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Private Client Interests Newsletter

How to Keep Control of your Assets when your Relationship Breaks Down

Disputes over the division of property following the breakdown of a relationship, whether marital or otherwise, are not just the province of the rich and famous. They occur throughout every strata of society, and all too often end up before the courts.

However, they don't have to.

There are ways that parties to a relationship can maintain control over their assets and financial resources, rather than hand over the decision making power to a judge, who may get it right – but may also get it very wrong.

Throughout Australia, the division of property following the breakdown of marriage is governed by the *Family Law Act 1975 (Cth) (FLA)*. In NSW, property division following the breakdown of a de facto or other type of domestic relationship is governed by the *Property (Relationships) Act 1984 (NSW) (PRA)*.

FLA makes provision for parties to enter into financial agreements which set out how their assets and financial resources are to be dealt with in the unfortunate event of the breakdown of a marriage. They can be entered into before marriage, during marriage or even after the parties to a marriage have been divorced.

FLA sets out certain criteria which a financial agreement must meet. If the financial agreement meets these criteria, then it will be binding on the parties and the court will not make orders contrary to its terms.

The PRA makes provision for parties to a "domestic relationship" to enter into an agreement before the commencement of the relationship, during the relationship or upon breakdown of the relationship. The PRA definition of a "domestic relationship" includes the traditional de facto relationship (where a man and a woman live together on a bona fide domestic basis, but are not married to each other). However, it goes much further than that. It also includes close personal relationships – other than marriage or de facto relationships – between two adults, one or each of whom

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provides the other with domestic support and care. Examples of other relationships which fall within the definition include same sex relationships and close relationships between two family members or friends.

If the domestic relationship agreement meets the requirements set out in the PRA, then it will be binding on the parties, and the court should not make orders which are inconsistent with its terms, although it can, and does, do so.

Not only do these agreements allow the parties to a relationship to maintain control over what is to happen to their assets in the unfortunate event of a relationship breakdown, they can also be very useful tools in providing comfort to parties who are entering into a new relationship and wish to protect their assets for the benefit of their children from a previous marriage or relationship.

Informal Wills - Section 18A Documents

The *Wills, Probate and Administration Act 1898* provides that a Will is not valid unless:

- it is in writing; and
- it is signed by the testator; and
- it appears, on the face of the Will or otherwise, that the testator intended by the signature to give effect to the Will; and
- the signature is made by the testator in the presence of two or more witnesses present at the same time or the signature is acknowledged by the testator in the presence of two or more witnesses present at the same time; and
- at least two of those witnesses attest and sign the Will in the presence of the testator (but not necessarily in the presence of each other or of any other witness).

However, the Act also makes provision that other documents left by a deceased at his or her death, although not executed in accordance with the formal requirements of the Act, may constitute a Will, an amendment or a revocation of a Will. This is provided that an applicant can satisfy the Court that it was the deceased person's intention that any such document should constitute their Will, an amendment of their Will or the revocation of their Will.

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The Act was amended in 1989 (section 18A) to recognise that Wills formalities should not be seen as ends in themselves, but rather as tools for achieving particular goals. Therefore, a document that on the face of it appears to stipulate the intentions of a deceased person can, notwithstanding it has not been executed as formally required by the Act, be deemed to be a Will if the Supreme Court is satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his or her Will or an amendment to his or her previous Will.

However, although there is provision in the Act for such documents, we would point out that application for admission of such a document is time-consuming and costly with no guarantee that the applicant can satisfy the Court. It is therefore advisable at all times, when considering making provision for disposal of your assets, that you make your intentions clear by completing and executing a Will in the formal manner. If for some reason you are unable to have a formal Will completed and you wish to either amend or revoke your existing Will, an application for admission of a document utilising section 18A will, we believe, have an easier passage through the Supreme Court if the document addresses the following matters:

- whether it is an amendment or a complete revocation of your existing Will;
- it clearly states your full name, address and occupation;
- preferably confirms who you wish to act as your executor and trustee if you are completely revoking your previous Will;
- clearly states what gifts you are making including the residue if you are completely revoking your existing Will;
- the document is fully executed and dated; and
- the reason why it is impossible for you to complete the Will adhering to the formal requirements of the Act.

