WILLS & ESTATES BULLETIN – ISSUE #13

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Handwritten amendments to your will – a last resort

1. From time to time a person makes handwritten notes on their will, or a copy of their will, and dies before they ask their lawyer to incorporate those amendments. The Court then has to determine whether the willmaker intended those notes to formally amend their will.

2. In the case of Estate of the late James Sundell [2019] NSWSC 1108, James Sundell's will was amended by Mr Wooldridge, a long-time business associate of the deceased, in his presence and at his direction. The son of the deceased, also an, executor had brought an application for probate of the will, not including the hand amendments.

3. The amendments were made by hand, were not witnessed, but were initialed by the deceased.

4. Ordinarily hand amendments to a will have no legal effect unless properly executed and witnessed in accordance with the Succession Act.

5. Section 8 of the Succession Act allows the Court to dispense with the usual rules for how a will, or an amendment to a will, must be witnessed. The Court is permitted to inform itself how it sees fit as to the intentions of the deceased. Ultimately the enquiry by the Court is not a technical one, but a review of whether the amended document embodied the testamentary intentions of the deceased.

6. The Court heard evidence from a number of witnesses and closely examined the circumstances surrounding the amendment to the will. The plaintiff in this case, who stood to gain under the will if the hand amendments were not admitted to probate, had apparently been in the middle of a family law proceeding at the time the amendments were made. He gave evidence that he had asked his father to amend the will to improve his own position in the family law litigation, and on this basis, did not actually reflect his father's intentions, but instead his own.

7. The Court looked at the structure of the family business, the roles that different people played in that business, and the deceased's apparent motivations at the time. The Court heard evidence that it is likely the deceased did want the changes to his will to have legal effect, because the deceased is said to an associate that the deceased was concerned about his son's relationship breakdown and the effect it could have on the business. The Court heard evidence from multiple parties that the deceased intended to change his will for this purpose.

8. A witness to the deceased making the amendments was able to explain to the Court the exact context of the amendments. Combined with the thorough understanding the Court had gained of the business and affairs of the deceased, this gave the Court confidence that the hand amendments were sensible and logical for the deceased to make, and did in fact embody the deceased's intentions.

9. The case demonstrates that in the case of handwritten amendments, the Court will look closely at:

   (1) the circumstances of the amendments being made; and, if relevant,

(2) the general financial and business circumstances of the deceased's estate at the time;

in order to determine what the will maker intended.

10. Assembling and presenting this evidence is a cumbersome task on the person trying to prove the validity of the amendments.

Conclusion

11. The Judge was able to be satisfied in this case that the amendments embodied Mr Sundell's intentions. However the facts were favourable in that the person who made the amendments was a witness and still living and able to give direct evidence to the Court. If a person makes handwritten amendments to their will without a witness, and then dies, it will be much more difficult to have those amendments approved by the Court. In such case, the parties will have a high evidentiary burden to demonstrate that the amendments were the testamentary intentions of the will maker.

12. The uncertainty of hand amendments to a will means that it is highly unusual for a lawyer to hand amend a will. It is generally only done at a hospital bedside or another venue away from printers. It is simply too easy to quickly amend and reprint a will to countenance hand amendments in the office.

13. Another option rarely used anymore is codicils. A codicil is a document made to amend a will. They were in the days before computers regularly used to make minor amendments to a will without having to retype the whole will. But now a document can be

14. Our recommendation is that all amendments to a will should be done with the assistance of your lawyer. This will ensure that the document is able to be quickly and cost effectively admitted to probate without the expense, delay and uncertainty of Supreme Court proceedings. Don't roll the dice on hand amendments to your will.

Cameron Cowley

February 2020.

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PCG, CGT and the ATO - making life easier for accountants and advisors

1. In June last year, the Australian Taxation Office released the *Practical Compliance Guide 2019/5* (the PCG).

2. For advisors that work in the area of deceased estates, I am sure that you will be familiar with the capital gains tax (CGT) exemption for principal places of residence, provided that the property is sold within 2 years of the date of death.

3. The requirements were:

    (1) The deceased used the property as their principal place of residence OR the property was acquired prior to the introduction of CGT (20/9/1985);

    (2) The property wasn't used to produce assessable income just before they died (i.e Airbnb)

    (3) The property is sold (sale completed, not simply an exchange of contracts) within 2 years of the date of death of the deceased – by either the estate or by the beneficiary that inherited it.

4. Of course, not every estate administration was simple and getting a property onto the market and sold within that time frame can be impossible.

5. This resulted in some executors (or administrators) applying for extensions from the ATO. The ATO has a discretion to provide an extension but to make matters simpler, the PCG has been released for this purpose.

6. The result is a "safe harbour" whereby there is an automatic extension of up to 18 months – **but** there are conditions that have to be met.

7. To qualify for the safe harbour, you must satisfy the following criteria:

    (1) During the first two years after the death of the deceased, one of more of the following has to have occurred:

        (a) A challenge to the Will

        (b) A dispute or challenge to the ownership of the property;

        (c) A life or equitable interest given in the Will delays the disposal of the dwelling;

        (d) The complexity of the deceased estate delays the completion of the administration;

        (e) Settlement of the contract of sale of the property is delayed or falls through for reasons outside of your control;

    (2) The property was listed for sale as soon as practically possible after the above circumstances were resolved;

(3) The sale occurred within 12 months of listing;

(4) None of the following were part of the reason for the delay:

(a) Waiting for the property market to pick up;

(b) Renovating or refurbishing the property;

(c) Inconvenience on the part of the executor or trustee to organize the sale;

(d) Unexplained periods of inactivity on the part of the executor in administering the estate.

(5) The extension period is less than 18 months.

8. Interestingly, the ATO lists circumstances where the children of a deceased being unsure that a Will exists as being a significant contributor to "complexity of the deceased estate" (paragraph 1(d) above) in one of its examples in the PCG. In my view this is a little on the generous side, but I never complain when the ATO is generous.

9. Obviously this is fantastic for any advisor who has had the experience, or is currently enjoying the experience, of dealing with an estate that has become the subject of a will challenge.

10. In my experience, such claims are *very rarely* made at an early stage of administration, and most claims are lodged just prior to expiration of the 12 month limitation period. Even if such a claim is settled at mediation, this can be 6 months after the filing of the claim. That leaves about 6 months (at best!!) to get a property ready for sale, a contract negotiated and the sale completed.

11. The safe harbour is therefore a terrific addition to your arsenal in dealing with CGT.

12. If you don't qualify for the safe harbour, there is always the ability to seek a private ruling from the ATO – again at it's discretion.

Richard Morris

February 2020

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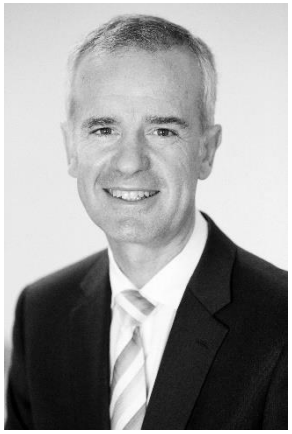
Our Estate Planning Team



Cameron Cowley

- Wills and Estate Planning
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- Taxation issues of estate planning
- Deeds of family arrangement
- Corporate succession

Greg Moin

- Wills and Estate Planning
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Richard Morris

- Wills and Estate Planning
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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.