

# THE 14<sup>TH</sup> ANNUAL WILLS AND ESTATES CONFERENCE

The Future of Discretionary Family Trusts Post-Owie

Managing Super Following the Death of the Member

Mitigating the Risks in the Digital Succession Plan

Testamentary Capacity, Cognitive Decline and Ageing Clients

Appointing Administrators in Deceased Estates

Estate Administration Litigation: Sharpening Your Skillset

Lawyers As Executors: If You're Going To Do It, Do It Right

Beneficiary Rights and Entitlements to Information

What Happens Next When a Trustee is Improperly Appointed

Documenting Settlement Agreements Reached at Mediation

Trouble-shooting Errors in the Succession Plan

Protecting Assets & Minimizing Clawback Risks for NSW Non-residents and Non-NSW Assets

A Two-day Conference

**Thursday 17 & Friday 18 August 2023**

RACV Royal Pines Resort, Gold Coast

## Feedback from last year's conference:

- “Very informative and a good opportunity to meet other practitioners in the same area.”
- “Great program, very well chaired and organized, interesting topics and excellent speakers in an amazing venue.”
- “This is the first conference of this kind that I have attended -- some great presenters with in-depth experience in the areas that they discussed, and some really good take-aways that we will look to implement in our office/documents/client experiences.”
- “Top shelf quality as always. Thank you.”



Leaders in online CPD for Lawyers & Accountants

# DAY 1 - THURSDAY 17 AUGUST 2023

## MORNING THEME: CRAFTING THE SUCCESSION PLAN

9.00 - 9.10am

Introduction and welcome

Day 1 Chair: Stephen Lynch, Director, Somerville Legal, Sydney

9.10 - 9.55am

### Session 1: Discretionary No More? The Future of Discretionary Family Trusts Post-Owie

The recent decision of *Owie* has thrown the future of discretionary family trusts into doubt by challenging the idea that trustees of discretionary family trusts have absolute discretion to distribute income for the benefit of one or more of the beneficiaries of the trust in preference to others. Lawyers must now grapple with the potential ramifications of this decision and what it means for their clients. To help understand these issues and their potential ramifications in more depth, this session will examine:

- What does 'real and genuine consideration' mean when trustees are exercising their discretion? How far does this extend?
- The facts in *Owie*, what led to the decision and its outcome
- What does *Owie* mean for the future of discretionary family trusts in Australia
- When will the court remove a trustee?
- Best practice tips in relation to what advice should be provided to clients following this decision when acting for both trustees and beneficiaries
- What steps should lawyers be advising their clients to now take to evidence the rationale behind trust distributions in the event of a future challenge

Speaker: Andrew Verspaandonk, Barrister, Victorian Bar, Melbourne

9.55 - 10.05am Panel Comments and Questions

10.05 - 10.50am

### Session 2: Managing Super Following the Death of the Member

It can be common for lawyers to want to treat superannuation as yet another financial asset of a client to be dealt with in accordance with their overall succession planning instructions. However, the treatment of superannuation on the death of a member is very strictly regulated and one which can be misunderstood without a comprehensive understanding of the SIS Act. This session will dispel some of the myths held about superannuation by providing an overview of the relevant SIS provisions concerning treatment of superannuation on the death of a member and will cover:

- Who can (and who can't) receive superannuation from the fund on the death of the member
- The definition of spouse, domestic partners and dependents for the purpose of SIS compared to tax law and other areas of practice
- The obligations of the executor or administrator vs the trustee of the fund
- What tax needs to be considered, including discussion of ATO Ruling 2011/77 in relation to step-children
- The requirements for valid binding death benefit nominations, who may constitute a valid nominee, how to check and drafting tips
- Practical case studies

