

# Heir tight.

**de GROOTS**  
wills and estate lawyers

The television series, "Modern Family" is a humorous yet serious look at some of the issues encountered by families today. It has put 'out there' dilemmas, dramas and issues that have, until recently, been ignored or little spoken of in the media. Grappling with these issues often is difficult for families and our clients appreciate the sensitive way that we approach their family issues.

In this edition we review the approach of NSW legislation to some modern families. We also look at tax changes that have led to testamentary trusts being more advantageous than ever. Many people opt for a simple will rather than incorporating a testamentary trust(s) into their wills – it is important to take account of the tax benefits that could flow to your family by your investment in more sophisticated and appropriate estate planning.

As we head towards the end of another year, it is timely to take stock of what we need to do before 2013 is upon us. We again thank you for your support during the past financial year and we look forward to continuing to enhance our services to you.

**Phillip McGowan**  
Director

## Is your will 'relatively' sound?

With the evolving face of the 'Modern Family', the law has had to adapt to recognise the many forms of the family unit.

Of increasing relevance, particularly in succession planning and deceased estate disputes, is the court's approach to the concept of family and parental rights of same sex and heterosexual couples of children conceived by in vitro fertilisation or carried by surrogates.

The 2002 decision of *Re Patrick* [2002] 28 Fam LR 579 recognised the diversity of family units, including same sex couples and the use of technology in the conception of children. The decision considered the concept of 'family' as well as 'parent' under the *Family Law Act 1975* (Cth).

Major reforms which were passed by federal parliament in 2008 increased the recognition of same sex relationships, including extending the definition of de facto relationships to same

sex couples in federal laws. There was also an extension of the definition of 'parent' and 'child' in certain federal laws to include lesbian parents who have a child through the use of assisted reproduction, and in more limited cases, through surrogacy.

The rights of same sex couples to enter into registered relationships were recognised in New South Wales through the implementation of the *Relationships Register Act 2010* (NSW). This recognition has strengthened the position of same sex couples who may become involved in a dispute regarding the estate of their deceased partner with respect to the intestacy rules and being entitled to inspect a will.

Such changes have significant ramifications from a succession planning as well as estate litigation perspective.

Clients who may be leaving assets to children in same sex relationships should consider implementing similar protective measures when undertaking succession planning as they would for children in heterosexual relationships.

Another key issue to be addressed in succession

planning is the provision for future children where the child is to be carried by a surrogate, given the particular rules governing the ability to transfer parentage of the child and sever the legal relationship of the gestational mother.

In New South Wales, the *Surrogacy Act 2010* (NSW) governs the ability of a single person, same sex couples and de facto partners to enter into "non-commercial" surrogacy arrangements. The parties to a surrogacy arrangement can apply to the Supreme Court of New South Wales for a parentage order.

Any succession planning undertaken in contemplation of a child carried by a surrogate should carefully consider the particular parentage issues distinct to surrogacy.

This area of law is continuing to evolve. If you would like more current information on these topics please let us know.

**Luke Friedman, Senior Associate, Member of our Estate Planning Team**



## Inaugural de Groot's Address, Sydney

The inaugural de Groot's Address, given by Dr John de Groot, took place on Wednesday 12 September 2012 at the State Library of New South Wales.

Dr de Groot's presentation on the topic "Family Feuds: The Problems and Risks", covered a range of issues confronting families.

Some of the key learnings were:

- Choice of executor and trustee is very important as the wrong choice may lead to conflict – even just due to the personality of the person appointed.
- Families where there has been a level of estrangement may be more prone to dispute but there are preventative strategies that can be employed to minimise the risks.
- It is important to consider the succession to the control of family trusts or companies in order to avoid unintended or inequitable consequences for family members.

- Carer arrangements within a family need to be carefully considered and documented.
- The terms of settlement and settlement deeds may themselves become the subject of disputes so it is important to carefully consider and take advice on issues that may arise post-settlement.
- The vulnerability of the elderly and infirm is an increasing problem and a growing area of dispute for families.
- "Prevention is better than cure" and often this involves the collaboration of a range of specialist advisors to enhance, preserve and effectively transfer a family's wealth.

