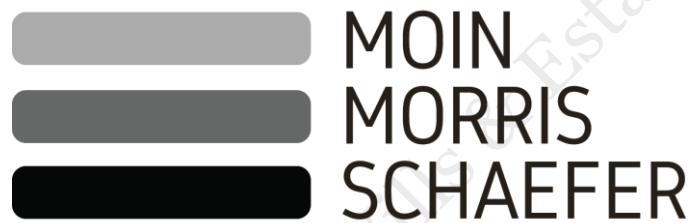


WILLS & ESTATES BULLETIN – ISSUE #9



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Changes at Moin & Associates

You might have noticed that we have a new name.

It is with the greatest of pleasure that we wish to inform you that Richard Morris and Chelsea Schaefer have joined Greg Moin as owners of the legal practice. Both Richard and Chelsea have worked for Greg for over 5 years during which time he has seen their passion for law, their ethical behaviour as lawyers and their care for clients.

While the ownership and the name of the legal practice has changed our offices and communication details are the same as are all of the familiar faces at the firm such as Cameron Cowley, Julie Parsons, Tammy Henshall, Trish Manttan, Liz Williams and Kate Simpson.



Wills in the technological age

1. When you think of Queensland, you don't always think of the words "technology" or "progressive". At least in my mind. You might get a different opinion if you talk to my colleague Cameron Cowley, who hails from north of the border.
2. But when it comes to admitting "documents" to Probate, the Supreme Court of Queensland is at the forefront in pushing the boundaries and traditional understanding of what constitutes a Will.
3. Probate is court recognition of a document as a final Will and the appointment of the executors, and accordingly allows the executors to deal with the deceased's assets.
4. In the case of *Nichol v Nichol (2017) QSC 220*, the presiding Judge admitted an unsent text message to Probate as a valid Will.
5. Queensland, like New South Wales, has legislation that allows the formal requirements for a Will to be dispensed with, if the Court is satisfied that the testator intended that the "document" to act as their Will. The formal requirements for a Will are that it must be:
 - (a) In writing
 - (b) Witnessed by two persons who were both present when the testator signed.
6. The text message said this:

"Dave Nic you and Jack keep all that I have house and superannuation, put my ashes in the back garden with Trish Julie will take her stuff only she's ok gone back to her ex AGAIN I'm beaten . A bit of cash behind TV and a bit in the bank Cash card pin 3636

MRN190162Q

10/10/2016

My will"
7. Seems straightforward right? No, it's not.
8. The testator committed suicide not long after drafting the text message. If he did not have a Will then his estranged wife (Julie – referred to in the text) would receive most of the estate. She contested the application by the deceased's brother and nephew (David and Jack – also referred to in the message) to obtain Probate for the text message.
9. When a Will is formally executed there is an automatic presumption that the person had the mental capacity to make the Will. There is no such presumption for "documents" like this text message.
10. As a result there was a lot of evidence filed about the state of mind of the testator.

11. It is also not easy to prove that a 'document' was intended to be a Will. The court must be satisfied that it wasn't a preliminary document or draft, wasn't incomplete or tentative in nature. This is determined on the evidence provided, on the balance of probabilities as to what was more likely.
12. The unsent text message was only found as a friend of widow had accessed the deceased's phone to determine who should be contacted and informed of his death.
13. The widow argued that because it wasn't sent, the text was only a draft and not "intended to be a Will without more". Much of the court's time was spent on this issue.
14. Ultimately the Court was satisfied that the deceased intended it to be his last Will, and was not a preliminary document. It was also satisfied that the deceased had mental capacity at the time.
15. The cost of these proceedings would have run into the tens of thousands, and more likely well into six figures. The widow had also foreshadowed bringing a family provision application to contest the Will if the text message was determined to be a Will. As such the cost of litigation to this estate was significant. The Court ordered that all of the costs were to be paid out of the estate, save for one minor matter. Most of the litigation could have been avoided with a proper estate plan, possibly all of it.
16. Informal wills ought to be limited to urgent wills in exigent circumstances. In all circumstances that it is possible, a formal will which accords with the requirements of should be prepared.

Richard Morris

August 2018

Accidently British

1. Please do not be alarmed, this article is not going to discuss the family backgrounds of certain former and current Federal politicians.
2. It is more a warning that trusts can change residence comparatively more easily than you might expect.
3. In Australia, there are some in the estate planning world that are seeking to set up trusts such that the laws of South Australia apply. This is not due to a love of Rundle Mall, but rather a quirk of their trust laws which allow trusts to operate for perpetuity rather than the 80-year time limit that applies in the rest of the country.
4. But rather than a voluntary choice, the jurisdiction of a trust may change unbeknownst to the trustees, and advisors must be cognizant of the risk of this event.
5. In our experience it is not unusual to have executors or administrators of estates that are based overseas.
6. For the purposes of UK tax law, if the deceased was living in Australia and all the assets were in Australia but the executors live in the UK then the estate will be deemed to be a UK resident for tax purposes. If one of the executors was a non-UK resident then the trust wouldn't be a UK resident for tax purposes.
7. For accountants, lawyers and advisors working with deceased estates it is vital to always keep in mind the potential for cross-jurisdictional issues.
8. Through our worldwide network of Trust and Estate Practitioner (STEP), Moin Morris Schaefer can assist advisors in obtaining the right foreign professional to help navigate these complex problems.

Richard Morris

August 2018

Our Estate Planning Team



Cameron Cowley

- Wills
- Testamentary trusts
- Trusts
- Superannuation including SMSFs
- SMSF nominations
- Taxation issues of estate planning
- Deeds of family arrangement
- Corporate succession



Greg Moin

- Wills
- Powers of Attorney
- Appointment of Enduring Guardians
- NCAT Reviews
- Farm succession
- Advanced Care Directives
- Corporate succession
- Aged Care Law
- SMSF nominations



Richard Morris

- Wills
- Deceased Estates
- Family Provision Claims
- Complex Estates
- Foreign Wills
- Capacity claims
- Informal Will cases
- SMSF nominations
- Special Grants
- Probate/ Administration

We stand by all of the legal information in this bulletin. However it is important to understand that it is not legal advice for you. Advice must be tailored to your circumstances, and every client's circumstances are unique. If you try to apply the above information to your circumstances it may not lead to the outcome you seek. We would be most happy to provide tailored advice for you suited to your circumstances.