

# THE 8<sup>TH</sup> ANNUAL FEBRUARY WILLS AND ESTATES CONFERENCE

OUR REGULAR TWO DAY CONFERENCE  
DELIVERED **ONLINE** IN FOUR PARTS  
**OVER FOUR HALF DAYS**

**10**  
**CPD UNITS**  
INCLUDING  
COMPULSORIES

## **Part 1: Mutual Wills and Authority Issues**

Thursday 11 February 2021 [10am to 12.45pm]

## **Part 2: Challenging Wills and Estate Disputes**

Friday 12 February 2021 [10am to 12.45pm]

## **Part 3: Taking Care of Tax and Super Issues in the Estate**

Thursday 18 February 2021 [10am to 12.45pm]

## **Part 4: CPD Compulsories**

Friday 19 February 2021 [10am to 1.15pm]

### **FEEDBACK FROM LAST YEAR'S CONFERENCE:**

*"I thought the content was fantastic, and the length of the sessions was also perfect as it ensured none of the presenters dragged on too long. Well presented and managed, overall I feel it is quite good value for money."*

*"Excellent subject matter and learned/experienced presenters."*

*"Great Speakers. Good range of topics.."*



Leaders in online CPD for lawyers

# PART 1: THURSDAY 11 FEB 2021

**CHAIR – PART 1: Phillip McGowan,  
Partner, McCullough Robertson Lawyers,  
Sydney**

**THEME: MUTUAL WILLS AND AUTHORITY  
ISSUES**

**10.00 - 10.05am**

Introduction and welcome

**10.05 - 10.45am**

## **Session 1: Till Death Us Do Part: How Effective Are Mutual Wills?**

Mutual wills can be a useful estate planning tool, but should not be entered into lightly. This session will take a deep dive into the characteristics and requirements applicable to mutual wills, including cases that provide a warning of what a tricky area this is for practitioners:

- Contractual aspects of the agreement
- In what circumstances are mutual wills a good estate planning tool? Common scenarios discussed
- What are the disadvantages of a mutual will?
- What are the essential components of a mutual will? A drafting toolkit for practitioners
- Can one party change their will without the consent of the other at a later date?
- Family transparency - what do you need to advise your client?
- Can a mutual will defeat a family provision claim?
- Can mutual wills be founded on estoppel rather than contract? *Legg v Burton* [2017] EWHC 2088 (UK)
- Case studies

*Speaker: Christian Teese, Special Counsel, Rigby Cooke Lawyers, Melbourne*

**10.45 - 10.55am Questions and Discussion**

**10.55 - 11.35am**

## **Session 2: You Can't Get Away with That! Challenging Abuse of Enduring Powers of Attorney and other Unconscionable Conduct**

In theory an EPA can provide an important protection for those who have lost decision-making ability. However, in practice, the handing over of such power can result in decisions and actions which ultimately impact on the estate of the appointor following death. In a similar vein, even where there is no EPA, what can be done about pre-death actions taken by close family members under apparent or perceived authority? This session explores what the courts can do in relation to such actions impacting the estate, including:

- Duty and powers of the EPA - at law and the importance of the appointing document
- Exercising powers in accordance with intentions: *McFee v Reilly* [2018] NSWCA 322; *Smith v Smith* [2017] NSWSC 408
- What is the effect of the appointor's death on the attorney? *Dawson v Dawson* [2019] NSWCA 826
- Recent cases on pre-death "gifts": *Olsen v Mentink* [2019] NSWCA 1299; *Meiners v Gunn* [2020] WASC 18; *Mikhail v Hana* [2019] NSWCA 97
- Who can challenge the wrongdoings and what are the available remedies?
  - Statutory
  - Common law
  - Criminal
- Law reform and EPAs - developments
- Drafting EPAs to prevent elder abuse risk and other strategies for protection of vulnerable clients

*Speaker: Carolyn Sparke QC, Barrister, Victorian Bar, Melbourne*

**11.35 - 11.45am Questions and Discussion**

**11.45 - 11.55am**

Short Break

# PART 1: THURSDAY 11 FEB 2021

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**11.55am - 12.35pm**

## **Session 3: Executor Limitations: The Consequences of Acting Without a Grant**

Attempts by executors to deal with an estate prior to a grant of probate can be fraught with danger. This session will explore what can happen when an executor fails to follow the requirements, and the consequences for uninformed or unsuspecting financial institutions or others, including:

