

Estate Planning

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Acorn Lawyers Monthly Estate Planning Update



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Free CPD Points!

Have you and your colleagues met your CPD requirements? With the end of the financial year approaching, we can offer you two CPD points for free!

We have two seminars, "The Basics of Estate Planning" and "Foundations of Testamentary Trust Wills" which are accredited with the Financial Planners Association. Accountants can also self assess their development points.

Each seminar is about 45 minutes and one CPD point. We can also do them together. Seminars can be run from your boardroom or similar at any time. Please contact us to arrange.



Rights of Occupation and the Importance of Substituted Residences - Blended Families

Purchasing Property

Spouses/partners often purchase property as joint tenants, but this may not always be the best option. Property owned as joint tenants passes automatically to the surviving spouse on death. This is a non-Will asset. However, property owned as tenants in common (in equal/unequal shares) passes into the estate and is dealt with in accordance with the Will.

There are benefits of the deceased spouse/partner's interest in the family home passing under a Will as tenants in common, including:

1. spouses/partners will often downsize on the death of the first spouse/partner. If there is a testamentary trust will, excess sale proceeds can be held in the trust for asset protection and tax minimisation;
2. in second marriages or de facto relations the spouse/partner often wants to ensure their children shares in the proceeds of the home under their Will.

Right of Occupation

With second marriages and de facto partners, how do we look after the surviving spouse, but ensure the children of the first partner to die receive their inheritance? The answer, a right of occupation / contract of mutual wills.

A right of occupation provides the surviving spouse/partner with the right to reside in the residence or another property for their natural life. On their subsequent death, the proceeds revert to the estate of the spouse/partner who died first to be distributed to their children or other beneficiaries.

Bill and Ben – the de facto men

Bill (55) and Ben (52) had both separated from their wives some years earlier and had entered into a relationship 5 years ago. Bill had 3 daughters and Ben had 2 sons from their previous marriages who they cared for dearly. Property settlements were completed with both of their respective ex-wives.

Bill and Ben wished to draw new Wills where they adequately provided for each other, but ensured their respective children received a share of their own estates. Bill and Ben each owned a half share of their home valued at \$700,000 as tenants in common in equal shares, while Ben had shares of \$400,000 and Bill had cash of \$50,000.

Bill and Ben drew mirror Wills as follows. They provided each other with a right of residence over the home and a small gift of \$50,000 each. The right of residence ensured that the survivor could remain in the home for their natural life and could sell the home and purchase a substituted residence or aged care bond using the proceeds. On the death of the second of them, each of their estates would then be distributed equally to their respective children. A contract of mutual wills was entered into (see below) to safeguard this.

Bill and Ben have ensured that the survivor is adequately looked after for their natural life and then their respective children will receive their inheritance from their father.

Kowalski v Kowalski

An important and often overlooked part of the above story is the right to sell the residence and use the proceeds towards an accommodation bond or purchase of a substituted residence. In the case of *Kowalski v Kowalski & Ors* [2012] QCA 234, an old widow was left with only a right to occupy the current residence but no power to sell it to pay for an accommodation bond. The Court held that this provision was insufficient for her maintenance and accordingly amended the Will to provide the right to use the proceeds from the home to pay for her accommodation bond.

This case and others have set the precedent that a mere right of occupation over the current home will not be sufficient for the maintenance of a long-term spouse/partner. The Will may likely be later amended, at great legal cost to the estate, to provide substituted residence rights. The amended Will may also not accord with the other wishes of the Willmaker. E.g. in this case the wife was also given a gift of \$100,000 from the estate for her general living expenses.

Contract of Mutual Wills

A contract of mutual wills is a contract between two Willmakers, providing that they will not later amend their Wills without the consent of the other Willmaker. On the first Willmaker's death, the second Willmaker cannot legally change their Will without breaching this contract as consent cannot be given. E.g. On Bill's death, Ben cannot change his Will to exclude the entitlements of Bill's children in favour of his own. This is an extra safeguard to protect both sets of children.

- Lindsay Stoddart, Director