



PUBLIC TRUSTEE
FOR THE AUSTRALIAN CAPITAL TERRITORY
WILLS • ESTATES • POWERS OF ATTORNEY • TRUSTS

Issue 3 ■ August 2015

PROPERTY MATTERS

"This issue deals with upcoming events at the Public Trustee for the ACT (PTACT) and concentrates on what happens to our property and assets"

WELCOME

Welcome to the third edition of 'Going Public'.

This issue deals with upcoming events at the Public Trustee for the ACT (PTACT) and concentrates on what happens to our property and assets in the event of death, executorship, administration, financial management, the effect of the *Family Provision Act 1969*, challenges to a Will and other related information.

We will provide insights, useful facts and information on property and estate matters prepared by PTACT staff members, proposed changes to laws and information about forthcoming events. We will also bust some myths about property matters and the role of the Public Trustee.

Our next issue in February 2016 will deal with Philanthropy and your Will.

We trust you find Going Public interesting and informative.

Andrew Taylor
PUBLIC TRUSTEE



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PTACT What we do

- **Wills** - Wills for ACT residents who appoint the Public Trustee as Executor.
- **Financial Management Services** - Under order of the ACT Civil and Administrative Tribunal.
- **Estates** - Permanence, trustworthiness and professionalism are vital in the choice of an executor.
- **Powers of Attorney** - Power of Attorney services (financial) for Will clients where you appoint the Public Trustee as attorney.
- **Trusts** - Act as trustee under court order, will or deed including Special Disability Trusts for those unable to manage their funds.
- **Unclaimed Money** - Pay claims associated with certain unclaimed money.
- **Confiscated Criminal Assets** - Administer forfeited assets restrained.
- **Official Visitors** - Provision of administrative services to Official Visitors.
- **GreaterGood** - Our own Charitable Foundation enables Canberrans to establish a charitable fund of their own.

WE ARE CHANGING...

In our quest for continuous improvement -

- We will soon be launching our online Unclaimed Money register and claims system.
- Our business system 'TACT' is in the final stages of upgrade to the latest version.
- GreaterGood, our own charitable foundation, reached \$16M this year.
- In the event of disability, we can now come to you to prepare your Will on the spot.
- We now provide free Wills for Aboriginal and Torres Strait Islander persons.
- We now use iPad tablets when visiting clients or attending Tribunal to take notes, photographs, and research.

Join Us in Celebrating Wills Week 2015

Wills Week 2015 will be celebrated from 18-24 October 2015. During Wills Week, PTACT will hold daytime and evening seminars on the importance of having an up to date Will and Enduring Power of Attorney.

The seminars will take the form of panel presentations specifically targeting the often neglected issue of planning ahead in respect to Enduring Powers of Attorney and Wills.

All persons are invited to attend these presentations where a free Will consultation and Information Packs will be distributed.

The seminars will be held on Tuesday 20 October and Thursday 22 October at locations and times to be notified in the media in advance of the seminars. The seminars will take the form of a panel presentation specifically targeting the often neglected issue of planning ahead in respect to Enduring Powers of Attorney and Wills.



When you acquire (real) property you have the choice of three different forms of legal ownership, each with its own implications upon your death.

Sole proprietor

This form of ownership is usually chosen by single people or by corporations. In a sole proprietorship, one person owns that property. Upon the person's death the property forms part of their estate and is either sold or transmitted to their beneficiary.

Joint tenants

This is usually preferred by persons in a relationship. A joint tenancy can involve two or more owners. In this form of ownership, the joint tenants together own the whole of the land. The ownership is not divided into shares for each owner. Upon the death of a joint tenant, the remaining joint tenant/s owns the whole of the land and must register a Notice of Death at the Land Titles Office to effectively remove the deceased as a joint tenant.

Tenants in Common

This form of ownership is preferred by persons who prefer that their property interests become part of their estate upon death. A tenancy in common involves two or more persons holding the property in specified shares. The shares may be equal or unequal. On the death of one of the owners, their share is transmitted in accordance with their wishes as part of their estate.

What is a Caveat?

A Caveat is a form of statutory injunction which effectively prevents the registration of any dealing with specified property under the *Land Titles Act 1925*.

