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15TH ANNUAL WILLS & ESTATES CONFERENCE

Rights, Entitlements and Status of Step-Children to the Estate and Super Family Provision Claims and the Lessons from Jurak

Mutual Wills and the Impact of Re Miglic

The Consequences of Broken Promises for Estate Administration

Trust Deed Tune-Up: Do You Have the Power to Vary (and Should You Use it?)

Counting the Cost of the After-tax Treatment of Inheritances

Death Benefits - They Can be Challenging and They Are Being Challenged

The Reality of Judicial Advice Applications

Ensuring a Past De Facto Cannot Claim on the Estate

Severing A Joint Tenancy? Let Me Count The Ways

Incapacity and the Surviving Spouse

A Two-day Conference

Thursday 29 & Friday 30 August 2024

Imperial Hotel, Gold Coast (formerly Palazzo Versace)

Feedback from last year's conference:

- Great bunch of people and lovely speakers! Overall very well organized and lovely to attend again!
- I always love this conference. It is my 5th. It is high level which I appreciate. I enjoyed it overall.
- Papers always on point and relevant. Speakers convey well their topics and with humour. Also a good opportunity to meet interstate practitioners with like interests.
- The speakers and content were very informative. I could not fault anyone..



The Professional Development Specialists

DAY 1: THURSDAY 29 AUGUST 2024

**CHAIR DAY 1: JENNIFER MCMILLAN,
MANAGER - PRACTICE SUPPORT
SERVICES, LAWCOVER, SYDNEY,
NSW**

**MORNING THEME: DISGRUNTLED
BENEFICIARIES AND THE ESTATE**

9.00 - 9.15am

Introduction and welcome

9.15 - 10.00am

Session 1: I'm a Step-Child, Can I Claim? The Rights, Entitlements and Status of Step-Children to the Estate and Super

Step-children, though often beloved members of blended families, can become significant points of contention in succession planning. This session shall breakdown the complex web of rights, entitlements and status that step-children navigate when it comes to inheritance and superannuation. It covers:

- Step-children eligibility to make a family provision claim under different state laws, including how different states have approached the definition of step-child, relevance of dependency
- The status of step-children for superannuation purposes
- The divergence between ATO and the common law in terms of how step-children are dealt with in Interpretative Decisions, including whether they continue to be one after the death of their biological parent)
- Steps that could be taken when drafting a will to appropriately deal with step-children
- Lessons from recent cases involving step children

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

10.00 - 10.10am Panel Comments and Questions

10.10 - 10.55am

Session 2: Family Provision Claims and the lessons from Jurak

Family provision claims are the most common form of litigation for many wills and estate practitioners. However, in light of the sheer volume of such cases being heard around Australia, it can be difficult to stay on top of recent trends and practice developments. And as the important recent decision of *Jurak v Latham* has demonstrated, mistakes can be costly - for the estate, client and lawyer. To help busy practitioners stay up to date, this session explores:

- The perpetual problem of how to assess quantum in family provision claims - best practice guidance
- Spotlight on *Jurak v Latham*:
 - Who falls within the definition of an interested person with reference to recent case law
 - What may constitute proper notice and the variety of manners in which such notice could now be provided, including use of social media
 - Why it is important to comply with the notice provisions - what are the potential consequences for the estate, client and lawyer if proper notice is not given
 - Examine the practical options available to lawyers when faced with difficult circumstances - what should you do if an interested person is identified but unresponsive?
- Lessons from other key cases, including *Papatoniou v Foundourakis* [2023] NSWSC 1374 and *Rijven v Lynam and Rijven* [2023] ACTSC 265

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

10.55 - 11.05am Panel Comments and Questions

11.05 - 11.30am Networking Break and Morning Tea

DAY 1: THURSDAY 29 AUGUST 2024

11.30am - 12.15pm

Session 3: Gone but not Forgotten: Mutual Wills and the lessons from Re Miglic

In the recent decision of *Re Miglic*, the plaintiffs succeeded in proving that an oral agreement made over 30 years ago, between deceased parties, was in fact a mutual wills agreement. This significant decision raises many interesting considerations for practitioners in many areas of practice and is set to have wide sweeping ramifications. To help succession lawyers understand the impact of *Re Miglic* on their own practice, this session shall summarise the facts of the decision and break down the useful lessons to be learned from the decision in relation to:

- How the Court assesses evidence in relation to the testamentary intention of people long deceased, with a spotlight on rules of evidence in relation to hearsay evidence and practicalities of evidence of recollections over a long period of time
- The role and weight of evidence from beneficiaries who stand to gain from the outcome
- When the recollection of the substance of communications rather than precise words may be sufficient to establish an agreement
- The giving of evidence by a solicitor and issues surrounding intentional waiver of privilege
- The challenges to proving the existence of a mutual wills agreement and how these were overcome in, or maybe impacted by, *Re Miglic*

Speaker: Andrew Verspaandonk, Barrister, Victorian Bar, Melbourne, Vic.

12.15 - 12.25pm Panel Comments and Questions

12.25 - 1.10pm

Session 4: Made to be Broken? The Consequences of Broken Promises for Estate Administration

While some may say that promises are made to be broken, it doesn't mean there won't be serious legal consequences as a result, particularly in the context of wills and a contested estate! This session shall take a deeper dive into cases involving broken promises and look closely at:

- The equitable claims which could potentially arise from a broken promise and the elements required to prove promissory estoppel, constructive trust etc
- The facts which gave rise to successful claims of promissory estoppel, and what steps could have been taken to identify and manage this during the testator's lifetime
- How the court approached the equitable claims in recent cases including *Kramer v Stone*, *Reeves and Scaff* and the practical aspects of such cases

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

1.10 - 1.20pm Panel Comments and Questions

1.20 - 2.15pm Luncheon

DAY 1: THURSDAY 29 AUGUST 2024

AFTERNOON THEME: THE IMPACT OF TRUSTS, TAX AND SUPER

2.15 - 3.00pm

Session 5: Trust Deed Tune-Up: Do You Have the Power to Vary (and When Should You Use it?)

Trusts offering a versatile mechanism for managing assets and providing for beneficiaries over time. Central to the adaptability of trusts is the power of variation embedded within these deeds, allowing trustees to modify terms and conditions as circumstances evolve. However, wielding this power requires a deep understanding of legal principles, fiduciary responsibilities, and practical implications. This session explores the power of the court across the different jurisdictions to vary trusts, including:

- The source of power to vary trusts in different states, focusing on what is required in each jurisdiction for a court to approve a variation
- The factual circumstances which give rise to an application to the court to vary and how the sections can be employed to resolve various issues
- Can a trust deed be amended after the vesting date?
- Lessons from recent cases, including Application of Nyasa No.19 Pty Ltd [2023] NSWSC 578

Speaker: Ed Skilton, Principal Lawyer, Sladen Legal, Melbourne, Vic.

3.00 - 3.10pm Panel Comments and Questions

3.10 - 3.55pm

Session 6: Counting the Cost of the After-tax Treatment of Inheritances

As certain assets have their own unique tax treatment and as certain individuals can have their own unique tax situations, the after tax amount of an inheritance can differ markedly between beneficiaries. This session explores why this is so and the key considerations to navigate when crafting the succession plan. It covers:

- Which CGT assets may be more tax friendly when left to which beneficiaries?
- Should a "capital gains tax provision" for each CGT asset held by the willmaker be factored into the estate plan?
- Should the personal tax attributes of each potential beneficiary be a consideration of the willmaker?
- How CGT event K3 applying for one beneficiary's situation can reduce the pie for the remaining beneficiaries
- When may a special disability trust be a beneficial insertion in a will for a beneficiary?
- Tax effectively allocating superannuation death benefits, including:
 - determining if an interdependency or financial dependant relationship exists (Tratter v Aware Super [2023] FCA 491)
- The pros and cons of tax equalization clauses in a will (Todd v Todd & Ors [2021] SASC 36)
- Case study

