

NEW SOUTH WALES WILLS & ESTATES CONFERENCE

Knowledge and Approval and Testamentary Capacity

Statutory Wills: The Making or Altering of Wills by Courts

Informal Wills and Testamentary Intent

Guarding Against Family Provision Claims by Disgruntled Beneficiaries

The Intersect Between Constructive Trusts,
Promissory Estoppel and Family Provision Claims

The Use and Abuse of Notional Estate Orders

Deceased Estates and Tax

Incapacity, POA and Guardianship in NCAT

When the Trust Deed is Lost or Needs Alteration

Detecting and Addressing Undue Influence in Succession Matters

Executor Duties and Misconduct:

Safeguarding Beneficiary Rights in Estate Administration

Safeguarding Against Elder Abuse and Fraud by Powers of Attorney

A two day conference delivered online in four parts
over 4 half-days

Thursday 16 November 2023

Friday 17 November 2023

Thursday 23 November 2023

Friday 24 November 2023



Leaders in online CPD for Lawyers & Accountants

PART 1: THURSDAY 16 NOV 2023

**CHAIR - PART 1: STEPHEN LYNCH,
DIRECTOR, SOMERVILLE LEGAL,
SYDNEY**

THEME: CREATING THE WILL

10.00 - 10.10am

Introduction and welcome

10.10 - 10.55am

Session 1: Knowledge and Approval and Testamentary Capacity: Getting the Foundations Right

In the realm of wills and probate, objections to the admission of a will often revolve around challenges to the testator's testamentary capacity or their failure to fully comprehend and approve the specific contents of the will. This session delves into the proactive measures succession lawyers can employ during the will-making process to minimize the likelihood of such disputes. Key topics covered include:

- The relationship between testamentary capacity and the testator's knowledge and approval - how these factors intertwine and influence each other
- Navigating the evidentiary burdens involved in testing testamentary capacity
- The assessment process to determine whether the will is the genuine product of a free and capable mind, considering the factors that influence this determination and how they can be evaluated
- Best practices for communicating with clients during capacity assessments, ensuring clarity, sensitivity, and compliance with ethical and professional obligations
- Critical factors to consider when determining whether to refer a client for further assessment of their capacity, and providing insights into the process of obtaining expert opinions
- Case update, including *Lim v Lim* [2023] NSWCA 84

Speaker: Caroline Sims, Partner, Teece Hodgson & Ward Solicitors, Sydney

10.55 - 11.05am Questions and Discussion

11.05 - 11.50am

Session 2: Statutory Wills: The Making or Altering of Wills by Courts

In NSW, the Supreme Court has the power in certain appropriate circumstances to make an order authorising a will to be made or altered on behalf of a person who lacks testamentary capacity. To assist succession lawyers understand when such an order may be appropriate and exactly what circumstances may warrant such a finding, this session will examine:

- The relevant sections of the Succession Act and what is required to satisfy the Court that it is appropriate?
- In what circumstances will the Court grant authority irrespective of lack of testamentary capacity?
- How the specific terms of the new or altered will are to be determined and what evidence is required
- Lessons from the Court of Appeal's decision in *Small v Phillips* and the impact of this decision on the Court's exercise of discretion to make such orders
- Case update involving statutory wills

Speaker: David Liebhold, Barrister, 13 Wentworth Chambers, Sydney

11.50am - 12.00pm Questions and Discussion

12.00 - 12.10pm Short Break

12.10 - 12.55pm

Session 3: Where There's a Will There's a Way: Informal Wills and Testamentary Intent

While wills are generally regarded as formal legal documents, there are circumstances in which other documents or records of testamentary intentions may be accepted by the courts as an informal will. In a world where technology has caused a general relaxation of language and diverse means of communications, it is more important than ever to understand the circumstances in which an informal document or recording may end up being construed as a will and to advise clients accordingly. This session will examine:

- The requirements, and exceptions, of a valid will under the Succession Act 2006
- When should practitioners consider preparing an informal wills?
- Probate and informal wills - what are the challenges?
- Recent case examples of when recordings and less common forms of communication have been used as the basis of an alleged will and the practical issues which arose in such cases
- Spotlight on the problems which have emerged with remote signing
- The circumstances in which the Court may recognise an informal will - what are the courts looking for?

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

12.55 - 1.05pm Questions and Discussion

1.05pm Close

PART 2: FRIDAY 17 NOV 2023

**CHAIR - PART 2: ANTHEA KENNEDY,
PARTNER, BRIDGES LAWYERS,
SYDNEY**

THEME: LITIGATION AND DISPUTES

10.00 - 10.10am

Introduction and welcome

10.10 - 10.55am

Session 4: Think of the Children: Guarding Against Family Provision Claims by Disgruntled Beneficiaries

In the realm of succession planning and administration, the spectre of family provision claims looms large, posing a significant challenge to the wishes of testators and the orderly distribution of assets. The emotional complexities surrounding these claims are further amplified when disgruntled beneficiaries seek to challenge the testamentary dispositions on the basis of a parent / child relationship. This practical session examines the various forms in which such claims can arise, with a focus on the strategies and safeguards available to mitigate the risk of family provision claims. It covers:

- Rights of grandchildren:
 - lessons from the Court of Appeal decision in *Chisak v Presot*
 - what the *Chisak* decision means for establishing 'eligible person' and the question of partial dependency
 - what should grandparents do to protect against potential claims
- Rights of stepchildren:
 - criteria and factors relevant to a step-child's eligibility to make an application
 - potential outcomes if eligible to make a claim
 - avenues available to step-children when they are not eligible and the potential options available to address these issues during the life of the testator
- Rights of foster children - lessons from *Hamilton v Moir*
- Relationships akin to parent and child - spotlight on *Rakovich v Marsszalek*
- Preventative measures to consider and lessons from recent family provision cases involving children

Speaker: Max Williams, Special Counsel, de Groot's Wills & Estates Lawyers, Sydney

10.55 - 11.05am Questions and Discussion

Session 5: Three Claims and A Court: The Intersect Between Constructive Trusts, Promissory Estoppel and Family Provision Claims

Contested estate matters often have facts which could ground multiple, and overlapping, equitable claims. There can be a tendency for claims to be bundled together. Cost-benefit decisions need to be made as to the claims advanced in light of an assessment of how the case is likely to pan out at trial. This session will explore:

- The intersection between equitable claims (including constructive trusts and promissory estoppel) and family provision claims
- How the overlapping doctrines of constructive trust and family provision played out in the recent case of *Clayton v Clayton* [2023] NSWSC 399 and lessons to be learned from that decision
- How promissory and other estoppel claims may operate within the facts of a family provision claim, including when promissory estoppel is run as a defence to a family provision claim
- Tips for drafting your orders sought, structuring your arguments and leading evidence when running multiple claims

Speaker: Craig Birtles, Barrister, Second Floor Wentworth Chambers, Sydney

11.50am - 12.00pm Questions and Discussion

12.00 - 12.10pm Short Break

12.10 - 12.55pm

Session 6: Once Upon a Time In NSW: The Use and Abuse of Notional Estate Orders

Notional estate orders are a complex and unique component of New South Wales succession law, shaping the distribution of assets in a manner that extends beyond the confines of a testator's will. Given their potential to reshape asset distribution and inheritance outcomes, it is vital that succession lawyers understand the full reach of notional estate rules. This session will examine:

- Essential characteristics of notional estate laws and their implications for asset distribution
- Scenarios where notional estate laws may be applicable
- Strategies for minimizing the risks associated with the clawback of a deceased individual's assets
- Identifying potential issues before they escalate into significant problems

Lessons from recent cases

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

12.55 - 1.05pm Questions and Discussion

1.05pm Close

PART 3: THURSDAY 23 NOV 2023

**CHAIR - PART 3: RICHARD NEAL,
PARTNER, TEECE HODGSON &
WARD, SYDNEY**

**THEME: SHARPENING THE PRACTITIONER
SKILLSET**

10.00 - 10.10am

Introduction and welcome

10.10 - 10.55am

Session 7: The Perks of Being Tax Savvy: Deceased Estates and Tax

There is a tendency in succession law practice for tax to be treated as an afterthought and a matter for which separate specialist expertise should be obtained after the estate plan has been developed. While tax is certainly an area of legal specialisation and expertise, every succession lawyer requires a solid understanding of the taxation principles to ensure advice and succession plans can be developed from a holistic and informed position. This session examines:

- The key tax events that occur during the lifecycle of a deceased estate
- How capital gains, stamp duty, land tax are calculated when it comes to deceased estates and how these should inform the development of options for succession planning
- The recent amendments to tax and stamp duty arising from State Revenue and Fines Legislation Amendment (Miscellaneous) Act 2022 and how they may impact succession plans
- Case examples to illustrate the effect of such tax on the quantum of the estate and what can happen when taxation advice is only considered as an afterthought

Speaker: Robert Monahan, Principal, Monahan Estate Planning, Sydney

10.55 - 11.05am Questions and Discussion

11.05 - 11.50am

Session 8: Incapacity, POA and Guardianship in NCAT: Mind the Gap

Since the High Court decision in *Burns v Corbett*, it can be difficult to identify to what extent the NSW Civil and Administrative Tribunal provides options for succession law clients. This session will explore:

- The types of matters that can be determined by NCAT (and what can not):
 - how to identify whether your matter involves an exercise of federal jurisdiction
 - what to do if there is an identified federal jurisdiction issue
- Procedural challenges and strategies involving NCAT:
 - what orders should you seek in NCAT?
 - tips for applying and preparing for hearings
 - what changes lie on the horizon?
- When may it be preferable for a matter to be commenced in NCAT?
- Understanding the alternative options available to succession law clients

