

EARN YOUR  
**10**  
CPD UNITS  
FOR THIS  
CPD YEAR

# THE 10<sup>TH</sup> ANNUAL MELBOURNE WILLS & ESTATES CONFERENCE

Key Clauses in Testamentary Trust Deeds

Statements of Wishes in the Firing Line

Asset Location in Wills and Estates

Digital Currency Disposition

Keeping Superannuation Trustees on the Straight and Narrow

Administration of Insolvent Estates

Family Provision Claims and Non - Biological Children

Disappointed Beneficiaries and Broken Promises

Attorney Wheeling and Dealing with Estate Assets

**PROFESSIONAL SKILLS:** Professional Responsibility for Determining Capacity

**PRACTICE MANAGEMENT & BUSINESS SKILLS:**

Electronic Documents, the Digital Age and the Succession Law Practice

**ETHICS:** Practitioner Executors Dealing with Estate Assets

A Two-day Conference  
**Thursday 16 & Friday 17 February 2023**

The Langham Melbourne

## Feedback from last year's conference:

- “Great speakers, comprehensive papers, a good mix of topics.”
- “Relevant and informative. I wish I had the benefit of this conference 30 years ago.”
- “Quality papers, interesting topics and presenters who were engaged with their subject matter.”
- “The Melbourne Wills & Estates Conference is always very well run with interesting & relevant speakers, and the 9th annual conference was no exception.”



Leaders in online CPD for Lawyers & Accountants

# DAY 1 - THURSDAY 16 FEBRUARY 2023

## MORNING THEME: CREATING THE WILL

### 9.00 - 9.10am Introduction and welcome

*Morning Chair: Eleanor Coates, Barrister, Victorian Bar, Melbourne*

### 9.10 - 9.55am

#### Session 1: Anoint and Appoint: Key Clauses in Testamentary Trust Deeds

The most important role in a trust arrangement is that of the appointor. The choice of an appointor is the first significant decision that needs to be made, with other considerations following. This session will examine why practitioners and their clients need to give serious consideration to the selection and powers of an appointor and the consequences of getting things wrong, including:

- Does a trust need to have an appointor?
- What qualities does the appointor need to possess?
- What powers does an appointor need to properly discharge their duties?
- What happens if the appointor dies or becomes incapable of acting? How should the role pass?
- What mechanisms need to be in the trust deed to change the appointor or trustee?
- When should an appointor remove a trustee?
- Can an appointor be personally liable?
- Drafting tips for trust deed appointments and variations
- Recent cases including *Cardaci v Filippo Primo Cardaci* [2021] WASC 331; *Re Owies Family Trust* [2020] VSC 716; *Edwards & Anor v Brougham* [2022] SASC 8

*Speaker: Bryan Mitchell, Principal, Mitchells Solicitors, Brisbane, Qld*

### 9.55 - 10.05am Panel Comments and Questions

### 10.05 - 10.50am

#### Session 2: Be Careful What You Wish for: Statements of Wishes in the Firing Line

A letter or memorandum of wishes accompanying a will or inter vivos family trust can be a helpful tool for an executor or trustee, but also have the potential to cause discontent and lead to challenges. This session provides a tool kit for practitioners in drafting letters/memorandums of wishes and a guide to avoiding the problems that can accompany these personal letters, including:

- When should a will - maker complete a statement of wishes regarding his/her will or inter vivos family trust? Advantages and disadvantages discussed
- Timelines for creation and review of a statement of wishes
- What matters should be included and in what detail?
- What matters should not be included?
- Drafting tips and traps including using statements to explain exclusions and intentions in gifting
- What form should the statement take? Does it need to be signed or sworn?
- Are statements of wishes confidential and who can they be disclosed to?
- To what extent are statements bindings on the executor and how should they be treated?
- Does a statement of wishes form part of probate?
- Key lessons from cases

