Issue 1 2012/13

Heir tight.

de GROOTS
wills and estate lawyers

Welcome to the first edition of our re-badged bulletin. We have chosen the name **'Heir tight'** as it reflects what we hope to assist you to achieve in your estate planning – the protection of your wishes to benefit those named in your will.

Challenges to your testamentary intentions can take many forms. Any challenge may result in the value of your estate being diminished, delay in the administration of your estate, the fracturing of family relationships and time for grieving being impacted by the need to engage in litigation with the consequent stress and distraction that involves.

These days it's not only wills that are being challenged. We are also seeing more litigation over trusts as highlighted by the recent case involving Solomon Lew. He is trying to have himself and his wife declared as the only potential beneficiaries of his $621 million trust and in the process shutting out his 3 children and 2 former in-laws from the fund. The Rinehart Family is also embroiled in litigation regarding a family trust set up by the late mining tycoon and family patriarch, Lang Hancock. One of our Sydney Directors, Donal Griffin, comments below on trust disputes and the need to review family trust deeds.

We hope you enjoy this edition of our bulletin and in the lead up to the end of the 2011/2012 financial year, you act on issues raised that may be relevant to you.

Margot de Groot
Director

Keeping the Family Trust Intact

The succession to discretionary family trusts needs to be carefully considered, properly documented and sensitively communicated.

Many families use family trusts for asset protection and estate planning purposes. Trusts can also be used to preserve confidentiality, if managed well, as the legal owner of assets (often a corporate trustee) does not have to include a reference to a family name eg 18 Holes Family Trust Company Pty Limited. Many families choose to forego this ability to own assets discreetly and name the trust and trustee along the lines of the "Hope Margaret Hancock Trust".

The Rinehart family saga has taken up many inches of newspaper columns and airtime at dinner parties over the last few months.

It seems that, despite some expensive Court applications, the matter has some way yet to run. In the absence of a suppression order, embarrassing email exchanges have been made public. It appears that the dispute intensified after the Rinehart children discovered that the vesting date of the Hope Margaret Hancock Trust had been extended without notice to them.

The Rinehart children appear to be arguing over the alleged misconduct of the trustee of that trust. These allegations are often difficult to prove. They can also be costly and drawn out. Having a well chosen appointor (who can remove the trustee) can reduce or avoid damaging public conflict. At de Groots, we offer our clients an independent appointor in trusts we draft.

In one of the Rinehart court applications, the Court was asked whether a request to remove the trustee fell within the obligation in the trust deed to keep disputes about the deed confidential.

Where a dispute is possible, the provisions of the trust deed could include a dispute resolution process which would operate to keep disputes private. Family meetings are also a way to get the parties' agreement to succession or control issues.

Most trust deeds provide for the trustee to determine how income and capital are distributed. Similarly, in most trusts an 'appointor' can, in its absolute discretion, appoint and remove the trustee. It follows that the role of appointor is generally of great significance. However, succession to the role of appointor is, in our experience, often overlooked by a client's family lawyer.

Especially in light of changes to tax law (as mentioned elsewhere in this bulletin), it may be appropriate to now consider reviewing trust deeds of family trusts so that the assets end up in the hands of the right people with a minimum of dispute.

Donal Griffin, Director

Visit our New Website

We are pleased to announce that our new website www.degroots.com.au was launched in early January 2012, and is already demonstrating early success in meeting key business objectives we have identified.

Our challenge was to provide a website that reflects our dedication to the provision of personalised service to clients requiring assistance with wills or estate matters, and which highlights our key point of difference - our commitment to exclusively focusing and specialising in this area of the law.

Lloyd Grey Design was entrusted with the redesign. We worked with their team to try to capture and effectively communicate our purpose, positioning and philosophy. We hope you like the result and find the site engaging.

Please let us have your feedback on our new website. We would also welcome your suggestions on content for the site.

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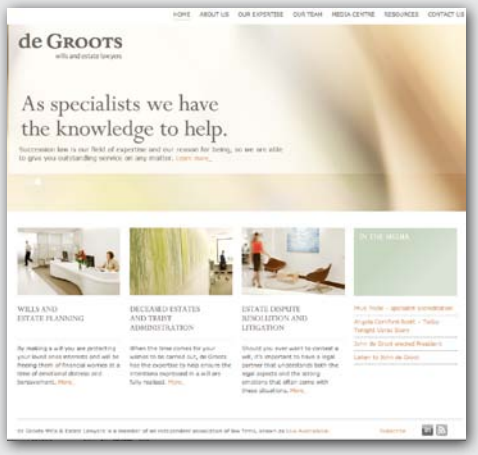


If you would like the opportunity to have an information DVD on 'Planning for all of your life' or 'Estate Litigation', please phone Pam Corbett on (07) 3221 9744 who will be happy to send it to you with our compliments.

