

# The 12th Annual Wills & Estates Conference

A TWO-DAY CONFERENCE ORGANISED BY  
**TELEVISION EDUCATION NETWORK PTY LTD**

DELIVERED ONLINE OVER 4 HALF DAYS  
ON 19, 20, 26 & 27 AUGUST 2021

Knowledge and Approval and Testamentary Capacity  
The Dangers of Joint Ownership in the Succession Plan  
When Meaning and Intent of Wills is Unclear  
Family Provision Claims: Lessons from the Frontline  
Negotiating and Drafting Terms of Settlement in Wills and Estate Matters  
When will Proprietary Estoppel Trump a Will?  
Trustee Discretion: Understanding the Limits of Power  
When the Attorney Goes Rogue - Remedies Against Errant Attorneys  
The Bad Executor: Stop, Wrong Way, Turn Around Now  
Disclosure Obligations in Wills and Estate Matters  
Tax Bombs in the Will  
Practitioner Liability in Wills and Estate Matters

## Feedback from last year:

*"Very relevant content provided by presenters who knew their stuff! Helpful for my day-to-day practice."*

*"Great speakers and relevant content. Looking forward to returning to the Gold Coast next year if possible!"*

*"I appreciated the consideration of and reference to each of the Australian jurisdictions, I found the speakers to be of a high quality and their respective supporting papers very detailed and informative and I thought that the sequencing of the topics was logical and thoughtful."*



The professional development specialists

# Day 1: Thursday 19 August 2021

## THEME: STRUCTURING THE WILL

**CHAIR:** Jen McMillan, Manager Practice Support Services, Lawcover, Sydney

**10.00 - 10.05am**

Introduction and welcome

**10.05-10.45am**

### **Session 1: Knowledge and Approval and Testamentary Capacity: Getting it Right from the Starting Block**

Objections to a will being admitted to probate are generally based on either the testator lacking testamentary capacity, or failing to know and approve the particular will. Disputes can be complex and the costs substantial. This session examines how succession lawyers can prevent these types of disputes at the will-making stage, including:

- Testator's knowledge and approval essential to validity - what are the parameters?
- Relationship between testamentary capacity and knowledge and approval
- Evidentiary burdens in testing capacity - an overview
- Assessing whether the will is the product of a free and capable mind
- Assessing capacity remotely and in person - differences in evidentiary burden
- Communicating with client over capacity assessment
- Recording of initial mental capacity assessment
- Determining when to refer for further assessment
- When capacity is at issue - key dos & don'ts of solicitors
- Case update

*Speaker: Andrew Verspaandonk, Barrister, Victorian Bar, Melbourne*

**10.45 - 10.55am** Comments and Questions

**10.55 - 11.35am**

### **Session 2: The Dangers of Joint Ownership in the Succession Plan**

Joint tenancy is often used by couples as a means of owning shared assets, such as the family home. While joint ownership and the right of survivorship can work well for couples in long-standing relationships, complications can arise when dealing with blended families, or assets jointly owned by parent and child. This session examines the complexities, including:

- Joint tenancy v tenants in common - when are they appropriate?
- Survivorship rights and bank accounts - does joint signatory equate to joint owner?
- When is a joint account regarded as an estate asset?
- Family law consequences of joint ownership
- Joint ownership and Centrelink and tax consequences
- Case study: blended families and joint ownership
- Case update, including *Gambacota v Di Giovanni* [2021] NSWSC 61

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

**11.35 - 11.45am** Comments and Questions

**11.45 - 11.55am** Short Break

# Day 1: Thursday 19 August 2021

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11.55am - 12.35pm

## Session 3: Practitioner Liability in Wills and Estate Matters - A Precautionary Approach

This session examines some precautionary risk management tips for wills and estate practitioners. It includes:

- Liability of practitioner in wills and estate matters - an overview
- Timeliness, prompt attention and file notes on will and estate matters
- The lawyer's duty in drafting wills - to whom is it owed?
- Liability to persons who do not receive an intended benefit under a will
- Right of disappointed beneficiary to recover damages
- Are there any limitations on the practitioner duty of care?
- Risks in not clearly following client or courts instruction
- Case update