*Speaker: Paul Evans, Partner, Makinson d'Apice Lawyers, Sydney, NSW*

### 10.50 - 11.00am Panel Comments and Questions

### 11.00 - 11.25am Networking Break and Morning Tea

# DAY 1 - THURSDAY 16 FEBRUARY 2023

**11.25am - 12.10pm**

## **Session 3: It's a Small World After All: Asset Location in Wills and Estates**

Whether through investment, inheritance or adventure, many Australians have assets located interstate or overseas. Ranging from real property to foreign bank accounts, these assets need to be identified and assessed by practitioners at both the will preparation stage and following death. This session will explore the challenges, complexities and consequences in succession planning and administration for assets out of the jurisdiction, including:

- Domicile and residency issues in will making
- Should asset location dictate where a will is made?
- Doing the due diligence on assets outside the jurisdiction and applicable laws governing them
- Are Australian wills recognised overseas? International conventions and limitations
- Tips and traps of multiple wills
- Practical considerations including:
  - advice from foreign experts
  - document repository and location
  - keeping up with international legal developments
- Practical case studies highlighting the rules in practice

*Speaker: Angela Cornford-Scott, Director, Cornford-Scott Lawyers, Brisbane, Qld*

**12.10 - 12.20pm** Panel Comments and Questions

**12.20 - 1.05pm**

## **Session 4: The New Frontier: Digital Currency Disposition**

The increasing availability and popularity of digital currency means that practitioners need to be on top of estate planning and administration process for clients with these holdings. This session provides a guide for asset recognition, estate planning and disposition, including:

- What are digital currencies and how and where are they held?
- A guide to the most common terms, asset types and associated technologies including:
  - cryptocurrency
  - bitcoin
  - NFT's
  - blockchain
- What questions do you need to ask your clients for asset identification and disposition intention on death?
- Inventory preparation and determining value
- What information does your client need to give you?
- Drafting digital currency asset disposition in the will - key issues and risks
- Planning for access in the event of death or incapacity
- Challenges in administering an estate with digital assets
- Is the law keeping up with digital currency asset holdings and disposition?

*Speaker: Kimberley Martin, Director, WMM Law, Hobart, Tas*

**1.05 - 1.15pm** Panel Comments and Questions

**1.15 - 2.15pm** Luncheon

# DAY 1 - THURSDAY 16 FEBRUARY 2023

## AFTERNOON THEME: FINANCIAL ISSUES IN THE SUCCESSION PLAN

2.15 - 3.00pm

### Session 5: Keeping Superannuation Trustees on the Straight and Narrow

Ensuring superannuation is dealt with after death in the manner intended by the member requires careful planning, preparation and management. This session will provide a guide to practitioners in super - proofing one of their client's biggest assets, including:

- Fitting superannuation into estate planning
- Why binding death nominations are essential and the consequences of failing to have one
- Duties of trustees and responsibilities for discretionary decision - making
- Deed drafting tips for minimising or limiting decision - making and risks
- When and how are superannuation trustees' decisions reviewable?
- Strategies for managing disputes between the estate and a superfund
- Practitioner self - checks on client obligations and conflict of interest in disputes involving super funds and potential claimants
- Case update including *Wareham v Marsella* [2020] VSCA 92

*Speaker: Nathan Yii, Principal Lawyer, Chartered Tax Advisor/SMSF Specialist Advisor, Nathan Yii Lawyers, Melbourne, Vic*

3.00 - 3.10pm Panel Comments and Questions

3.10 - 3.30pm Networking Break and Afternoon Tea

3.30 - 4.15pm

### Session 6: When the Cupboard is Bare: Administration of Insolvent Estates

In difficult economic times it is not unusual for the deceased to have accumulated more liabilities than assets during his or her lifetime. This situation brings up particular challenges in the administration of a will and stress for any family or creditors remaining. This session provides a deep dive into management of such estates, including:

- Distinguishing bankruptcy and insolvency and key challenges for the estate
- What are the obligations of the executor?
- Cost and other issues for administrators and advisers
- When is it appropriate to apply for bankruptcy?
- Who is liable for the deceased's remaining debts?
- Rules for accessing non - estate assets including insurance proceeds and superannuation
- Asset protection advice for insolvent clients
- Recent cases

