs and funds, financial planning and investment advice.

Perpetual are offering a fee discount of 15% to clients referred by members of the Perpetual Alliance. Our firm does not hold a licence to provide financial services advice.