- Where does the authority of the executor come from?
- Nature of a grant of probate - why is it required and what does it do?
- When is a grant of probate not required or necessary? Small estates and other circumstances discussed
- Status of the executor prior to a grant of probate
- Vesting of property in the executor: the legislative position
- The use of waivers and releases pre-probate grant to deal with the estate: *Public Trustee v CBA & Ors* [2018] SASC 25
- Ability of the executor to deal with real property in the estate before a grant of probate: *Carolyn Deigan as executrix for the estate of the late James Boyd Lockrey v Barnard James Fussell* [2019] NSWCA 159
- Tips for advising executors pre-grant

*Speaker: David Topp, Barrister, Queensland Bar, Brisbane*

**12.35 - 12.45pm** Questions and Discussion

**12.45pm**

Close

# PART 2: FRIDAY 12 FEB 2021

**CHAIR – PART 2: Gerard Basha, Partner, Bartier Perry, Sydney**

## THEME: CHALLENGING WILLS AND ESTATE DISPUTES

### 10.00 - 10.05am

Introduction and welcome

### 10.05 - 10.45am

#### **Session 4: Is Home Where the Heart Is? The Importance of Domicile and Residency in Will Disputes**

In a shrinking world with more movement than ever before, Australians have assets overseas and may even spend the greater part of their lives living or working outside Australia. Further, there are people living in Australia who have not taken out citizenship who call other parts of the world home. The issue of where a person lives and where their assets are located can significantly impact the way their estate is treated and the claims that can be made against it. This session will explore the impact of domicile and residency on estates, including:

- Why is domicile important?
- How are domicile and residency determined? A review of legislation and common law: *Re Tang* [2017] VSC 59
- Evidence of domicile - what will the courts look at?
- Change in domicile following will execution - does it matter?
- When does domicile matter? Intestacy, family provision applications and other claims
- Do the courts have recourse to assets outside the jurisdiction of domicile? *Chen v Lu* [2014] NSWSC 1053; *Hitchcock v Pratt* [2010] NSWSC 1508
- What happens if the beneficiary is a foreigner - which law applies to the distribution?
- The relevance of international conventions and treaties, and international wills - consequences for practitioners.

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

### 10.45 - 10.55am Questions and Discussion

### 10.55 - 11.35am

#### **Session 5: The Age of Entitlement: Eligibility for Family Provision Claims**

Not everyone who feels hard done by in relation to the distribution of the estate is able to make a claim for a slice of the pie. This session looks at eligibility for making a claim against an estate, and what evidence is required to satisfy the court, including:

- Who can bring a claim? Do the Australian jurisdictions differ on eligibility?
- Partners, children, grandchildren and others - analysing the categories of eligible claimants
- How important are fairness and moral duty? *Vigolo v Bostin* [2005] HCA 11; *Firth v Reeves* [2019] VSC 357
- Evidence of relationships - what do the courts need to see? *Re Gunn*; *Thomas v Gunn* [2019] VSC 772; *Estate of the late Shirley Joan Violet Gardner*; *Bernengo v Leaney* [2019] NSWSC 1324
- How is “need” proven? Looking at need, dependency and other factors: *Dannawi v Dannaway* [2019] NSWSC 1287; *Veniou v Equity Trustees Limited* [2018] VSC 832; *Firth v Reeves* [2019] VSC 357
- Costs considerations: shifting the burden, proportionality and sounding a warning: *Wengdal v Rawnsley* [2019] NSWSC 926; *Oslen v Oslen* [2019] NSWSC 217; *Harris v Harris* [2018] NSWCA 334

*Speaker: John Armfield, Barrister, Second Floor Wentworth Chambers, Sydney*

### 11.35 - 11.45am Questions and Discussion

### 11.45 - 11.55am

Short Break

### 11.55am - 12.35pm

#### **Session 6: Will Caveats: Proceed with Caution**

Probate caveats are a useful tool to prevent the grant of probate. However, filing a caveat should not be done lightly and could result in significant costs if filed in the wrong circumstances or without proper grounds. This session will provide a guide to the lodging of a caveat and what practitioners need to be aware of, including:

- When should a caveat be lodged? Distinguishing types of challenges against the will
- Who has standing to lodge a caveat?
- What are sufficient grounds for lodging?
- How long does a caveat remain in force?
- What happens after a caveat is lodged?
- Cost risks of the caveator
- Practice notes from the courts
- Case studies and drafting tips