*Speaker: David Topp, Barrister, Bank of New South Wales Chambers, Brisbane, Qld*

4.15 - 4.25pm Panel Comments and Questions

# DAY 2 - FRIDAY 17 FEBRUARY 2023

**CHAIR DAY 2 - AM: ANDREW  
VERSPAANDONK, BARRISTER,  
VICTORIAN BAR, MELBOURNE**

## **MORNING THEME: MANAGING RISKS TO THE SUCCESSION PLAN**

**9.00 - 9.05am**

**Introduction and welcome**

**9.05 - 9.50am**

### **Session 7: In for a Penny, in for a Pound: Family Provision Claims and Non - Biological Children**

The concept of a family has greatly changed over the last few generations and, further complicated by assisted reproduction technology, the issue of who is a child has become far more complex. This session will examine the availability of potential claims against an estate by a person who is not a child of the deceased in a traditional sense, including:

- The basis of inheritance rights of children and their development to current family provision legislation
- Relevant State legislation and jurisdictional requirements
- Who is a child or family member for family provision claims?
- An analysis of the rights of foster, adopted and step - children and grandchildren
- Is there any difference where the step - child is within a de facto relationship?
- What are the rights of a child to make a claim from the estate of his or her egg/sperm donor parent?
- What factors will the court consider in determining a family provision claim in a blended family situation?
- The role of releases and waiving the right to make family provision claims
- Cases including Estate of Wright [2016] NSWSC 1779; Scott - Mackenzie v Bail [2017] VSCA 108; Lowe v Lowe (No 2) [2015] NSWSC 16; Haertsch v Whiteway [2020] NSWSC 133; Re Williams; Smith v Thwaites [2017] VSC 365; Masson v Parsons [2019] HCA 21

*Speaker: John Armfield, Barrister and Mediator,  
Wentworth Chambers, Sydney, NSW*

**9.50 - 10.00am** Panel Comments and Questions

**10.00 - 10.45am**

### **Session 8: Are Promises made to be Broken? Options for Disappointed Beneficiaries**

In the absence of standing to bring a family provision claim, reliance on proprietary estoppel may be a potential option for those who feel let down by the representations of a will - maker about testamentary intentions. This session will examine the key elements of a successful estoppel claim and recent cases, including:

- Who is able to bring a claim of promissory estoppel?
- What evidence is required to found a claim? How can a promise be proved?
- What degree of reliance on the promise must be shown?
- Does there need to be detriment on the part of the promisee and to what extent?
- What orders will the court make?
- When will compensation be awarded rather than specific performance?
- Cases including Stone v Kramer [2021] NSWSC 1456; Harris v Harris [2021] VSCA 138; Moore v Aubusson [2020] NSWSC 1466

*Speaker: Scott Whitla, Partner, McCullough Robertson  
Lawyers, Brisbane, Qld*

**10.45 - 10.55am** Panel Comments and Questions

**10.55 - 11.15am** Networking Break and Morning Tea

# DAY 2 - FRIDAY 17 FEBRUARY 2023

11.15am - 12.00pm

## Session 9: Attorney Wheeling and Dealing with Estate Assets

The passage of time between will execution and eventual estate administration can be significant, and circumstances may result in a change or diminution of assets left in the will. An added challenge can be when the assets are used or sold by the will - maker's attorney between appointment and death. This session will explore some of the issues, cases and developments in this area. Including:

- Why attorney choice is so important - should there be more than one attorney?
- Issues in second spouse/blended family situations
- Taking instructions and ensuring client understanding of the grant
- Does an attorney need to consider the will - maker's testamentary intentions in decision - making?
- Can the attorney's actions be challenged by potential beneficiaries if their proposed actions impact estate property?
- Does a practitioner have a conflict of interest where the will property is dealt with by an attorney?
- Drafting tips and traps for limiting powers of attorney dealings
- Relevant legislation and State reforms on power of attorney misuse and elder abuse
- Cases including *McFee v Reilly* [2018] NSWCA 322; *Reilly v Reilly* [2018] NSWSC 804; *Wylie & Anor v Wylie* [2021] QSC 201; *Smith v Smith* [2017] NSWSC 408; *Dawson v Dawson* [2019] NSWCA 826