Review Family Trust Deeds **Now**

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 (the "Act") was passed. Where the trust deed categorises capital gains as income, they must be distributed by 30 June in the given financial year.

The new 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.

As we plan for the end of another financial year, thoughts will be turning to finalising last year's treatment of income and planning for the management of income in this financial year.

We suggest that, if it has not already been done, now is the time for clients to look very closely at the resolutions they propose drafting and review the terms of their trust deeds.

Donal Griffin, Director

Presumption of Undue Influence

This is providing fertile ground for estate litigation lawyers. Section 87 of the Powers of Attorney Act 1998 (Qld) legislates that a transaction between the principal and the attorney and/or a relation, business associate or close friend of the attorney, gives rise to a presumption in the principal's favour that the principal was induced to enter into the transaction by the attorney's undue influence.

McMurdo J. in Smith v Glegg [2004] QSC 443 makes the following pertinent point with respect to rebutting the presumption: "It is not necessary in every case for a donee to demonstrate that the donor received appropriate and independent advice, although that is often how the presumption is rebutted."

Obviously great care is required when these transactions are contemplated. Almost always independent advice and representation for both parties is highly recommended.

John Forde, Lawyer, Member of the Estate Litigation Team

A Note of Caution for All Families

Due to relatively recent changes to the law, the Court has power to admit a document to probate if satisfied that the document embodies the testamentary intentions of a deceased person, even though the document does not comply with the formal requirements for executing, altering or revoking a will. For example, a will may still be valid where it is not witnessed by two witnesses.

Documents such as a suicide note, an undated and unsigned handwritten will, a copy of a will with handwritten amendments not witnessed and an unexecuted copy of a lost will are all examples of the types of documents which have been admitted to probate as a will.

Whilst it may once have been appropriate to avoid putting lists of miscellaneous household contents and jewellery in the will and putting in place a separate list or memorandum, such a document could now be considered to be testamentary and required to be brought to the Court's attention and potentially admitted to probate, together with any will which has been made by the deceased.

If a person makes general notes as to what items he or she would like to pass to certain individuals and such documents are located after his or her death, they may need to be included in the application for probate. The effect of this could be that the matter is referred to a Judge, becoming a much more costly procedure than the usual application.

Accordingly, you should avoid leaving any notes, lists, post-it notes or other records of your intentions. These should be incorporated within the terms of your will to avoid costly procedures and delays in the administration of your estate.

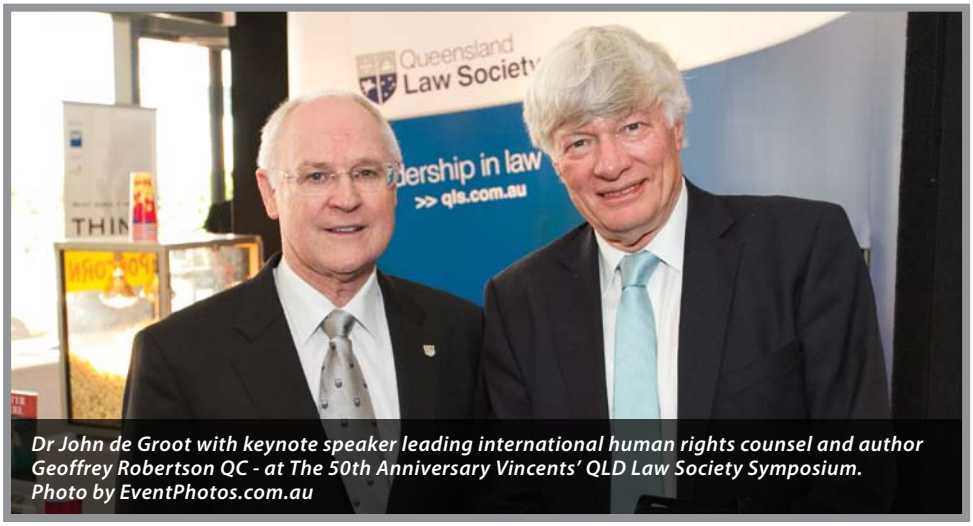
Rebecca Burness, Accredited Succession Law Specialist & Senior Associate

Civil Partnerships Act

On 23 February 2012, the Civil Partnerships Act 2011 (Qld) commenced in Queensland. This new legislation gives same-sex couples in Queensland the right to enter into legally recognised civil unions.

The community needs to be aware of this legislation as its introduction has wide implications for other laws. It is important to understand how a civil union may be entered into and when it ceases. In our next bulletin, we will review this legislation and its ramifications for our Succession Laws.

Prudence Poole, Accredited Succession Law Specialist & Senior Associate



Dr John de Groot with keynote speaker leading international human rights counsel and author Geoffrey Robertson QC - at The 50th Anniversary Vincents' QLD Law Society Symposium. Photo by EventPhotos.com.au

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