In the ACT, if a person has a caveatable interest, they may lodge a Caveat application with the Land Titles Office if they are able to claim an interest which runs with the land. It can only be removed if it is formally withdrawn, lapses or is cancelled or removed by the Registrar-General.

In-going Property Report (tenant taking up residence)

A condition report is completed by either the managing agent or the landlord if renting privately and is a detailed assessment of the state of repair which includes detailed photos and the general condition of the property. The managing agent or landlord must complete the report and provide the tenant with two copies within one day of the tenant taking possession of the property.

The tenant can accept the report or make comments and should return one signed copy of the report to the managing agent within two weeks. The report is a very important document and affects the release of the rental bond at the end of the tenancy agreement.

You may be able to claim depreciation on an investment property

The Australian Taxation Office allows property investors to claim a deduction related to the building and equipment items contained within it. The deduction can be claimed by any owner of an income producing property. This deduction essentially reduces the after-tax cost of owning an investment property - meaning you pay less tax!

PTACT'S PROPERTY PORTFOLIO IS VALUED AT \$43 MILLION

PTACT is responsible for managing real estate on behalf of trust and estate beneficiaries, and financial management clients. The current portfolio consists of 96 properties with a value of around \$43 million and represents a significant area of responsibility. There are a variety of reasons which lead to the Public Trustee's involvement with property and this is reflected in the portfolio.

Many properties become vacant and require preparation for sale as in the case of an estate or financial management client entering residential care. There are also investment properties managed by agents and long term residential trust or estate owned properties.

The diverse requirements of caring for these various situations range from ensuring all properties are adequately covered by insurance and identifying maintenance issues to getting the best outcome when selling a property. Liaising with real estate agents and tradespersons, making property visits and coordinating the office administration for property matters are everyday tasks of our Property Officer.

MEET OUR PROPERTY OFFICER



Kristy White commenced with PTACT on 16 March 2015 following a career of twelve years in Property Management in the private sector. Kristy has extensive experience in the private sector in managing a large portfolio of properties, maintaining a high level of customer service and managing a team of Property Officers.

As an investment property owner herself, Kristy understands the needs and requirements of property investors.

MYTHS BUSTED

MYTH - *All land in the ACT is real estate*

BUSTED - Untrue, technically, all land in the ACT is leasehold, although for ownership purposes it is treated in the much the same way as real property. Real estate is a term that relates to freehold ownership in which the owner owns the land whereas in the ACT's leasehold system, the owner owns a lease of the land from the Territory. Leasehold property is regarded in law as personal property and not real property.

MYTH - *Making money on property is a sure thing*

BUSTED - Unfortunately this is not the case, a rising market doesn't mean all property will grow in value – some cities and towns will go up while others will go down. Even if a property has risen in value, it still doesn't mean it has delivered an acceptable return.

MYTH - *Routine Property Inspections are a waste of time*

BUSTED - Regular routine inspections ensures that your tenants are looking after the property. It's also a great way to spot potential maintenance or discuss requests or current issues with your tenants.

GOING PUBLIC PROPERTY MATTERS



"We start accumulating assets early in our adult life. However, it can be a slow accumulation and it often takes a milestone event such as marriage, birth of a child or purchase of a home to bring thoughts of a Will to mind"

HOME OWNERSHIP AND YOUR WILL

The family home is the major asset for most people. However, it is surprising how home buyers make detailed arrangements when buying real estate but neglect to review their Will at the same time. On the same day as the purchase, home owners will carefully ensure they have insurance against fire, storm and malicious damage but overlook the next step of making provision for succession in the event of death.

We start accumulating assets early in our adult life. However, it can be a slow accumulation and it often takes a milestone event such as marriage, birth of a child or purchase of a home to bring thoughts of a Will to mind.

How you hold the title to your property may well affect the way it devolves upon your death. For instance,

property held as joint tenants does not follow the terms of the Will but will pass directly to the surviving joint tenant. But this is no good reason to delay making a Will which should be drafted to cover most possibilities including the consequences of simultaneous death of partners in a relationship.

The laws of intestacy vary between jurisdictions. In the event of simultaneous death, ACT law will treat jointly held real property as if it were held as tenants in common in equal shares thereby devolving through each person's estate while New South Wales will presume the older to have died first with resultant devolution through the younger person's estate. Results can be markedly different where the laws of intestacy are relied upon and a suitably drafted Will is recommended.