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

12.35 - 12.45pm Comments and Questions

12.45pm Close

# Day 2: Friday 20 August 2021

## THEME: DISPUTES

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

**10.00 - 10.05am**

Introduction and welcome

**10.05 - 10.45am**

### Session 4: Family Provision Claims: Lessons from the Frontline

This session considers recent developments in family provision claims across different jurisdictions and the lessons practitioners can learn from recent cases. It includes:

- Are judgements taking a harder line?
- Are we seeing a more genuine assessment of the needs of the applicant?
- Establishing financial need - what are the relevant factors in recent decisions
- Cross jurisdictional issues emerging in family provision claims
- Calderbank offers in family provision claims
- Cost consequences when failing to establish financial need
- Impact of living together despite separation
- Lessons from recent cases, including *Cowap v Cowap* [2020]NSWCA 19; *Sarant v Sarant* [2020] NSWSC 1640

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

**10.45 - 10.55am** Comments and Questions

**10.55 - 11.35am**

### Session 5: Negotiating and Drafting Terms of Settlement in Wills and Estate Matters

Negotiating and settling wills and estate disputes require refined skills. This session looks at what these are, with practical advice on implementation. It includes:

- Understanding the timing of negotiations and its practical effects
- Process and procedure in disclosing financials
- Determining the property pool
- Having some bargaining power whilst maintaining ethics and fairness
- Knowing when to reach the settlement middle ground
- Construction of terms of settlement - what to put in and what to leave out
- How to ensure terms of settlement are binding
- Case study - a settlement agreement checklist

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

**11.35 - 11.45am** Comments and Questions

**11.45 - 11.55am** Short Break

**11.55am to 12.35pm**

### Session 6: Beware of Promises: When will Proprietary Estoppel Trump a Will?

When will estoppel for breach of promise override the contents of a will? The recent case of *Moore v Busson* has shone a spotlight on the power of estoppel to trump a will. This session examines the key issues, including:

- When will an understanding between the deceased testator and another party give rise to a claim of estoppel?
- Navigating the key elements of estoppel in the context of will disputes
- When is estoppel preferable to a family provision claim?
- Key tips and tricks for preventing estoppel claims
- Case update, including *Moore v Busson* [2020] NSWSC 1466; *Gill v Garret* [2020] NSWSC 795

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

**12.35 - 12.45pm** Comments and Questions

**12.45pm** Close

# Day 3: Thursday 26 August 2021

## THEME: AUTHORITY ISSUES

**CHAIR:** Robert Monahan, Principal, Monahan Estate Planning, Sydney

**10.00 - 10.05am**

Introduction and welcome

**10.05 - 10.45am**

### Session 7: Trustee Discretion: Understanding the Limits of Power

The case of Re Marsella raised issues on the nature of trustee discretion. This session looks at developments since that case and the ambit of its reach. It includes:

- Revisiting Re Marsella; Marsella v Wreham (No.2)
- Trustees duty to act in good faith
- Duty of trustee to avoid conflict of interest
- Do the same principles apply to trustees of discretionary trusts?
- Key inclusions in the trust deed to minimize conflicts
- Trustee communication with potential beneficiaries
- Obligation of trustee to give reasons for exercise of discretion
- Best practice in dealing with trustee's discretion

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

**10.45 - 10.55am** Comments and Questions

**10.55 - 11.35am**

### Session 8: When the Attorney Goes Rogue - Remedies Against Errant Attorneys

When an attorney does the wrong thing what are your options? What precautionary steps should be taken prior to this risk occurring? This session looks at the main issues, including:

- What not to do when appointing a power of attorney
- Identifying rogue behaviour and then acting - when third parties should step in
- Making tribunal applications over actions of errant attorneys
- Actions for breach of fiduciary duty
- Actions in conversion - is this a good idea?
- When does behaviour justify a claim of fraud?
- Damages claims against errant attorneys
- Case update