**Phillip McGowan, Director**

## Cyber Security

Few people consider what will happen to their emails, facebook account and other online accounts when they die.

As the policies of online companies vary wildly, important information or records, including precious photos, can be lost and potentially embarrassing content revealed.

We recommend that you record details of all online accounts, including updated passwords and login details, and your wishes as to what should happen with these accounts on your death. We provide our clients with a dossier for this purpose. This information should be stored safely or provided to someone trusted by you.

**Monica Ross-Maranik, Member of our Estate Administration Team**



## Need to review Family Trust deeds

Since the first decision in Bamford v Federal Commissioner of Taxation ("Bamford"), there has been a lack of clarity regarding the way distributions from discretionary family trusts should be taxed. Streaming of income and capital gains to beneficiaries who can most cost effectively digest the taxable impact of such distributions is a key reason for having such a trust.

The situation became clearer on 29 June 2011 when the Tax Laws Amendment (2011 Measures No 5) Act 2011 was passed. Where the trust deed categorises capital gains as income, they must be distributed before 30 June in the given financial year.

The law requires that beneficiaries need to be specifically entitled to income or capital from specific assets if the income is to be effectively streamed to them. This means that the combination of previous resolutions and old deeds are unlikely to work effectively.

Taxpayers had reason to be anxious that amendments to trust deeds could have negative tax implications. However, in June 2012, the Australian Tax Office issued draft Taxation Determination TD 2012/D4 which sets out when changes to a trust may give rise to CGT consequences. The determination indicates that a valid amendment of a trust under an existing power in the trust deed will not generally have CGT implications.

We suggest that, if it has not already been done, now is the time for clients to review their trust deeds.

**Donal Griffin, Director**

## Testamentary Trusts – even more effective since 1 July 2012

Since the tax free threshold increased from \$6,000 to \$18,200 effective 1 July 2012, people with children or grandchildren, now have even more reasons to consider using testamentary trusts as a part of their estate planning.

The following example illustrates the advantages of establishing a testamentary trust compared with a traditional will provision.

Assume a husband dies leaving a dependant wife and three infant children. His estate is valued at \$1,000,000.00. If this were invested at (say) 8%, it would generate an income of \$80,000.00.

**Example 1: The husband's will leaves everything to his wife. Her tax position is therefore:**

Beneficiary	Income	Tax
Wife	\$80,000	\$17,547

**Example 2: The husband's will establishes a testamentary trust controlled by the wife and providing for the wife and three children to be beneficiaries. The family's tax position might be:**

Beneficiary	Income	Tax
Wife	\$20,000	\$ Nil
Child 1	\$20,000	\$ Nil
Child 2	\$20,000	\$ Nil
Child 3	\$20,000	\$ Nil
<b>Total</b>		<b>\$ Nil</b>

In example 2, there is a tax saving of \$17,547 when compared to example 1 which shows what happens if no trusts are used. It is important to remember that this level of saving is annual and may be possible for many years.

*(Note: Tax calculations based on rates effective as at 1 July 2012. Medicare levy is not considered for these purposes. Although the income amounts in example 2 are above the tax free threshold of \$18,200, no tax would apply as a result of the low income tax offset.)*

**Donal Griffin, Director**

## Asset Protection for Company Directors

The decision in ASIC v Healey [2011] FCA 717 last year found that the Centro board of directors had a responsibility to understand accounting standards when signing off on financial statements.

The Australian Financial Review recently quoted a survey of 210 directors and 175 accountants by the Financial Reporting Council which found that almost half of company directors rate their knowledge of important financial analytical skills as only fair to poor.

Directors of companies have an increasing level of responsibility and the Courts are more commonly holding individual directors responsible for losses arising from acts of companies based on decisions of directors. Resigning as a director may not remove the risk as liability may arise many years later. Fortunately, there are some steps that company directors can and should take to manage their exposure in this regard. If you would like more information, please contact us.

**Monica Ross-Maranik, Lawyer**

SYDNEY: Level 5 Suite 4 – 66 Hunter Street, Sydney, NSW 2001 Ph: +61 2 9101 7000  
BRISBANE: Level 7 – River Quarter, 46 Edward Street, Brisbane, Qld 4000 Ph: +61 7 3221 9744