FAMILY PROVISION ACT 1969 - CHALLENGES TO YOUR WILL

At the time of making our Will, we would like to think that our choice of beneficiary is ultimate and could not be overturned. By nominating our beneficiaries, we declare who we wish to benefit from our estate and expect this to be final.

However, in reality, certain members of the family may contest the terms of our Will in Court. Under the *ACT Family Provision Act 1969*, claims for variation of the Will may begin in the Supreme Court up to six months from when probate is granted in a deceased estate.

Persons entitled to apply are the deceased person's spouse, children, a former spouse or step child (if maintained by the deceased at time of death) and also a grandchild or parent in certain cases.

'Spouse' includes a civil partner or an eligible partner (whether or not of the same gender) who has resided with the deceased as a couple in a genuine domestic relationship for over two years, or who is the parent of the deceased's child.

Persons who have responsibilities for the maintenance of others should fully consider those responsibilities when making a Will to avoid any costly challenge to the Will after death.

If one person is to be favoured due to disability, hardship or other reason, this is best discussed and disclosed to others during the Will maker's lifetime for understanding and acceptance.

Circumstances that could invite a challenge to a Will are best avoided and a well considered professionally drafted Will is recommended.



Common Property Pitfalls

- Failing to keep your will, title deeds and other related information in a safe place that is easily accessible if required.
- Failing to have up to date insurance cover on your properties.
- Failing to keep up to date with repairs and maintenance on your properties.
- Failing to have a full understanding of your financial situation before committing to purchase a property.
- Know what you are buying, research the area and surroundings, inspect the property more than once and at different times.

DEATH DUTIES - DEAD AND GONE

In 1978, Australia took the popular step of abolishing death and gift duties. From there, other countries have followed including New Zealand, Canada, Sweden, India, Russia and Singapore.

Death duties were despised but the spectre of estate and succession duties did encourage citizens to consider their will and to plan their estate. With that concern removed, it is easy to get on with life and to overlook the essential consideration of making a will.

Nowadays, people plan their assets for living rather than death and are more likely to engage the services of a financial planner. Most financial planners will address the desirability of a will and will recommend regular reviews to ensure that your intentions and the interests of your beneficiaries are protected.



CAPITAL GAINS AND YOUR WILL

In the administration of deceased estates, Capital Gains Tax (CGT) has been referred to as a de facto death duty. While this is not correct, there are CGT issues in estates that are worthy of our attention.

Death, in itself, does not necessarily result in GST however, death can change the CGT status of assets. When a beneficiary acquires an asset in a deceased estate, the acquisition date is the date of death. Thus pre-CGT assets, (those acquired prior to 19 September 1985 and exempt in the hands of the deceased), become taxable assets in the hands of the beneficiaries. Accordingly, the acquisition value will be the market value at date of death. Any growth in the value of the asset from date of death will be subject to CGT.

A sometimes overlooked aspect is the death of a joint tenant. We hear families say that the holiday cottage on the coast is exempt as dad and mum acquired it well before 1985. However, Mum died ten years ago in 1996 and, as the survivor, Dad will be treated as having acquired one half of the property upon her death. Therefore, there will be a CGT liability on one half from that date.

The main residence of a deceased taxpayer is exempt from CGT and the

executor or the beneficiaries have two years from date of death to settle a sale of the property without creating CGT liability. However, if the property is sold after this two-year window and was not the main residence of the beneficiary, capital growth from date of death is taxable.

Since 1996, the acquisition value of the main residence to the beneficiaries is the value at date of death regardless of whether the property was acquired pre or post 1985.

Death can create a CGT liability if assets pass to a beneficiary who is a tax advantaged entity (for example, overseas residents and non tax-deductible charities).

In these instances, capital gains on liable assets are to be disclosed in the deceased's terminal year income tax return. If one of the beneficiaries is a non-resident, to avoid creating a terminal year CGT event, it may be best for the will to leave the capital growth assets to the local beneficiaries.

Where a tax-deductible charity is to benefit under the will, there are tax advantages in leaving the charity those assets with large capital growth attached. Cash gifts to charities although tax-deductible, if made during a person's lifetime, are not deductible when left under a will.

