Issue 3 2011/12

Life matters

de Groots
wills and estate lawyers

The festive season is traditionally a time for families to come together to celebrate. Often family dynamics can make these occasions difficult for all concerned. The modern family takes many forms but undoubtedly today there are greater levels of complexity, not only in a family's personal dynamics but also in the legal issues they present.

Years end for most of us brings with it a desire to have our affairs in order and to have them better organised than they were in the year just passing. We hope this edition gives you food for thought and encourages you to ensure your affairs are in order no matter how simple or complex your family situation. Our best wishes to you and your family for a relaxing holiday season and a great 2012. Thank you for your support in 2011.

Margot de Groot
Director

Blended families can cause a stir

A relatively recent social phenomenon is the growing complexity of family relationships – re-marriages and re-partnering, children born from sometimes a number of relationships their parents have entered into, sometimes concurrent defacto relationship and so on.

This complexity can have profound implications in the transfer of family wealth on a person's death. Careful planning can often avoid disappointment, disagreement, feuding and resultant litigation.

It is salutary to consider what happens when one of the parties to the newly established relationship dies. The persons who may have a claim upon the estate are the surviving spouse/defacto spouse, the previous spouse if not divorced, the former defacto spouse if he or she is the parent of a child of the deceased under the age of 18 years, the children from both relationships and the stepchildren. Not all these persons have claims of equal merit and individual circumstances will determine outcomes, but they all may be entitled to make a claim for provision or better provision from the estate. This is not a fanciful scenario, but a frequent one and one likely to be more common in the future.

Another phenomenon is what a sociologist might term the parallel family. The circumstances of Richard Pratt's various relationships provide a well-known recent example. Richard Pratt, a billionaire and philanthropist, had a child with one of his mistresses. Although provision was made for the child in Richard Pratt's will, the child's mother, Shari-Lea Hitchcock, and her daughter, Paula, filed a family provision claim, the former as a de facto spouse of Richard Pratt. These claims have failed, not on the merits of the claim itself, but for the reason that the court was not persuaded that property in trust was in fact part of the estate in New South Wales. We now read (Herald Sun 12.09.11) that another mistress has filed a claim of a different kind based on promises she said were made to her but never kept. This is a claim not dependent on any of the relationships described above, but on promises made to her.

As painful as the publicity may be for the Pratt family, the lesson to be taken from this example is the importance of proper estate planning. Persons leaving relationships and entering new ones and those with additional partners in varying kinds of relationships are well advised to ensure their wills reflect their changing circumstances.

Elizabeth Lorimer is an associate in our Estate Litigation Team.

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

Accredited specialist tops the state

Clients expect a high level of expertise in lawyers dealing with their affairs. Becoming an Accredited Specialist is an important step in responding to that expectation – a step Prue Poole recently undertook with great success. She topped the class and will shortly be presented with an award from the Chief Justice of the Supreme Court of Queensland, in recognition of that achievement.

Prue says "I always wanted to practice in succession law and saw completing the Specialist Accreditation program as a step to furthering my career and bringing the knowledge acquired to our clients' affairs."

We congratulate Prue on achieving specialist accreditation and also on her recent appointment as a senior associate of the firm.

Congratulations Mr President

As you may have heard our Special Counsel, Dr John de Groot, has been elected as President of the Queensland Law Society for 2012. He is looking forward to this new role, representing the solicitors' branch of the profession, as well as continuing his work with us for our clients. Congratulations, John!

Crucial new superannuation ruling

The Government has in the last few months released a draft taxation ruling which clarifies some uncertainty that previously existed around the tax consequences of superannuation pensions passing to spouses or dependants on the death of the pensioner.

The tax ruling provides that when a pensioner dies, the pension ceases until such time as the trustee determines to pay the funds to an entitled dependent, either as a lump sum or as a pension. As a result, for the period that the pension has stopped, your superannuation fund is no longer tax-free. Tax will not only be payable on all income earned during that time but also on capital gains realised on any sale of assets during that time.

These problems can be avoided by either establishing the pension as a reversionary one (i.e. which automatically passes to your spouse in the event of your death) or by putting in place a binding death benefit nomination which requires your entitlement to be paid to your spouse as a pension in the event of your death. In both of these situations the Tax Office should treat the pension as continuing and therefore the super fund will remain a tax-free environment.

It is important that all binding death benefit nominations and all superannuation trust deeds be reviewed to ensure pensions have been properly established as reversionary pensions or, alternatively, an appropriate binding death benefit nomination can be made requiring that it be paid to the nominated beneficiary in pension form.

Our estate planning team conducts these reviews for clients so please let us know if you would like to avail yourself of this service.

Angela Cornford-Scott, Director

Re-partnering later in life

A second marriage or re-partnering later in life can often upset adult children, particularly when one partner has built up significant wealth and the other has not. At de Groots we regularly act in litigation which has arisen following the death of a person who has entered into a new relationship, particularly when there has been little or no effective estate planning on the part of the deceased.

The recent marriage of the 85 year old Spanish Duchess of Alba to a 60 year old civil servant is a good example of an attempt to avoid litigation. The Duchess has five adult children who have spoken out against their mother's marriage to a man much younger and far less wealthy than her. The Duchess, estimated to be worth somewhere between $800 million to $4.7 billion, has attempted to appease her children by gifting them some of her fortune before her death. However, children, spouses and dependants all have a right to make a claim for further provision from a deceased estate and this right is not extinguished by inter vivos gifts even substantial ones.

If you are one of the hundreds of thousands of Australians who are part of blended family, it is important to consider any potential claims that may be made on your estate by putting an effective estate planning strategy in place.

Halie Beaumont, Lawyer, is a member of our Estate Litigation Team.

Self-managed superannuation fund members need EPAs

Many people understand the importance of putting in place protections in the event that they lose capacity and are unable to make decisions for themselves. An enduring power of attorney is an important document in this regard. It ensures that you decide who will make decisions for you on financial, personal or health matters if you are unable to make them for yourself. However, while desirable generally, it is vital that members of self-managed superannuation funds have an enduring power of attorney in place.

Under the superannuation legislation, to be a complying self-managed superannuation fund, (and thus enjoy the benefits (taxation and otherwise) of our superannuation regime) all trustees or directors of a corporate trustee of the superannuation fund must be members and similarly all members must be trustees or directors of the corporate trustee.

So what happens in the event that one of those members loses capacity? If that member has an enduring power of attorney, the superannuation legislation specifically allows for the member's attorney to act for him or her as a trustee of the fund or as a director of the corporate trustee of the fund. However, if the member does not have an enduring power of attorney, there is no provision as to who can stand in that member's place as a trustee or director of the corporate trustee. The fund at that point in time becomes a non-compliant fund and the member, having lost capacity, can no longer maintain his or her superannuation in that self-managed super fund. The result is effectively that the member's superannuation entitlement must be immediately paid out of the superannuation fund. This can have serious consequences. Substantial funds will be taken out of what, in many situations, is a tax-free environment and become taxable in the hands of the member.

We recommend you speak with our estate planning team to ensure you have the appropriate documents in place to protect you in the event that you lose capacity and cannot manage your own affairs. There are many issues that can arise if you overlook this aspect of your estate planning.

Angela Cornford-Scott, Director

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