Appointing Suitable Executors

When appointing an executor, you need to consider carefully who that person(s) should be. In many cases, our first thought is to appoint our wife/husband/partner (provided he or she is living at our death) and this is probably because we believe that such a person knows us the best. It is also more than likely we will leave our entire estate to our surviving

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spouse/partner. Generally, in the event that our wife/husband/partner dies before us, the appointment of executor, together with the gift of the estate, passes to our children or other family members in the absence of children.

This is all very neat and tidy apart from one thing. That is, what happens if our wife/husband/partner does not have mental capacity at the date of our death and is unable to carry out our wishes? In appointing a wife/husband/partner, we are forgetting that he or she is more than likely similar in age to our own age and, with the population living longer, the question of mental capacity will become an issue more frequently.

In the case where an executor has no capacity to act, it then falls to the residuary beneficiary/beneficiaries named in the Will (the person with the most interest in the Will) to apply to the court to administer the estate. As is the case with standard husband/wife Wills, the residuary beneficiary is usually the same person as the executor. The incapable executor is also an incapable residuary beneficiary. This eventuality results in the administration of an estate being complicated, more expensive and distressing for family members.

We need to consider and make provision for a substituted executor in the event that the initial executor appointed lacks capacity. In this event, all that would be required to support an application by the substituted executor would be medical evidence from the medical practitioner of the incapacitated executor. Furthermore, in the event that the initial executor, although having capacity, is unwilling to act, a renunciation of the appointment would be sufficient to satisfy the Court.

It is important to appoint someone you can trust as an executor because they are responsible for seeing that your wishes are carried out with regard to the disposal of your assets, payment of any liabilities you leave and your funeral arrangements.

If you would like to review the appointment of your existing executor or make provision for substituted executors, please contact Richard d'Apice or Sam Kremer on 9233 7788.

Did you know...

...that in addition to acting for private clients with respect to Wills, Powers of Attorney, Appointments of Guardian, Deceased Estates advice, *Family Provision Act* claims and other private client matters such as Family Law and Domestic Relationships advice, our firm also has considerable experience in the following areas of law:

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- **Property & Construction Law** – including residential and commercial conveyancing; commercial leasing; property development advice; staged strata and leasehold developments; disputes with local Councils; Strata and Company Title disputes, management and advice; appearances in the CTTT in tenancy and strata matters; all aspects of retirement village law including sales and purchases of retirement village units, preparation of documentation for retirement village operators and advising operators on retirement village issues; advising on the creation and interpretation of easements and covenants; advising on environmental law and planning issues and appearances in the Land & Environment Court of NSW.
- **Charity & Community Law** - including advising charitable, religious and community organisations in relation to the creation, conduct and running of those legal entities; advising in relation to income tax, GST, deductible gift recipient status and other concessions; interpretation and amendment of constitutions and rules; and providing general advice to charities and not-for-profit organisations concerning the various legal responsibilities applicable to those entities. The firm also publishes a regular newsletter called "[Balancing Act – Legal and tax affairs for the non-profit industry](#)". Please contact us if you wish to be included on the distribution list.
- **Litigation** – Our Litigation team handles all aspects of commercial, equity (including injunctive relief), professional negligence, debt recovery, personal injury and administrative disputes and general litigation in all courts and tribunals. Our Litigation team acts for individual and corporate plaintiffs and defendants, and also has extensive experience in Alternate Dispute Resolution.
- **Finance and Mortgage** transactions and advice including residential and commercial mortgages and construction finance, advising on acquisitions, joint ventures, project agreements and general commercial and business related finance transactions.

Copies of our most recent newsletters in these areas can be obtained from our website at http://www.makdap.com.au/resources_documents.cfm.

Please contact us if you wish to be included on any of the regular distribution lists.

Alternatively, if you wish to discuss or obtain advice in relation to any of the above matters, please contact Vera Visevic on (02) 9233 7788 or visevic@makdap.com.au and she will refer you to the Partner of the appropriate practice group.

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