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

**11.35 - 11.45am** Comments and Questions

**11.45 - 11.55am** Short Break

**11.55am - 12.35pm**

### Session 9: The Bad Executor: Stop, Wrong Way, Turn Around Now

When executor(s) turn out to be either bad or incompetent what do you do? Removing the executor is only part of the story. This session looks at the main issues, including:

- The role of executor and where things may go wrong - an overview
- Time frames for executor to act and consequences when failing to do so
- Executor obligations to beneficiaries - detecting bad behaviour
- Executor by chain of representation - risks in the system
- Standing to remove executor
- Passing over and removal of executors
- Accountability for self-dealing transactions
- Case update

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

**12.35 - 12.45pm** Comments and Questions

**12.45 pm** Close

# Day 4: Friday 27 August 2021

THEME: LIABILITY & RISK MANAGEMENT

CHAIR: TO BE ADVISED

10.00 - 10.05am

Introduction and welcome

10.05 - 10.45am

## Session 10: The Right to Know: Disclosure Obligations in Wills and Estate Matters

They say that knowledge is power, and that maxim certainly applies in the context of succession law. However, when can information be shared, and when is it inappropriate? Through the use of practical case studies, this session examines disclosure obligations and the interplay with professional and fiduciary obligations. It covers:

- Disclosure of documents and information in contested wills and estate matters
- Power of executor to gain access to will files of practitioners
- Who pays for the cost to copy files where they are requested?
- Does an executor or trustee have a duty to maintain confidentiality?
- Does the trustee have a duty to provide the trust deed and other information to potential beneficiaries?
- Family provision claims and access to financial records
- Confidentiality requirements with medical records
- Confidentiality and disclosing information after death
- Preliminary discovery application in wills and estate matters
- Case update, including *Jordon v Goldspring* [2021] NSWSC 7

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

10.45 - 10.55am Comments and Questions

10.55 - 11.35am

## Session 11: Tax Bombs in the Will

Many clients may be unaware that they are leaving a tax bomb in their will. This practical session examines some of the key tax issues to navigate when structuring a client's succession plan. It covers:

- Understanding how a will provides opportunities for tax planning
- Tax implications of non-resident status of intended beneficiaries
- Leaving super to non-tax dependents
- When will CGT be triggered?
- Unpacking the recent excepted trust income reforms for minors
- When stamp duty and land tax surcharges may apply on dispositions
- Adjustments provisions in wills to deal with assets that have big capital gains

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

11.35 - 11.45am Comments and Questions

11.45 - 11.55am Short Break

# Day 4: Friday 27 August 2021

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**11.55am - 12.35pm**

## **Session 12: When Meaning and Intent of Wills is Unclear**

Poor drafting and ambiguous terms in wills may complicate estate administration and lead to disputes. This session looks at the court's approach to ambiguity, including:

- How do courts interpret unclear wills?
- Giving effect to the intentions of the testator - what does this really mean?
- The process of reconciling conflicting provisions of a will
- What happens with an obvious ambiguity or omission?
- When can extrinsic evidence be used to resolve an ambiguity?
- Rectification for unilateral mistake
- Case update, including *Benaroon Pty Ltd v Larmar & Ors* [2020] QCA
- Prevention better than cure - key drafting strategies to minimise risk of ambiguity

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

**12.35 - 12.45pm** Comments and Questions

**12.45** Conference Close

# General Information

## Conference Registration fee

The registration fee includes attendance at the online conference, conference papers and recordings of all sessions following the conference.

## Conference Materials

Access to the papers and Powerpoints will be available online to all delegates in the lead-up to the conference (as they become available). The materials will be available in .pdf format for easy download or viewing on your local computer or portable device.

## CPD Lawyers - all delegates will receive CPD Certificates for attendance

- Lawyers in all states except WA can claim 10 CPD units (substantive Law)
- Lawyers in WA can claim 6 CPD points (substantive law)

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