"Death can create a CGT liability if assets pass to a beneficiary who is a tax advantaged entity (for example, overseas residents and non tax-deductible charities)."



CHANGES TO ACT LEGISLATION

Public Trustee Act 1985

PTACT recommended that the *Public Trustee Act 1985* be amended to include a new provision at S.66 as follows –

66 Public Trustee may require information or documents

(1) The public trustee may, by written notice given to any entity (other than an individual), require the entity to give the public trustee stated information or documents relevant to the exercise of the public trustee's functions under this Act or another territory law.

(2) The notice must state a reasonable period (not less than 14 days) within which the information or documents must be given.

Following is a paraphrased extract from Information Privacy Principle 11 in the *Privacy Act 1988*, which applies in the ACT stating that:

"A record-keeper who has possession or control of a record that contains personal information shall not disclose the information to a person, body or agency (other than the individual concerned) and that if the information is no longer required, that the information is destroyed."

The effect of this, is that s.66 overrides the privacy issue and makes it mandatory for public authorities to provide information to the Public Trustee in the exercise of his functions.

OUR CUSTOMERS SAID...

In the last financial year, 92% of customers surveyed stated that PTACT met or exceeded their expectations. Here are a few comments made by customers in response to our Customer Survey -

"Staff members at the Public Trustee explained everything in an easy to understand detail. I felt very confident and appreciated their advice."

"My wife and I found staff members at the Public Trustee to be excellent representatives. They demonstrated excellent knowledge, was very obliging and efficient. They were willing to give advice and the advice was very clear and concise. We had great confidence with the staff member as an outstanding ambassador and officer of the Public Trustee."

"Excellent service and very helpful to be able to deal with!"

"Speedy and efficiency of service exceeded expectations and we were able to leave the office satisfied in the knowledge that our Wills were in place."

"The staff at the Public Trustee was most helpful and kept in close contact at all times. Since this was a new experience for me, I really appreciated their help and their friendliness."

"Your staff were easy to talk to and explained everything in a manner I understood".

WHEN WE SELL PROPERTY



"In transferring the legal ownership upon a sale or purchase we instruct a law firm to provide professional conveyancing services and these services are provided at a fixed price."

PTACT sells some 30-35 properties each year on behalf of a deceased estate, under Enduring Power of Attorney or for any of our Financial Management clients as their circumstances change. We also buy property on behalf of our trust clients and for financial management clients.

When preparing to sell a property we ensure that the property is physically secured and that a Caveat is placed on the relevant title with the Land Titles Office to control further dealings with the property. We ensure that all rates, bills and insurance policies are paid for and up to date.

We also engage an entity to prepare a building, pest and compliance report. All properties for sale must have a Pest and Building Report prior to selling and this forms a part of the contract of sale. The building and pest report is ultimately reimbursed by the purchaser as part of the settlement process. We also conduct a property inspection and engage a valuer to prepare a valuation report.

If repairs or cleaning of the property is required, we will organise for this to be completed to prepare the property to be sold on the market. We will organise for agents to be engaged to assist with placing the property on the market to ensure the best outcome or successful selling of the property. The selling agent will have options for advertising packages and campaigns

to select from and would guide you on your selection. The agent's fee or commission maybe negotiated and is generally a percentage of the sale price and is paid on settlement.

We choose an estate agent from a panel of providers that meet our expected standards of service. We ensure that any issues of cost of commission are negotiated and that a suitable agent is chosen to suit the style and location of the property. Real estate agents also provide PTACT with advice on how to improve the property by advising to undertake gardening, painting and maintenance to raise interest in the market and ensure a positive outcome for our clients.

In transferring the legal ownership upon a sale or purchase we instruct a law firm to provide professional conveyancing services and these services are provided at a fixed price.

Common methods of sale are private treaty (price on listing), auction expressions of interest and by negotiation. Each method has its pro's and con's which the agent will advise with. The best method will be dependent on the client's circumstances, the location and type of property to be sold and the current marketing conditions.

CASE STUDIES- LESSONS LEARNT



Case Study 1

A former landlord had been managing his property investment himself and had not been keeping up to date with the current legislation. The landlord allowed tenants to move into a property without having an in-going condition report. Once the tenants had vacated the property, it was discovered that it was unclean and damaged but the landlord could not prove the condition of the property prior to the tenancy because there was no in-going condition report. The landlord incurred significant expenses to make repairs to the property.