Speaker: Nathan Yii, Principal Lawyer, Nathan Yii Lawyers, Melbourne

10.50 - 11.00am Panel Comments and Questions

11.00 - 11.25am Networking Break and Morning Tea

# DAY 1 - THURSDAY 17 AUGUST 2023

11.25am - 12.10pm

## Session 3: Digital Disruption: Mitigating the Risks in the Digital Succession Plan

One of the lasting effects on the commercial world arising from the pandemic has been the acceleration of digital transformation and use of technologies. As these changes have made their way to the 'new normal' of legal practice, how can succession lawyers ensure that the legal challenges associated with digital wills are mitigated? This session explores the legal challenges associated with digital wills and provides best practice guidance on ensuring the validity and enforceability of digital wills. It covers:

- The current status of legislation around Australia relevant to the use of technology in succession planning and anticipated legislative reform in this area
- Overview of other legal challenges associated with digital wills, such as questions around authenticity, identity and revocation – how does digital technology exacerbate these challenges?
- Spotlight on undue influence:
  - definition and examples of undue influence in the context of digital wills
  - how digital technology can increase the risks
  - legal remedies available to address undue influence
  - practical tips for succession lawyers to consider to manage the risks
- Best practices for ensuring the validity and enforceability of digital wills
- Recent judicial commentary on these issues across a range of jurisdictions including the case of *Re Curtis* [2022] VSC 621 and useful guidance for practitioners for dealing with such issues when they arise in practice

Speaker: Kimberley Martin, Director, WMM Law, Hobart

12.10 - 12.20pm Panel Comments and Questions

12.20 - 1.05pm

## Session 4: Testamentary Capacity, Cognitive Decline and Ageing Clients: Medical and Legal Insights

Problems of testing capacity include determining the decision-making capacities of the client, and properly instructing the specialist ahead of testing capacity. This session, jointly presented by a legal professional and former health professional, examines the key issues including:

- Capacity – a legal test informed by medical assessment
- Understanding what 'mental capacity' means
- Key indicators demonstrating a lack of mental capacity
- Communicating with the client and recording initial capacity assessment data
- When to refer and assessing who to refer to – key criteria in making referral decision
- Constructing the referral letter to medical specialist
- The solicitor's role in mental capacity assessment – taking clear instructions
- Conferring with client and making legal judgement on medical evidence
- Should you appoint a substitute decision maker?
- The distinction between capacity to make a will compared to power of attorney
- Lessons from cases

Speaker: Lindsay Ellison SC, Barrister, Wardell Chambers, Sydney and Hayley Bennett, Barrister, New Chambers, Sydney

1.05 - 1.15pm Panel Comments and Questions

1.15 - 2.15pm Luncheon

# DAY 1 - THURSDAY 17 AUGUST 2023

## AFTERNOON THEME: ADMINISTRATION ISSUES AND CHALLENGING THE WILL

### 2.15 - 3.00pm

#### Session 5: Appointing Administrators in Deceased Estates: When, How and Doing it Right

In some circumstances, it might be appropriate and indeed preferable for an administrator to be appointed to deal with the administration of the deceased estate. But what circumstances are these? What type of administrator is required? What factors should lawyers consider? This session explores the key issues, including:

- The different types of administrators that can be appointed and the circumstances in which each type would be appropriate to appoint
- The different approaches by courts around Australia to managing such appointments in wills and estate matters
- The practical considerations lawyers should bear in mind when they advise clients in relation to their options
- Recent judicial commentary regarding the proper exercise of discretion to appoint interim administrators, including NSW Court of Appeal decision in *Ritossa*, Victorian Supreme Court decision in *Re Kordos* and Queensland Supreme Court in *Re Franks*) and the key lessons lawyers in all jurisdictions should take away from such decisions

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

### 3.00 - 3.10pm Panel Comments and Questions

### 3.10 - 3.55pm

#### Session 6: Estate Administration Litigation: Sharpening Your Skillset When the Gloves Come Off

While few succession lawyers want their matters to end up in court, it is unavoidable that certain matters will eventually result in litigation. This practical session delves into the potential issues that may emerge in succession law litigation and offers insights on how lawyers can effectively equip themselves with the necessary skill set to navigate such situations. Topic areas covered include:

- Probate caveats and the impact of the recent decision of *Re Estate Capelin, deceased* [2022] NSWSC 238 on their use in contested matters
- The ins and outs of *ex parte* applications:
  - when are they appropriate?
  - how to present your case in accordance with current best practice standards
  - who to notify of the outcome (and when)
- Notices and applications to bar claims:
  - when they ought to be considered
  - practical and strategic considerations if served with one
- The duty of legal representatives in succession law litigation, as discussed in *Limberger v Limberger* [2021] NSWSC 474]

*Speaker: Carolyn Sparke KC, Barrister, Victorian Bar, Melbourne, Vic*

### 3.55 - 4.05pm Panel Comments and Questions

### 4.05 - 4.25pm Networking Break and Afternoon Tea

# DAY 1 - THURSDAY 17 AUGUST 2023

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4.25 - 5.10pm

## Session 7: Lawyers As Executors: If You're Going To Do It, Do It Right

Lawyers, particularly those in suburban or rural practices, are often approached by friends and clients for advice and assistance with tasks that are legal or even quasi-legal in nature. For those clients who have outlived or, for various reasons, can't rely on support from friends or family, their lawyer is sometimes the only person left to administer their estate on their passing. Whether or not a lawyer chooses to take on the role of executor for a friend/family member or client can be a challenging decision to make. This session examines whether lawyers should take on the role of executor and explore steps practitioners should consider taking if they decide to be nominated as executor. It covers:

- The tasks required to discharge your duty as executor, including domestic vs legal vs administrative tasks, what is appropriate for a lawyer to do, when to outsource and dealing with costs for same
- Dealing with conflicts of interests, including the role of disclosure letters
- Charging for services - what may be appropriate, what disclosure is required, tips for drafting charging clauses
- Management of the file within your legal practice and what to do if further or specialist advice is required
- Specific considerations when there is a trust or SMSF
- Does it matter if you drew up the will?
- Recent cases, including *Makripoulas v Arhontovasilis* [2022] VSC 53

*Speaker: Stephen Lynch, Director, Somerville Legal, Sydney*

5.10 - 5.20pm Panel Comments and Questions

# DAY 2 - FRIDAY 18 AUGUST 2023

## MORNING THEME: RIGHTS AND ENTITLEMENTS

9.00 – 9.05am

Introduction and welcome

**Day 2 Chair: Jennifer McMillan, Manager, Practice Support Services, LawCover, Sydney**

9.05 - 9.50am

### Session 8: I Have A Right To Know Don't I? Beneficiary Rights And Entitlements To Information

Traditionally, there have been two schools of thought when it comes to treatment of the rights of beneficiaries by the Courts: some consider beneficiaries to have quite expansive rights, while others considers a more narrow view. Over the past 12 months, a number of decisions have brought these issues to a head. This session will unpack the current legal arguments surrounding the rights and entitlements of beneficiaries to information and documents and seek to clarify how recent cases have impacted questions that arise in practice. It covers:

- What rights do beneficiaries have to information and/or documents about the trust?
- What documents may need to be disclosed to beneficiaries (e.g. summary of information about trust assets or complete financial statements for all entities within the trust structure?)
- Does this now include a right to know the reasoning of the trustee in relation to distributions of discretionary family trusts? How much detail is required?
- What steps might trustees now be expected to take to inform itself of the needs of beneficiaries?
- Is there any corresponding obligation now on beneficiaries to disclose information about their circumstances to the trustee
- Who pays for the access to the information or documents?
- Lessons from recent cases