*Speaker: Carolyn Sparke KC, Barrister, Svenson Barristers, Melbourne, Vic*

12.00 - 12.10pm Panel Comments and Questions

12.10 - 1.10pm Lunch

AFTERNOON THEME: 3 COMPULSORY CPD TOPICS

1.10 - 2.00pm

## Session 10: Professional skills - Shades of Grey: Professional Responsibility for Determining Capacity

At a time when people are living longer than ever before, the making of a will tends to happen in later life when declining health may impact decision - making. What are the obligations of legal practitioners faced with will preparation for a client with signs of cognitive impairment? This session will provide guidance to practitioners on precautionary measures to protect both their clients and themselves from challenges, including:

- At what stage does capacity need to be tested?
- Who is responsible for making a decision on capacity? Is medical evidence always conclusive?
- Can a person with any level of dementia make a will?
- The role and obligations of practitioners in assessing capacity and planning for will execution
- Key precautionary measures to avoid challenges on the grounds of capacity
- Who bears the onus of proof in a challenge?
- What evidence of capacity will the courts look at?
- The role of the statutory will regime when testamentary capacity is lacking
- Recent cases including *Greer v Greer* [2021]QCA 143; *Estate Rofe* [2021] NSWSC 257; *Chant v Curcuruto* [2021] NSWSC 751; *Gooley v Gooley* [2021] NSWSC 56

*Speaker: Margaret Arthur, Special Counsel, HopgoodGanim Lawyers, Brisbane, Qld*

2.00 - 2.10pm Panel Comments and Questions

# DAY 2 - FRIDAY 17 FEBRUARY 2023

## 2.10 - 3.00pm

### Session 11: Practice Management & Business Skills - Electronic Documents, the Digital Age and the Succession Law Practice

The digital era is here to stay, and with it comes electronic wills, probate and communications. How should your succession law practice adapt to these challenges? This session looks at the main rules and provides practical guidance on navigating the new landscape, including:

- Sending email or hard copy letter - a professional practice issue?
- Electronic communication and confidentiality issues
- Electronic communication and the intersect with legal professional privilege
- Without prejudice communications - risk factors in electronic communication
- Electronic probate - what are the practical issues emerging in practice?
- Electronic wills - It may be legal but is it practical?

*Speaker: Ines Kallweit, Principal, KHQ Lawyers, Melbourne*

**3.00 - 3.10pm** Panel Comments and Questions

**3.10 - 3.30pm** Networking Break and Afternoon Tea

## 3.30 - 4.20pm

### Session 12: Ethics and Professional Responsibility - Practitioner Executors Dealing with Estate Assets: Practical Ethical Dilemmas

The role of executor can be onerous, and this is particularly so for solicitors acting as executors. This session looks at the ethical risks for solicitors in this role, particularly when dealing with estate assets. It includes:

- Should solicitors be executor? - an ethics perspective
- Executor problems in working out who they represent
- Ethics issues when managing estate property for many beneficiaries
- The extent of fiduciary responsibility on an executor
- When the executor does not gain proper authority - when is this an ethical breach?
- When inadequate record keeping becomes an ethics problem
- Case study - what executors must not do if they want to avoid ethics breaches

*Speaker: Dr John de Groot, Special Counsel, de Groots Wills & Estates Lawyers, Brisbane*

**4.20 - 4.30pm** Panel Comments and Questions

**4.30pm** Conference Close

# GENERAL INFORMATION

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## Conference Registration Fee

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The registration fee includes attendance at the conference and conference papers. Refreshment breaks and lunch on both conference days.

## Conference Papers

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TEN will not provide printed copies of the conference papers or Powerpoints. Access to the papers & Powerpoints will be available online to all delegates in the lead-up to the conference (as they become available).

## CPD

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**Lawyers (except WA):** 10 CPD units for attending the conference including the 3 compulsory CPD units.

