

In the Loop - Spring/Summer 2017-2018

The Hicks Oakley Chessell Williams Newsletter

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Introducing Hayley Hunter - Senior Associate



We are very pleased to introduce you to Hayley Hunter - Senior Associate

Hayley joined the firm in September 2017 as a Senior Associate. Prior to joining, Hayley worked at one of Victoria's leading trustee companies giving her unique insight into the areas of guardianship, administration, and trust management.

Hayley works closely with both Lachlan Vallance in Wills & Estates and Elias Hanna in Family Law.

How your estate will be distributed if you die without a valid Will - new legislation

Recent changes to succession laws will have long-reaching impacts on estate planning in Victoria. Here we take a look at the recent changes and how they will impact you, your family, and your assets.

Intestacy

On 1 November 2017, new legislation came into effect which will affect the way your estate is distributed if you die without a valid Will. This is known as dying 'intestate'. In the absence of a valid Will, your estate is distributed according to legislation as follows:

- if you have no children and leave a spouse, your spouse will receive your entire estate
- if you have children with your spouse, your spouse will receive your entire estate
- if you have children who are not your spouse's children, your spouse will receive \$451,909 (indexed at CPI and a figure that will increase annually) and
 - ◇ 1/2 of the balance goes to your spouse; and
 - ◇ 1/2 of the balance goes to your children equally
 - ◇ however, if your estate is less than \$451,909, your spouse will receive your entire estate.
- If you leave no spouse and no children and grandchildren, then your nearest next of kin will stand to inherit.

'Spouse' is a broad term that now includes:

- husband
- wife
- registered de facto partners (also known as registered domestic partners)
- de facto partners and same sex partners with whom you have been living with for at least two years
- de facto partners of less than two years but with children
- registered caring partners

In the absence of a spouse, child, or grandchild, your estate will pass to your nearest next of kin in the following order: parents, siblings, grandparents, aunts/

uncles or cousins. This could mean that a distant relative with whom you have little or no contact stands to inherit your estate in the place of a loving partner, friend or chosen charity. For this reason, it is essential that you make sure your Will is up to date and valid.

In addition to the above, there are now specific provisions setting out how an estate is distributed in the event of multiple partners, and provisions which permit a spouse to elect to keep the matrimonial home.

Ademption

Another new change to Victorian legislation are the changes to the laws of ademption. Where a person gives a specific asset (say, a house) under their Will, but the asset is sold or disposed of prior to their death, the gift is said to be 'adeemed' and the beneficiary will receive nothing. Often the transactions to dispose of or sell the assets in question are carried out by attorneys under a Power of Attorney. A common example of ademption is set out below in our case study.

Case study

For example, Anne owns a house which she gifts to her daughter, Carla, under her Will. Her son, Brian, stands to receive the residue [balance] of Anne's estate. Prior to her death, Brian, acting as Anne's attorney, sells the house to pay for a refundable accommodation deposit in a nursing home for Anne. Upon Anne's death, Brian will receive the whole estate as the property has been adeemed and now forms part of the residuary estate, which Brian Inherits. Carla will not receive anything from the estate.

Under the new legislation, because Brian sold the house acting as Anne's attorney, Brian must account for the proceeds to the executor of Anne's estate and Carla now has a right to receive these, including any interest or income.

Alternatively, either Brian or Carla could apply to the Court if they believed that they had been unfairly disadvantaged by virtue of the ademption rules.

These type of applications are complex in nature and legal advice should be sought early. For more information contact our Wills and Estates team on 9550 4600.

Hayley Hunter - Senior Associate



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Changes to Remuneration for Executors & Administrators - Court now has the Power to Review



Recent changes to the *Administration and Probate Act 1958* came into effect on 1 November 2017 and impact the way all executors can charge fees and commissions for estates.

Some of the changes impact Wills made after 1 November 2017, and some impact the estates of people who die after 1 November 2017, irrespective of when the Will was made. The overall impact of the changes is that the Court is now empowered to scrutinise the way executors and administrators of estates charge their fees and commissions, whether or not those executors are professionals, such as solicitors or accountants, or a family member.

What are the changes?

- **The Court can review commissions, fees and expenses**

- ◇ For all persons who die on or after 1 November 2017, the Supreme Court is entitled to review and reduce fees, charges and commissions charged by executors and administrators of their estate, including any disbursement or expense for which the executor claims reimbursement.
- ◇ The Court can decide to carry out such review (e.g. where an unrelated application has been brought before the Court, such as a Testator's Family Maintenance Claim), or an application can be made by an interested party such as a beneficiary or creditor.
- ◇ The Court's power applies even if the Will fixes the commission.