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

9.50 - 10.00am Panel Comments and Questions

10.00 - 10.45am

### Session 9: Breaking the Chain: What Happens Next When A Trustee Is Improperly Appointed

Even with the best of intentions, situations arise when it is discovered that a trustee was incorrectly appointed. While forensic analysis can usually determine whose fault that may be, a harder question for lawyers is working out exactly what happens next in terms of the trust and assessing the legal effect and current status of all the decisions made by the trustee ultra vires. This practical session will examine:

- What options might be available to rectify the problem
- Determining the legal effect of the trustee's decisions made were during the period they operated ultra vires
- What happens to the person or entity that was meant to have been appointed as the proper trustee? What rights do they have? Should they be notified?
- The liability and other repercussion for the lawyers involved in the respective transactions
- The steps lawyers should take when reviewing trust documentation for long term clients

*Speaker: Adrian Bailey, Principal, Cleary Hoare, Sydney*

10.45 - 10.55am Panel Comments and Questions

10.55 - 11.15am Networking Break and Morning Tea

# DAY 2 - FRIDAY 18 AUGUST 2023

11.15am - 12.00pm

## Session 10: Documenting Settlement Agreements Reached At Mediation

It is often the case that a settlement is reached after a protracted and exhausting mediation. While it can be tempting once agreement is reached to delay recording the agreement until another day, this runs the risk of a party changing their mind and undoing all the good will created by the settlement and further entrenching the dispute. There are steps lawyers can, and should take, well in advance to ensure that, at the end of the mediation, the settlement agreement is able to be properly documented and immediately signed by the parties. This session will examine:

- Settlement agreements - when they will be held by the Court to be binding
- In what circumstances can estoppel arise?
- Disputes which may still arise even when settlement agreements are held to be binding (i.e. interpretation issues for contract terms e.g. NSW Supreme Court decision of *Fatseas* 2022)
- Drafting tips lawyers can employ to prepare draft settlement documentation ahead of the finalised agreement:
- How to word clauses when details may not yet be known and practical tips

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

12.00 - 12.10pm Panel Comments and Questions

12.10 - 1.10pm Lunch

## AFTERNOON THEME: CHALLENGES IN PRACTICE

1.10 - 1.55pm

## Session 11: Everyone Makes Mistakes: Troubleshooting Errors in the Succession Plan

No lawyer sets out to make mistakes when drafting wills and estate planning documents. However, everyone is human and it can be common to discover mistakes when reviewing wills and other documents. This session shall focus on 'what happens next' when a mistake has been identified and shall look at:

- The types of mistakes that arise in wills and estate planning documents and the options available to fix mistakes outside of court processes
- Court orders:
  - when is a court order required and how to seek this
  - what evidence is required and how to disclose the mistake in court documentation
- The role of consent when it comes to rectifying potentially invalid provisions in wills
- The potential legal and ethical issues which may arise - in what circumstances may a lawyer breach their duty by failing to discover a mistake earlier? Who should be notified, and when, on discovery of the mistake? Who should wear the cost of rectification?
- How the courts across jurisdictions have dealt with mistakes in wills and estate matters in recent times including *Williams v Duerinckx Futures Family Trust* [2022] TASSC 32, *In the Matter of George Hardi Family Trust* [2021] NSWSC 1584 and *Application of Walker Corporation Pty Ltd* [2022] NSWSC 1609

*Speaker: Asheetha Jelliffe, Partner, Bridges Lawyers, Sydney*

1.55 - 2.05pm Panel Comments and Questions

# DAY 2 - FRIDAY 18 AUGUST 2023

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**2.05 - 2.50pm**

## **Session 12: Notional Estate: Protecting Your Client's Assets and Minimizing Clawback Risks for NSW Non-residents and Non-NSW Assets**

Notional estate laws are a complex and often misunderstood area of succession law that can have a significant impact on the distribution of a deceased individual's assets. This session examines strategies for avoiding clawback of assets and provides best practice guidance on minimizing the impact of notional estate laws on clients' succession plans. It covers:

- Key features of notional estate laws and how notional estate laws can affect asset distribution
- Situations where notional estate laws may apply with a focus on the following:
  - attacking the assets of non-NSW residents
  - attacking assets of a NSW resident located outside of NSW
- Strategies for minimising the risks of clawback of deceased's assets:
  - key considerations for structuring an estate plan to minimize the risk of clawback
  - assets held in family trusts and companies
  - strategies for dealing with specific assets, such as superannuation and life insurance
- How to recognize potential issues before they become problems
- Can notional estate laws trump binding death benefit nominations? Lessons from *Benz v Armstrong* [2022] NSWSC 534
- Practical examples and lessons from recent cases

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

**2.50 - 3.00pm** Panel Comments and Questions

**3.00pm** 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):** 11 CPD units for attending the conference (all substantive law).

**WA Lawyers:** 6 CPD points (substantive law). WA practitioners can claim 6 CPD points for attending the conference (being the maximum allowable by the LPBWA per event). TEN is an accredited CPD provider.

## 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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### RACV Royal Pines Resort

Ross St, Benowa 4217

Reservations: (07) 5597 8797

## Conference Delegate Rate at RACV Royal Pines

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Accommodation at RACV Royal Pines Resort spans across 333 rooms including king and twin room types, corner spa suites with views of the golf course or the hinterland, executive suites with access to the exclusive Executive Lounge and two-bedroom family suites.

RACV Royal Pines Resort are pleased to offer conference guests access to discounted rates providing up to 15% off the best available online rate at time of booking (subject to availability).

Guests can book directly using this link: [RACV Royal Pines Resort Accommodation](#) or to book over the phone please call the reservations team on (07) 5597 8797 and ensure you state the name of the event and booking date to gain access to this discount.

## Travelling to the Conference Venue

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Delegates are advised to make their own travel arrangements.

## Conference Dress

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Smart casual attire is suitable (note: the temperature in the conference rooms can vary depending on where you are sitting so it is advisable that you bring a jacket/long sleeved top 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.
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## Conversion of face to face conferences to live online conferences

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

8. The copyright in materials prepared by presenters at a conference and made available to you by TEN is and remains the property of each presenter.
9. You are entitled to use those materials for private study and research only.
10. The copyright in the live stream and in any recording of a conference offered online is the property of TEN.
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.

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Registration is simple; complete the form below and fax or post your registration to us or register online.  
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GPO Box 61, Melbourne, Victoria 3001  
Phone (03) 8601 7700 Enquiries Hayley Williams-Cameron (03) 8601 7730  
Register online: <http://www.tved.net.au> – go to CONFERENCES

Please register me for the **14th Annual Wills & Estates** – a 2-day conference to be held at the Gold Coast on Thursday 17 & Friday 18 August 2023 [GDEAUG23]

- [ ] **Discount Registration** – for registrations made on or before 28 July 2023 – **\$2013** (\$1830 + \$183 GST)  
[ ] **Full Price Registration** – **\$2178** (\$1980 + \$198 GST)

**Multiple registration discount?** Discounts are available for multiple registrations: The more you send, the greater the discount. You can access the discount by contacting our Event Coordinator, Hayley Williams-Cameron, to organise your registrations - email [hayley@tved.net.au](mailto:hayley@tved.net.au) or phone (03) 8601 7730.

- 3 registrations – 5% discount for each delegate
- If you register 4 people at the same time you are entitled to a 10% discount for each delegate
- If you register 5 people or more people at the same time you are entitled to a 15% discount for each delegate.

**One-day only?** We do accept bookings for attending one day only (either day 1 or day 2). To organise a one-day booking, please contact Hayley (details above).

## Conference Papers

The papers from this conference will be available in electronic format approximately 1 week after the conference has been held. You can pre-order the papers now online via our website at [www.tved.net.au](http://www.tved.net.au). The papers are \$198 (\$180 + \$18 GST) (code: PGDEAUG23).

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