



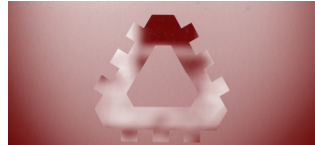
Estate Planning Tasmania News

Issue 6 March 2009

In this Issue

- Defending a constructive trust claim
- Improvements to Special Disability Trusts
- Our regular features

Have you kept your New Year resolution and updated your Will?



Will Tips

- Remember that not all "assets" can be gifted by Will: some are not willable.
- Caution should be exercised when making "nominations" of life insurance
- Remember to sign your Will in front of 2 adult persons who are not beneficiaries or related

Defending a constructive trust claim

In our December issue, we looked at how a constructive trust claim can be established. In this issue, we look at how to protect against a constructive trust claim, and how to defend such a claim when it is raised.

A constructive trust arises where the legal title to a property does not reflect its true ownership in equity. A constructive trust is claimed when a person alleges that they have contributed to a property (financially and/or non-financially) without their interest reflected on the legal title.

So, if your name is on the legal title to a property, and you are concerned that a constructive trust may be alleged (be it by a spouse, family member, business partner, or some other person), what should you do?

Prevention

The saying goes that "prevention is better than cure." An ill-founded, vexatious allegation of the existence of a constructive trust is best defeated by presenting evidence that refutes that claim. Since the Court's investigations focus on contributions to property, it is important to provide evidence detailing these contributions. This should be done by keeping records and documentation of all contributions to the property over time (between all the parties if possible). Any contributions made by another person who is not the legal owner should be paid for or reimbursed, and documented by the legal owner.

It is also important to create a mutual understanding for the reason that contributions are made. It should not be represented (either impliedly, or expressly) to the contributing party, that the property is held on Trust for them, or that the contributions create a trust relationship between the parties.

If all parties consent, it is also possible to create arrangements or agreements that acknowledge and confirm the way in which property is owned.

(Continued on page 3)

Recent/Pending Legislation & Cases

- The *Wills Act 2008 (Tas)* commenced operation on 1 March 2009
- Time is running out for Prescribed Private Funds to be established in the 2008/09 tax year
- The Supreme Court of Tasmania gave judgment in the family provision case of *Adkins v Adkins*

Our Firm News

- Sam McCullough is presenting to the Association for Families of Children with Disabilities in Hobart on 18 March 2009 and in Kingston on 19 March 2009.
- Kate Smith has attended a seminar of The Association of Independent Retirees in Devonport which included speakers on elder law issues.

Asked and Answered:

Q. I heard that the new *Wills Act* requires that a beneficiary must survive the testator by at least thirty days before they can receive an inheritance – is that correct?

A. The *Wills Act 2008 (Tas)* implies into Wills executed after 1 March 2009 a requirement that a beneficiary survive the testator by thirty days before their gift will take effect. This is referred to as a "survivorship period", and will apply unless a contrary intention is expressed in the Will itself. To be valid, a contrary intention must be clearly expressed. Willmakers should think carefully about whether they want to include a survivorship period in their Wills at all. They have options including excluding the statutory survivorship period, and inserting their preferred period. There can be downsides to having a survivorship period.



Peter Worrall



Estate Planning Tasmania News

Issue 6 March 2009

Improvements to Special Disability Trusts

A report currently before the Commonwealth Parliament may lead to significant improvements to Special Disability Trusts (SDTs).

A Senate Report has recommended significant changes to the existing legislative regime applying to family members of children with severe disabilities establishing Special Disability Trusts. The Senate Committee included four Tasmanian senators, and the proposed reforms would in our view significantly improve the options open to Tasmanian parents of children with disabilities.