**WA Lawyers:** 6 CPD points (there are 3 CPD compulsory subject sessions and 9 substantive law sessions – take your pick). WA practitioners can claim 6 CPD points for attending the conference (being the maximum allowable per event).

## CPD Certificate

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All delegates attending the conference will receive a CPD Certificate confirming attendance.

## The Conference Venue

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**The Langham Melbourne**, 1 Southgate Avenue, Southbank

The Langham are offering delegates 10% off their best available rate - click this link to access it the discounted rate:

<https://gc.synxis.com/rez.aspx?Hotel=27408&Chain=10316&template=GCFlexi2&shell=Flex4&promo=OPTIMUM>

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## Travelling to the Conference Venue

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Delegates are advised to make their own travel arrangements.

## Conference Dress

Smart casual attire is suitable (note: the temperature in the conference rooms can vary depending on where you are sitting. Short sleeves/summer tops are generally OK, but it is advisable that you bring a jacket/long sleeved top just in case you need it).



# TERMS AND CONDITIONS

1. In these terms,
  - a. "TEN" means Television Education Network Pty Ltd
  - b. "you" means the person who has registered to attend or the person or persons who attend[s] the conference (if different from the person registered)
  - c. "conference" means the live face to face or live or recorded online educational event or which you have registered (by whatever name called and includes conferences, masterclasses, webinars and webinar series).
  - d. "live conference" means a conference other than a recorded conference.
  - e. "recorded conference" means a recording of a presentation or a series of presentations which you can view at a time of your choosing
  - f. "online" in relation to a conference means a conference you attend by viewing the conference over the Internet
  - g. "face to face" in relation to a conference means a conference held in an external venue where you view the conference in the conference room

## General – all conferences

2. TEN may change the program for a live conference as described in the brochure you have downloaded or in the TEN website without notice to you in any manner and at any time.
3. The information and opinions of presenters at the conference are not necessarily those of TEN and are in the nature of general information and not professional advice and you rely on these at their own risk. TEN is not responsible for the accuracy of the information or the correctness of the opinions offered by presenters at the conference.
4. TEN is not responsible for any financial or other losses incurred by you or for injury or damage to persons or property which occur at or in connection with the conference.

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5. If the conference is being held face to face or face to face AND online, TEN reserves the right to convert the conference on no less than 24 hours' notice to a solely online conference or to cancel the conference or to postpone the conference to a later date if TEN determines that it is unable to hold the conference face to face on the date/s advertised for any one or more of the following reasons:
  - a. State or national border closures
  - b. Restrictions on movement of persons imposed on persons by any responsible authority in Australia
  - c. The inability or refusal of one or more presenters or TEN team members to attend the conference to present
  - d. In its opinion, it is unsafe to hold the conference face to face for any reason.
6. If TEN converts the conference from face to face only or to face to face and online to online only or postpones the conference or cancels the conference, TEN will not be responsible for any loss or damage you suffer as a result including any travel costs relating to the conference.
7. If TEN converts the conference from face to face to online or postpones the conference and as a result you are not able to attend you will be entitled to a full refund of registration fee paid or a credit equal to that fee to use for a future purchase of a TEN product.

## Copyright

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9. You are entitled to use those materials for private study and research only.
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11. You are entitled to watch a conference for private study and research only.

## Conference cancellation by TEN – all conferences

12. TEN reserves the right to cancel a conference for any reason.
13. If TEN cancels the conference, you will be entitled either to a refund of the registration fee you have paid or to a credit equal to that fee which you can use to purchase another TEN product within 12 months of the first day of the cancelled conference.

## Cancellation by You – all conferences

14. Refunds for registration cancellation by you other than under Clause 6(b):
  - a. If notice of cancellation is actually received by TEN more than 10 days before the first day on which the conference is to be held, 85% of the registration fee you have paid
  - b. Otherwise, no refund.

## Governing Law – all conferences

15. The agreement between TEN and you is governed by the laws in force in the State of Victoria and the courts and tribunals of that State have sole jurisdiction to determine disputes arising in relation to it.