Speaker: Margaret Pringle, Barrister at Law, Chalfont Chambers, Sydney

11.50am - 12.00pm Questions and Discussion

12.00 - 12.10pm Short Break

12.10 - 12.55pm

Session 9: Lost in Practice: When the Trust Deed is Lost or Needs Alteration

Given the intended lifespan of numerous family discretionary trusts, it is perhaps unsurprising that original trust deeds can be misplaced, particularly in circumstances involving the testator's passing or when a new practitioner assumes responsibility for the matter. Furthermore, circumstances may arise where amendments or modifications become necessary to ensure the trust aligns with changing legal requirements or intentions. This session will explore the options available to succession lawyers when it is discovered that the original trust deed has been lost or requires modification, including:

- The potential options available pursuant to s63 and s86A of the Trustees Act, what they each require and how to advance said applications
- How these matters were considered by the Supreme Court in the recent case of *In the Application of Nyasa No.19 Pty Ltd*
- Issues arising from the lack of jurisdiction in relation to approving alterations to the trust in NSW and trends that have emerged in NSW to get around this
- The current status of proposed reform in this area

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

12.55 - 1.05pm Questions and Discussion

1.05pm Close

PART 4: FRIDAY 24 NOV 2023

**CHAIR - PART 4 JENNIFER
MCMILLAN, MANAGER - PRACTICE
SUPPORT SERVICES, LAWCOVER,
SYDNEY**

THEME: MISCONDUCT AND ABUSE RISKS

10.00 - 10.10am

Introduction and welcome

10.10 - 10.55am

Session 10: Under the Influence: Detecting and Addressing Undue Influence in Succession Matters

Undue influence stands as a persistent challenge in succession planning, casting a shadow of doubt over the intentions and wishes of testators. For succession lawyers, understanding the intricate nuances of undue influence is paramount in effectively safeguarding the integrity of the succession planning process and upholding the intentions of their clients. This session explores:

- Deciphering undue influence: understanding its legal parameters
- Actual vs. Presumed undue influence
- Proving the unseen: evidentiary considerations in establishing undue influence
- Identifying behaviours that invalidate wills
- The ethical compass: obligations of practitioners in suspected cases of undue influence in estate planning
- Standing and the burden of proof in allegations of undue influence
- Remedial measures: exploring constructive trusts as a remedy for undue influence
- Case update, including *Alexakis v Masters* (No. 2) [2023] NSWSC 509

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

10.55 - 11.05am Questions and Discussion

11.05 - 11.50am

Session 11: Executor Duties and Misconduct: Safeguarding Beneficiary Rights in Estate Administration

Executor misconduct can have significant ramifications in the administration of estates, undermining the integrity of the probate process and jeopardizing the rights and interests of beneficiaries. For succession lawyers, understanding the intricacies of executor misconduct is paramount in safeguarding the rights of their clients and preserving the intentions of testators. This session examines:

- Identifying signs of executor misconduct:
 - common and not-so-common indicators and red flags that may suggest executor misconduct
 - how to identify potential issues early on
- Steps and procedures for investigating allegations of executor misconduct
- Practical guidance on preventive measures that can be taken during the succession planning process to minimize the risk of executor misconduct
- Lessons from recent cases, including *Galea v Camilleri* [2023] NSWSC 206

Speaker: Katelin Whitley LLM, MFMH, Principal, Bestic Law, Sydney

11.50am - 12.00pm Questions and Discussion

12.00 - 12.10pm Short Break

PART 4: FRIDAY 24 NOV 2023

12.10 - 12.55pm

Session 12: Protecting the Vulnerable: Safeguarding Against Elder Abuse and Fraud by Powers of Attorney

Elder abuse and fraud perpetrated through powers of attorney is an alarming issue that demands the attention and vigilance of all succession lawyers. As the aging population continues to grow, the vulnerability of older individuals to exploitation and mistreatment becomes increasingly evident. Powers of attorney, entrusted with significant decision-making authority, can wield substantial control over an elderly person's finances and assets. Regrettably, some unscrupulous individuals abuse this power for personal gain, leading to devastating consequences. This session provides a comprehensive analysis of elder abuse and fraud committed by powers of attorney, including:

- The prevalence and types of elder abuse and fraud perpetrated by powers of attorney
- The legal frameworks and regulations surrounding powers of attorney, including the responsibilities, obligations, and limitations imposed on attorneys to prevent abuse and fraud
- Spotlight on transfers of land via online conveyancing and the rise of elder abuse:
 - the practical/PEXA and legal requirements when transferring land pursuant to a power of attorney and how to determine when the transfer was effected under a power of attorney
 - steps prudent solicitors should take when faced with a potential transfer of land purporting to be pursuant to a power of attorney
- Preventive measures and best practices that lawyers can implement to mitigate the risks associated with powers of attorney, including thorough client assessments, effective documentation, and ongoing monitoring.
- Lessons from recent cases

Speaker: Justine Taylor, Principal Director, Uther Webster & Evans, Sydney

12.55 - 1.05pm Questions and Discussion

1.05pm Close

GENERAL INFORMATION

Conference Registration Fee

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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.

Conference Papers

Access to the papers & Powerpoints will be available online to all delegates in the lead-up to the conference (as they become available).

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- [] **Early Bird Registration** – for registrations made on or before 15 October 2023 – **\$1573** (\$1430 + \$143 GST)
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