- **Informed consent of a will-maker**

- ◇ For all Wills executed on or after 1 November 2017, an executor cannot be paid under a remuneration clause in a Will unless the will-maker gave informed written consent to the clause before the Will was executed.

- **Consent of beneficiaries**

- ◇ For all Wills executed on or after 1 November 2017, an executor can be paid a commission or fee in the absence of a charging clause if:
 - * All beneficiaries have full legal capacity (i.e. are 18 years or over and do not suffer from any impairment that might impact their ability to make reasonable decisions);

- * Relevant information about the beneficiaries' rights in relation to the estate, commission and fees has been provided to them; and
- * They have provided their informed consent.

- **Executors can charge fees in lieu of commission**

- ◇ Fees can be charged in lieu of commission if:
 - * The fees are less than any commission amount;
 - * The fees are not charged at a professional rate; and
 - * The fees are distinguished from any fees charged for professional services.

What are the practical implications?

The impact of these changes is wide-reaching; it will impact not only lawyers who frequently act as executors but any other professional or lay person who takes on this role and is expecting to receive a fee or commission. Special care must be taken to ensure that informed consent to commission or fees is given by either a will-maker at the time the Will is prepared and an appropriate charging clause included in the Will, or informed consent is obtained from the beneficiaries of the estate upon death. The legislation sets out in detail the information that must be provided to beneficiaries, but does not set out what information must be provided to will-makers.

Bear in mind that even if informed consent is given (by either a will-maker or beneficiaries), the Court may still seek to review the fees, commissions or expenses for which the executor seeks to be paid.

Practically speaking, it will be interesting to see how the Court exercises its powers in scrutinising expenditure by executors, such as funeral and memorial expenses. Previously, these were expenses for which an executor could reasonably expect to be reimbursed irrespective of the arrangements made. Moving forward, executors should take care in ensuring that expenditure from the estate is reasonable and warranted having regard to the size of the estate, the wishes of the family and any expressed wishes of the deceased.

For further information or clarification about how these changes might impact you, please contact our Hayley Hunter or Lachlan Vallance on 9629 7411.

Hayley Hunter - Senior Associate



Hicks Oakley Chessell Williams wish you Season's Greetings and Best Wishes for a safe and happy New Year.

Please note that our offices will be closed from 1.00 pm Thursday 21 December 2017 and will reopen at 8.45 am Monday 8 January 2018

Title Insurance - Protection for Property Purchasers & Owners

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When purchasing a property it is important to understand that you may unknowingly inherit 'latent' or hidden defects in the title which may cause you loss or affect your ownership.

Title Insurance is a specialised type of insurance which provides cover in relation to certain unknown and hidden risks that may exist at the time of purchase. These risks may only present themselves after you take ownership of the property, such as:

- Enforcement action by a Local Authority in relation to structures illegally built or altered on the property by a previous owner or structures which do not comply with existing approvals for which you become liable as the new owner (maximum of \$160,000 to be provided for a claimable event);
- Any adverse matters that would have been revealed in an up to date survey report, such as boundary defects or encroachments (for properties with a land area of 50 acres or less);
- Forced removal of a structure illegally built by a previous owner over an adjoining boundary;
- Non-compliance with zoning and planning laws and conditions;
- Non-compliance with easements and covenants which burden your land;
- Non-compliance with By-Laws or other obligations which are registered on your title; and
- Complete loss of legal ownership due to a fraudulent sale or mortgage of your property.

Title Insurance is a different kind of insurance:

- One-time premium provides protection forever
- No excess payable on claims
- No-fault claims process means you don't have to prove fault or negligence – you need only prove that you have suffered actual loss based on cover that the policy provides
- 200% 'inflation' allowance for increase in the value of the property over time

Your practitioner's advice combined with Title Insurance

Title Insurance does not replace the role of your practitioner. The combination of Title Insurance with your practitioner's professional advice will provide the most comprehensive protection against risks which may affect your legal ownership of your home.

If you already own your home, you can obtain the protection that Title Insurance provides by applying for an Existing Owner policy.

Please note that this information is provided solely for general information purposes only. It is not intended to be a complete description of all the terms, conditions, exclusions applicable to the title insurance product and does not constitute legal advice. You should contact the title insurer directly for specific advice in relation to the title insurance product and for a copy of a sample policy.

If you are interested in finding out more about Title Insurance and whether it is appropriate for your circumstances please contact:

Sarah Lindsey - Principal Lawyer, Property and Conveyancing on 9550 4600.



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