



Dixie Ann Middleton & ASSOCIATES

Family Law & Estate Administration

Emma L Turner
Principal



Lisa M O'Dwyer
Solicitor

Summer 2018/19

FAMILY LAWYERS
The Thynne Centre
4/18 Thynne Road
MORNINGSIDE Qld 4170

Phone: (07) 3395 5502
Fax: (07) 3399 1692
Email: mail@middletonlawyers.com.au
www.middletonlawyers.com.au



Please note: Many of the comments in this publication are general in nature and anyone intending to apply the information to practical circumstances should seek professional advice to independently verify their interpretation and the information's applicability to their particular circumstances.

Individual liability limited by a scheme approved under professional standards legislation.

Firm News

Welcome to the last edition of our Newsletter for 2018!

It was with great sadness that we made the following announcement via our Facebook page at the beginning of October:

"After nearly 35 years as a practicing solicitor and more than 26 years at Dixie Ann Middleton & Associates, Dixie Ann Middleton had her last day in the office today. We will miss you and we thank you for all the guidance you have given us all over the years. Rest assured that Emma Turner has been trained in the Dixie Ann Middleton way over the last 13 years and will continue to provide the usual Dixie Ann Middleton service."



On a happier note, we are delighted to announce that we welcomed a new solicitor to our team last month. Lisa O'Dwyer has a Bachelor of Laws (Honours) and Graduate Diploma of Legal Practice. She is admitted as a Lawyer in the Supreme Court and also as a solicitor in the High Court of Australia.

Lisa is experienced in family law, criminal law and domestic violence matters. Lisa values technical excellence and she practises law in an empathic manner. Lisa considers it a privilege to stand alongside clients and not shrink back from the grief and complexity of both the legal and non-legal issues that characterise the practice of family law.

In her spare time, Lisa has an interest in all things fitness, literary and New York related. She has been known to travel around the country in pursuit of the best coffee and cake in town.



Christmas Closure

We advise that our office will be closed from 12 noon Friday, 21 December 2018 until 8.30am Monday, 7 January 2019. We wish you a safe and happy Christmas and New Year!



New Family Violence Restrictions

Did you know that the Commonwealth Government recently passed laws to ban the cross-examination of victims of family violence by their perpetrator? Cross-examination in these circumstances will now be conducted by a legal representative.

The Australian Government will fund legal aid commissions to provide legal representation to parties subject to the ban. Access to that funding will not be limited by means and merits tests.



Dixie Ann Middleton & ASSOCIATES

Family Law & Estate Administration

Delay can be Fatal to Challenging a Will

It is always important to have a Will but be aware that in some circumstances the Court has the power to vary the terms of a Will.

The Legislation

In Queensland, a small class of people may make an application to the Court for a change to a deceased's Will. This class of people are limited to the following:

1. Spouse
2. Child
3. Dependant

The mere fact that someone falls within this class does not automatically mean that they would be successful on such an Application. They also must make sure that they file the application within the required time limits. Pursuant to the Succession Act, such an application needs to be filed within 9 months from the death of the person whose Will is being challenged. However, notice of the intention to make a claim must be given within 6 months of the date of death.

While the Court has power to extend this time limit, an Applicant should not risk expiration of the time limit in the expectation that the Court will automatically extend the time. In exercising its discretion, the Court will consider the following:

1. Whether there is an adequate explanation for the delay.
2. Whether there would be any prejudice to the beneficiaries of the contested Will.

1. Whether there has been any unconscionable conduct by the party seeking to challenge the Will.
2. The strength of the case for the party seeking to challenge the Will.

Mortimer & Lusink

In this case, the daughter of the Deceased filed a Family Provision Application 12 days outside the time limit. While she was unsuccessful in extending the time for filing in the first instance, on Appeal she was successful. It was determined on Appeal that the delay in filing the Application was the daughter's lawyer's fault and not through her own inactivity. The Court also found that she only needed to establish that she had an arguable case and she did not, at the first instance, need to produce all of the evidence one would expect to see at a Final Hearing.

Frastika & Cosgrove as Executor of the Estate of Russell Walter O'Halloran

In this decision of the Queensland Court of Appeal 23 December 2016, the second wife of the Deceased sought leave to make a Family Provision Application out of time, being 63 days late. The nett value of the Estate was \$1,000,000.00 and the contested Will had left a gift of \$100,000.00 to a testamentary trust for the benefit of two of his children of his first marriage. The second wife, who was disputing the Will, received \$10,000.00 from a joint account, two motor vehicles and \$150,000.00 under a superannuation Binding Death Benefit Nomination. The residual Estate had been given to the Deceased's autistic granddaughter who had been

raised by the Deceased. The Application for extension of time was dismissed on the basis that the explanation for the delay was unsatisfactory and the Family Provision Application had poor prospects of success.

It is, therefore, important if you fall within that class of people who can challenge a Will, that you seek legal advice early about your prospects of successfully challenging the disputed Will. You should then lodge within time the Application if the advice supports this course of action.

Refer also to:

- Hills v Chalk & ors [2008] QCA 159
- Re Terlier, deceased [1959] QWN 5
- Re Walker, deceased [1967] VR 890 at 892
- Ashurst v Moss (2006) 14 VR 291 at 316
- Warren v McKnight (1996) 40 NSWLR 390 at 395
- Bird v Bird [2002] QSC 202