*Speaker: Ursula Stanisich, Barrister, Victorian Bar, Melbourne*

### 12.35 - 12.45pm Questions and Discussion

### 12.45pm

Close

# PART 3: THURSDAY 18 FEB 2021

CHAIR – PART 3: Ed Skilton, Special Counsel, Sladen Legal, Melbourne

THEME: TAKING CARE OF TAX AND SUPER ISSUES IN THE ESTATE

10.00 - 10.05am

Introduction and welcome

10.05 - 10.45am

## Session 7: Nothing is Certain Except Death and Taxes: Tax issues in Estate Administration

While death duties in Australia are long gone, tax remains an important part of managing a deceased estate. This session provides guidance on what administrators need to be aware of in the estate management process from a very early stage onwards, including:

- ATO Ruling 2622 - the three stages of deceased estate administration for tax purposes
- Responsibilities and liabilities of the legal personal representative
- Who should notifications be made to after death?
- Documents at the ready - what do you need?
- When to call in the professionals
- Outstanding tax returns of the deceased prior to death - when do they need to be lodged?
- Tax liabilities of the estate
- Tax liabilities of non-estate assets
- When does income stop being estate income and become beneficiary income?
- Preparing a timeline for responsibility and action

Speaker: Warwick Gilbertson, Partner, Turnbull Hill Lawyers, Sydney

10.45 - 10.55am Questions and Discussion

10.55 - 11.35am

## Session 8: A Super-Size Complexity: Post Death Superannuation Distribution

Personal superannuation assets are increasingly becoming more valuable and, in some instances, may exceed the value of assets forming part of the estate. There is often confusion about what happens to superannuation when the fund member dies, and this session will provide a guide to management of this non-estate asset, including:

- What happens to the fund on the death of the member? The role of the trustee in decision-making
- Binding and non-binding death benefit nominations (BDBNs) - what difference do they make to fund distribution?
- What are the consequences of an invalid BDBN and can a BDBN be overruled? *Munro v Munro* [2015] 306 FLR 93; *Re Narumon Pty Ltd* [2018] QSC 185
- In the absence of a BDBN, who can receive the super fund assets? Eligible superannuation beneficiaries
- Dependents and non-dependents and tax consequences
- Trustee discretion - how should it be exercised and can it be challenged?
- Preventing and managing conflict between the estate and the super fund.

Speaker: Jennifer Dixon, Practice Leader, Moores, Melbourne

11.35 - 11.45am Questions and Discussion

11.45 - 11.55am

Short Break

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## 11.55am - 12.35pm

### Session 9: A New Era for Trustee Discretionary Distributions?

It has long been accepted practice that the trustee of a discretionary trust has complete discretion to determine when and how to make distributions to the beneficiaries of a trust. However, a recent case concerning the decision of a superannuation trustee may have turned that practice on its head. In this session, a number of seminal and recent decisions will be examined in an effort to provide guidance on the limitations, if any, on trustee discretion post-death, including:

- The nature of a trustee relationship
- Duties and responsibilities of trustees
- Trustee exercise of discretion in SMSF following member death: *Katz v Grossman* [2005] NSWSC 934; *Ioppolo & Hesford v Conti* [2013] WASC 389
- Importing a good faith test: *Re Marsella; Marsella v Wareham (No 2)* [2019] VSC 65 and the Court of Appeal's decision in *Wareham v Marsella* [2020] VSCA 92
- Is having a binding death nomination enough to avoid a dispute? *Wooster v Morris* [2013] VSC 594
- What actions can be taken to claw back discretionary distributions? *McIntosh v McIntosh* [2014] QSC 99; *Brine v Carter* [2015] SASC 205; *Estate of Burgess; Burgess v Burgess* [2018] WASC 279; *Gonciarz v Bienias* [2019] WASC 104.
- Dealing with superannuation death benefits and beneficiaries' entitlements in a dispute setting

*Speaker: Nathan Yii, Director, Nathan Yii Lawyers, Melbourne*

## 12.35 - 12.45pm Questions and Discussion

### 12.45pm

Close

# PART 4: FRIDAY 19 FEB 2021

**CHAIR – Jennifer McMillan, Legal Practice Consultant, Lawcover, Sydney**

**THEME: CPD COMPULSORIES**

**10.00 - 10.05am**

Introduction and welcome

**10.05 - 10.55am**

**Session 10: Professional skills**

***Preparing Wills and EPOAs in Uncertain Times: Is Close Enough Good Enough?***

In these unprecedented times, succession lawyers will be receiving many enquiries from clients wishing to make wills and enduring powers of attorney to ensure that their affairs are in order. However, how can these documents be validly prepared and executed whilst adhering to social distancing rules? This session examines how to navigate this new and unsettling landscape, including:

- How do you obtain valid instructions from your client?
- Issues to consider when a face to face meeting is not possible
- Testamentary capacity revisited - how can you satisfy the key elements?
- 'Drive-in' services and other novel solutions
- How to use video evidence effectively and other strategies to prevent future challenges
- When can beneficiaries witness a will?
- Witnessing and execution requirements in a COVID-19 landscape - unpacking COVID-19 Legislation Amendment (Emergency Measures) Bill 2020 and other reforms
- Case study: Preparing documents for a client living in an aged care facility

*Speaker: Steve Grant, Director, Merthyr Law, Brisbane*

**10.55 - 11.05am Questions and Discussion**

**11.05 - 11.55am**

**Session 11: Practice Management**

***Making Your Succession Practice 'Hum' - Strategies to Build Your Practice***

Effective practice management involves understanding the particular needs of the practice disciplines. This session updates on developments in running a successful succession law practice, including:

- Marketing you and your practice - limits and possibilities
- Spotlight on building your online brand and promoting specialist accreditation
- Client management - adding value and locking in the future client
- Building ongoing relationships - tips and tricks to ensure 'sticky' relationships
- Developing an effective networking capability - knowing who to connect with
- Thinking beyond the brief - tapping into all areas of succession law practice
- Case study - examples of successful growth strategies in wills and estates practice

*Speakers: Laura Vickers, Principal Lawyer and Bianca Apollonio, Senior Estates Lawyer, Nest Legal, Northcote, Vic.*

**11.55 - 12.05pm Questions and Discussion**

**12.05 - 12.15pm**

Short Break

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**12.15 - 1.05pm**

**Session 12: Ethics**

***Who is My Client in Wills and Estate Matters***

Developments in technology and the virtual office create new ethical challenges in correctly identifying the client and knowing to whom you owe professional obligations. This session looks at the key issues, including:

- Not quite the client - care required in early interactions with potential clients
- Solicitor client relationship duties - the imperatives of client identification
- When capacity is an issue - who is my client dilemmas and responsibility
- Testamentary trusts - responsibility to testator or beneficiary?
- Donee of power of attorney - acting against doors interests
- Risks when identification at issue - conflicts of interest issues and other nasties
- Husband and wife client identification issues in succession matters
- Solicitor executors - when wearing two hats creates client identification problems
- Lessons from recent cases

*Speaker: Anthea Kennedy, Partner, Bridges Lawyers, Sydney*

**1.05 - 1.15pm** Questions and Discussion

**1.15pm** Conference Close



# GENERAL INFORMATION

## Conference Registration Fee

The registration fee includes attendance at the conference, online access to the conference materials and recordings of each of the sessions provided after the conference.

## Conference Materials

Access to the conference materials will be available online to all delegates. Access will commence in the lead-up to the conference as the materials become available. Following the conference delegates will have access to the conference materials online with no expiration date.

## Lawyers - CPD Units/Points

**Lawyers (except WA):** 10 CPD units (7 substantive law + 3 CPD compulsory subjects)

**WA Lawyers:** 6 CPD points (WA practitioners can earn a maximum of 6 CPD points for attending an event – you can choose whether to claim substantive law or a mix of the compulsory subjects + substantive law)

## CPD Certificate

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

## Online Conference Delivery

The conference will be delivered online. Delegates will receive a link to login and attend each of the 4 parts of this online conference.

This online conference will be delivered in a style similar to a live conference. There are Chairs for each part to introduce speakers and facilitate question time and the online portal allows delegates to pose questions to the speakers via the chat facility.

## Cancellation Policy

Cancellations must be received in writing at least 10 days prior to the Conference for a 85% refund. Substitute delegates accepted at any time.

If a registration was purchased as part of a group discount the cancellation of that registration may affect the discount level for other members of the group. The amount of the refund will be adjusted to recoup any adjustment required to the overall registration fees for that group.

## Conference Terms

Program subject to change without notice. The information and views presented in the conference are not necessarily those of TEN and participants rely on these at their own risk. TEN is not responsible for any financial or other losses incurred by delegates or for injury or damage to persons or property. TEN's maximum liability for conference cancellation or any other loss or liability is the refund of the registration fee paid.

TEN is not responsible for financial loss incurred by you as a result of the cancellation or postponement of the conference as a result of strikes, public health emergencies, natural disasters, and other Acts of God.

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