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

3.55 - 4.05pm Panel Comments and Questions

4.05 - 4.25pm Networking Break and Afternoon Tea

DAY 1: THURSDAY 29 AUGUST 2024

4.25 - 5.10pm

Session 7: Death Benefits - They Can be Challenging and They Are Being Challenged

Superannuation death benefit challenges can be complex and costly and they are on the rise. This session uses cases, some directly relating to SMSFs and some not, however all with key lessons to takeaway to assist with minimising the risk of a death benefit from an SMSF being disputed in the future, including:

- Who can make a binding death benefit nomination (BDBN)? (Re Rentis Pty Ltd [2023] PSC 252)
- Can a BDBN expire in an SMSF? (Hill v Zuda Pty Ltd [2022] HCA 21)
- Why are BDBNs being disputed? (incl. Williams v Williams & Anor [2023] QSC 90; Cantor Management Services Pty Ltd v Booth SASCFC 122; van Camp v Bellahealth Pty Ltd [2024] NSWSC 7; Carbisieri v NM Superannuation Pty Ltd [2023] FCA 1319)
- Does Owies case have an impact on determining who is to receive a death benefit from an SMSF? (Owies v JJE Nominees Pty Ltd [2022] VSCA 142)
- When to pay to the estate and when to pay to the individual (Wan v BT Funds Management Ltd [2022] FCA 302)
- Dealing with conflicts of interest when a trustee is a potential death benefit beneficiary (Wareham v Marsella [2020] VSCA 92)
- Key lessons to take away from case decisions

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

5.10 - 5.20pm Panel Comments and Questions

DAY 2: FRIDAY 30 AUGUST 2024

MORNING THEME: THE SUCCESSION LAW TOOLKIT

9.00 - 9.05am

Introduction and welcome

9.05 - 9.50am

Session 8: Nothing Ever Goes to Plan: The Reality of Judicial Advice Applications

It is an inevitable fact of life that people change, life gets more complicated and relationships sour. It is no wonder that even the best laid estate plans can go awry. While judicial advice applications are often a prudent option to take, knowing how to get the most out of them is another matter. To assist practitioners, this session shall look at:

- When do you need to apply to court for judicial advice, including examples of factual circumstances in which it would be prudent to seek judicial advice
- Practical steps lawyers should take to identify potential problems when taking instructions and drafting a will
- What to do when you do come across a problem, such as a property owned by a trust
- How to apply for judicial advice (and what alternatives may be available) and cost implications of applying, or failing to apply
- Issues which arose in recent cases including *Wheatley v Lakshmanan* [2022] NSWSC 583, *Yuen & Anor v Louey* [2023] VSC 423, *Alexopoulos v Krasovec* [2022] VSC 749, *Mantovani v Vanta Pty Ltd & Ors* (No.3)

Speaker: Paige Edwards, Senior Associate, McCullough Robertson, Brisbane, Qld

9.50 - 10.00am Panel Comments and Questions

10.00 - 10.45am

Session 9: To the Bitter End: Ensuring a Past De Facto Cannot Claim on the Estate

The end of a spousal relationship is relevant in many legal forums, from the obvious family law ramifications through to social security, superannuation, trust and estate administration implications. For couples who were married, the divorce certificate provides evidence of the end of the parties' legal relationship as spouses. However, for parties in a de facto relationship, the end is usually not so clean cut nor as easy to prove. This session explores:

- An overview of the circumstances in which termination of a relationship may be relevant in a wills and estate context, including impact on superannuation, BDBNs, family provision claim eligibility, life insurance
- Practical case studies highlighting the difficulties with proving the end of a relationship - what evidence does the Court actually require to meet the threshold and does that threshold change when separation is in dispute?
- How the Court has dealt with this issue in recent decisions, including *Corbisieri v NM Superannuation Pty Ltd* [2023] FCA 1319 and *Newman v Flint* [2023] TSC 15.