Lesson:

As we mentioned previously, it is important for the landlord or property agent to ensure that an in-going condition report is provided to a new tenant and that it is returned to the landlord or property agent by the required time.

Case Study 2

A property had an evaporative cooler installed into the ceiling of the property. Evaporative coolers require tanks to be emptied and the water taps turned off during winter. The Canberra winter months resulted in water being frozen in the pipes and effectively damaging the pipes and splitting them open. As the water supply was also not turned off, the property incurred significant water damage.

Lesson:

It is important for landlords and tenants to ensure that they read the instruction and maintenance manuals of all the equipment or fixtures in the property.

"A trustworthy attorney is essential, for sadly the incidence of elder financial abuse is increasing and can include transfer of real property out of the name of an older person."

DETERRING PROPERTY ABUSE OF SENIORS

Statistics show that over the past 60 years average life expectancy for men has increased from 66.1 years to 80.1 years and for women from 70.6 to 84.3 and that the ACT enjoys the highest life expectancy in Australia.

Our increasing longevity allows more time for medical conditions to develop and hence the increasing incidence of dementia and Alzheimer's disease in our community. Indications are that one in five of us will need assistance one day in looking after our financial affairs and it therefore becomes paramount that we make a wise choice when naming a prospective financial manager under our enduring power of attorney (EPA). Refer to the PTACT website at www.publictrustee.gov.au for a fact sheet on EPAs and the excellent publication, "The Power to Choose".

A trustworthy attorney is essential, for sadly the incidence of elder financial abuse is increasing and can include transfer of real property out of the name of an older person. Such misappropriation can occur even in trusting relationships and sadly has often been regarded

by the abusers as a harmless acceleration of an expected inheritance.

It is not viewed this way by society and exploitation of property can be disastrous for the victim's happiness, health and wellbeing and can lead to destitution. Transfer of the family home for less than fair value would caught by the Centrelink gifting rules with the amount exceeding the gifting allowance being treated as a deprived asset for purposes of the assets test. This can have disastrous results for the abused person's pension creating an inability to meet living expenses or nursing home accommodation.

Justifications readily surface such as, 'we just wanted to help dad reduce his income tax'. Recourse is not easy and there is a reluctance to report or prosecute family. Nursing homes, doctors or carers can be the reporters of suspicious matters and there is an Elder Abuse Prevention Information line 6205 3535 available for the public to access.

Agencies such as the ACT Civil and Administrative Tribunal, the Public Advocate of the ACT and the Public Trustee for the ACT have a role in protecting seniors from abuse and the Public Trustee has a free wills and enduring power of attorney service for seniors over 65 years wishing to appoint the Public Trustee as executor/attorney.



PUBLIC TRUSTEE
FOR THE AUSTRALIAN CAPITAL TERRITORY

Property services for persons when a manager is appointed

When a financial and property manager is appointed by the ACT Civil and Administrative Tribunal to manage the financial and property matters for a person that has a decision-making disability, the Public Trustee assists the protected persons in the following ways:

- Ensuring that the property is secure and Caveats are entered;
- Ensuring all rates and bills are paid;
- Ensuring there is a current insurance policy for the property and its contents;
- Coordinating any property repairs;
- Conduct routine inspections;
- Monitor market conditions; and
- Preparation to sell a property if required.



FACT SHEETS



Our Fact Sheets can be found under "Publications" on our website at www.publictrustee.act.gov.au

You'll find comprehensive information about a range of issues and services.

Our top four Fact Sheets have been translated into five different languages.

CONTACTING US

- | | |
|---------------|--|
| HOURS | - 9:00am – 4:30pm (Mon – Fri) |
| OFFICE | - 221 London Crct, Canberra City ACT |
| POST | - PO Box 221, Civic Square ACT 2608 |
| PHONE | - (02) 6207 9800 |
| FAX | - (02) 6207 9811 |
| EMAIL | - publictrustee@act.gov.au |
| WEB | - www.publictrustee.act.gov.au |

DISCLAIMER

The content of this newsletter is general information only and should not be relied upon as legal advice. You should contact a solicitor or the Public Trustee to obtain professional advice applicable to your particular issue and circumstances.