The key recommendations of the report (amongst others) were that:

1. The special disability trust eligibility requirements be amended to include eligibility requirements which effectively enable those with intellectual disabilities or mental illnesses to become beneficiaries of special disability trusts.
2. The asset value limit for special disability trust in section 1209Y of the *Social Security Act 1991* be increased to \$1,000,000.00.
3. The tax arrangements applying to SDTs should be improved in relation to:
 - the sale of a property that is owned by a SDT, and by the beneficiary as their principal place of residence be treated the same as any other person's principal place of residence, that is, exempt of capital gains tax;
 - the transfer of property and other assets to a SDT, and in relation to capital gains tax and stamp duty; and
 - unexpended special disability trust income.
4. The allowable uses of special disability trusts be expanded to include all day-to-day living expenses paid to maximise the beneficiary's health, wellbeing, recreation and independence.
5. The unexpended income from a special disability trust be able to be contributed, on a pre-tax basis, to a superannuation fund for the trust beneficiary.
6. The single trust rule be amended to allow two trusts for each beneficiary.

We have recently been advised that the report is awaiting the tabling of responses in the Senate, and will keep readers of Estate Planning Tasmania News informed of developments. Those currently considering options for planning for the future of children with disabilities should monitor developments closely and obtain advice before acting.

Sam McCullough.

A note from our Commercial Practice Group - Intellectual Property

Intellectual Property ("IP") assets do not usually feature on the business balance sheet. Business owners generally focus on things like plant, equipment and machinery. However, in most cases, IP assets are the lifeblood to a business - things like distribution agreements, client lists, and confidential know-how are among the most valuable assets a small to medium business will ever have. Understanding their value gives access to tax advantages and earlier profitability, and a sound IP strategy is a critical step towards branding success.

If you would like to know more about IP assets, please contact our Commercial Practice Group.

Nathaniel Flinn.

Glossary

Doona Companion

A colloquial expression which assists where a parent is not sure whether to describe one of their adult children's relationship with a person as a Defacto Relationship, or not, or a Same Sex Relationship, or not. That state of relationship reached for some, sometimes and somewhere between "they are only friends" and "yes, they are in a committed relationship".

Estate

This term covers all of the assets owned by the Willmaker that are capable of being transferred by a Will on the death of the Willmaker.

Estate Administration

The Process that occurs after the Grant of Probate or the Grant of Letters of Administration in an estate that encompasses the collection and recording of the willable assets, the payment of the debts of the Willmaker who has died, and the transfer of the remaining assets to the beneficiaries or to a Testamentary Trust for the benefit of the beneficiaries.

The lighter side of Wills

A "Will" written on a brick wall has been found to be a valid Will.





Estate Planning Tasmania News

Issue 6 March 2009

Defending a constructive trust claim

(Continued from page 1)

Defending a claim

So what is the situation where contributions have already been made to a property, and having not previously read this article, you were unaware that you should be maintaining accurate and detailed records of contributions? The arguments to defeat a constructive trust claim will depend on the circumstances of each case. However, in general, to defeat a constructive trust claim that you believe is inconsistent with your understanding of how the property is held, the following factors may be useful:

- (a) legal advice;
- (b) negotiation;
- (c) a full explanation outlining factors for and against a potential constructive trust argument to your lawyer; and
- (d) documentary evidence of contributions.

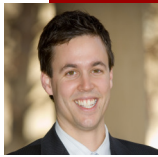
The aim however, is to minimize the risk of a constructive trust being claimed at all - because a dispute will inevitably result in lengthy and expensive litigation. Being clear about the consequences and effect of a person contributing either money, or time and effort to a property, is the best way of avoiding those. However, it is important to realise that the concept of constructive trust has an important public function in ensuring that those who contribute time and money to a property receive recognition for their endeavours. It therefore needs to be acknowledged that sometimes circumstances will create a constructive trust, and the imposition by a court of a constructive trust may be the appropriate, and inevitable result.

Kate Smith.

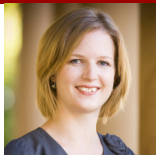
Our Estate Practice Group contacts



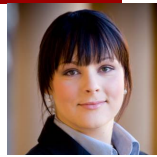
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Further Information

Our Website: A wealth of information in relation to estate and commercial matters can be found at our website www.pwl.com.au

Contributions: Contributions and suggestions from Estate Planning News readers are always appreciated. Email us at sam@pwl.com.au

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