

Estate Planning

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Acorn Lawyers Monthly Estate Planning Update



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Estate Planning Offers

Do you fancy a coffee? I am always interested in catching up with referrers new & old to discuss the estate planning requirements of your clients and how Acorn Lawyers can be of assistance. I will even buy the coffee!

For those wishing to learn more about estate planning I offer free in house seminars for you and your staff. Seminars can also be arranged for your clients. On request, we can also send you free copies of our estate planning booklet which contains useful information on estate planning.

Contact Hannah Swindells to arrange.



Family Provisions Claims (Contested Wills) – Has your client been left out of a Will? – Part 2

Our November issue raised such interest that we were encouraged to continue the topic.

Costs in Family Provision Claims

It is generally thought that the costs of any family provision (FP) claim (contested Will) will be borne by the estate. Unfortunately, some 'ambulance chasing' law firms do not carefully assess the merits of the claim and push on with litigation on this basis. Justice Gaudron in *Singer v Berghouse* said:

"FP cases stand apart from cases in which costs follow the event... FP cases generally depend on the overall justice of the case. It is not uncommon in the case of unsuccessful applications, for no order to be made as to costs... May even be circumstances in which it is appropriate for an unsuccessful party to have his or her costs paid out of the estate."

A new 2014 Court of Appeal case, *Chapple v Wilcox* warns against this assumption:

"[In FP claim] prima facie position is that costs follow the event.. unless the Appeal Court has good reason to think that some other result is more appropriate, costs should follow the event (loser pay costs)."

A claim brought without consideration of merit could result in your client paying the estate's costs if your client loses the case. Caution is paramount and litigation should be avoided. Conciliation should always be attempted from the outset in an attempt to achieve an early resolution and minimise costs. Failing this, the next step is always mediation.

Home Made Wills

If your clients' Will looks overly simple, not well drawn or insufficient to you, chances are it is! Wills should be reviewed by a lawyer every 3-5 years, 3 years for the elderly and those with large assets. Newsagent Will kits and other home-made Wills are a lawyer's gold mine. These Wills may require Court construction and can cost tens of thousands of dollars. In a recent Western Australian Supreme Court case, Master Sanderson said

"Homemade Wills are a curse... engaging the services of a properly qualified and experienced lawyer to draft a Will is money well spent."

For the sake of saving a few hundred dollars now to draft a quality Will, your client's beneficiaries could pay tens of thousands of dollars of their inheritance rectifying the Will in Court. In addition they will not receive the tax minimisation and asset protection advantages of a quality Will.

Good intentions alone do not suffice!

A suburban lawyer drafted a particularly poor Will and a \$1mil gift to charity fell into difficulty. The gift clause was ambiguous and the purpose of the gift could not be administered due to long-standing Council planning laws. The gift failed! The charity, a favourite to many, finally agreed with our Executor client and senior counsel that the gift had to be constructed by Court. Sadly, costs of about \$40,000 were incurred by both parties before the Court could validly establish the gift. Fortunately, the charity still received a substantial sum for its good work.

We are experienced in potentially rectifying poorly drawn Wills, while our Wills contain saving provisions to prevent gifts from potentially failing.

Difficulty of Blended Families

A wicked stepmother left her stepdaughter out of her Will which she made shortly after her second husband's death. There was a clear personality clash between our client, the stepdaughter, a social worker looking after children on the street, and the stepmother. Our client only wanted some sentimental items, but her stepbrothers, acting as Executors, refused to give her anything. On taking instructions, it became apparent her late father and the stepmother had promised each other that on the death of the second of them, the estate would be shared equally between the children of each marriage. The Executors argued that this promise needed to be in writing, but old case law provided that a single sentence around the dining room table, appropriately evidenced, was sufficient. The Executors compromised and some justice was achieved for our client.

A Contract of Mutual Wills is often essential in second marriages with stepchildren involved.

Merry Christmas from Acorn Lawyers

Our January newsletter looks at duty of care and of particular interest, why a lawyer might refer clients to a good financial planner. We thank you for your ongoing support in 2014 and wish you a joyful Christmas and prosperous 2015.

- Lindsay Stoddart, Director