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

10.45 - 10.55am Panel Comments and Questions

10.55 - 11.15am Networking Break and Morning Tea

DAY 2: FRIDAY 30 AUGUST 2024

11.15 - 12.00pm

Session 10: Severing a Joint Tenancy? Let Me Count the Ways

While it is common for persons to hold property as joint tenants, there continues to be a large number of claims made against lawyers who fail to advise their clients properly or act in a timely manner when there is a joint tenancy. To help wills and estate lawyers stay on the path of the straight and narrow, this session explores:

- An overview of the law of joint tenancy from a wills and estate perspective the ways in which they may be deliberately or inadvertently severed (at law and by conduct)
- Related ethical considerations for succession lawyers, including when a strategy to sever a joint tenancy may create a conflict of interest and/or require independent legal representation or advice
- The factual basis of recent claims made against lawyers - what are lawyers getting wrong and how could this be avoided or mitigated?

Speaker: Katelin Whitley, Principal, Bestic Law, Sydney, NSW

12.00pm - 12.10pm Panel Comments and Questions

12.10 - 1.10pm Lunch

AFTERNOON THEME: ELDER LAW

1.10 - 1.55pm

Session 11: Between A Rock And A Hard Place: Incapacity and the Surviving Spouse

It can be an extremely sad and devastating life event when an elderly person reaches the stage when they lose capacity and need to leave home to obtain the level of care they require. Many plan to cover the cost of entering into aged or high care from the sale of their family home. But what happens if their surviving spouse is not yet requiring that level of care and is able (and desires) to live independently? What if others are also residing in the family home? What if the family home has already been passed to adult children and the parties were residing in a grant flat out the back? Without proper planning, it can get complicated quite quickly. This session shall take a deeper dive into this and considers:

- The scenarios in which one party may need to cause the other to leave the family home, including loss of capacity, family violence, neglect and abuse of the carer by the spouse with dementia
- The liability issues which arise for the carer spouse and practical limitations of keeping the incapacitated spouse in the home, including tips for what questions to ask to ascertain if the carer spouse is being harmed and/or struggling and needing help
- The options available to finance this transition where equity is tied up in the family home
- The powers of the courts and tribunal to step in - what orders can they make, when will they intervene and how this has been dealt with by the courts in recent times

Speaker: Tanya Chapman, Lawyer, Baker Love Lawyers, Wallsend, NSW

1.55 - 2.05pm Panel Comments and Questions

DAY 2: FRIDAY 30 AUGUST 2024

2.05 - 2.50pm

Session 12: Drafting POAs To Minimise Risk of Elder Abuse

Misuse of POAs continues to be an issue plaguing Australian jurisdictions. While the law governing who can prepare and/or witness (or certify) a POA varies quite considerably as between states, lawyers in every jurisdiction are able to minimise the chances of financial abuse through careful structuring and drafting of the POA itself. This session examines:

- Best practice guidance in choosing the right attorneys
- The requirements of a POA and what it can and can't be used for in light of recent cases including *Huang & Anor v Kotsias & Ors*)
- Guidance on what to consider when structuring the POA
- Practical options available when drafting the POA to cover range of potential scenarios, including examples clauses for conditional or supportive POAs
- Lessons from recent cases

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

2.50 - 3.00pm Panel Comments and Questions

3.00pm Conference Close

GENERAL INFORMATION

Conference Registration Fee

The registration fee includes attendance at the conference and conference papers. Refreshment breaks and lunches are included for face to face attendees.

Conference Papers

TEN does 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

Lawyers (except WA): 11 CPD units/points (substantive law)

Lawyers WA: 6 CPD points (substantive law) – being the maximum allowable per conference by the LPBWA. TEN is an accredited provider.

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

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The Conference Venue

Imperial Hotel, Gold Coast (formerly Palazzo Versace)

Sea World Drive, Main Beach

Phone: (07) 5509 8000

Website: 5 Star Luxury Hotel in Gold Coast #1 Imperial Hotel (theimperialgc.com.au)

Delegate Rate at the Imperial Hotel

Lagoon King room - \$350/night including breakfast for 1 person.

Register online at this special rate via this link: <https://reservations.travelclick.com/106826?groupID=4141279>

Travelling to the Conference Venue

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 are generally OK, but it is advisable that you bring a jacket/long sleeved top just in case you need it).

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