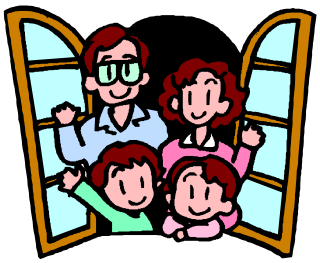
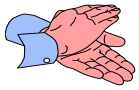
KR Hewlett & Co's
FAMILY RELATIONSHIPS and WILLS
NEWSLETTER July 2011



NEW INTESTACY LAWS: As indicated in our last Family Relationships and Wills newsletter, there are new intestacy (*relating to situations where a person dies leaving no – or an incomplete – Will*) laws, which took effect about mid last year.

An introductory comment: In the new laws, there is a new section which provides that gifts by an intestate deceased person, while that deceased person is still alive, to a person entitled in the intestacy, does not affect the intestacy entitlement of that person. This law should be considered by anyone contemplating making a gift shortly before their death.

Legal and de facto spouses: One effect of the new laws is to give a high monetary priority to any spouse over other classes of relations such as, for example, children. In a situation where an intestate deceased dies leaving just one spouse, and children of the deceased and that spouse, the spouse will receive everything to the exclusion of the children. Under the previous intestacy laws, of course, in this type of case, the children would receive some of the estate. This change maybe somewhat controversial.



Under the new laws, a surviving de facto spouse of a deceased intestate person, from a de facto relationship that has been in existence for a continuous period of *at least* 2 years, or which has resulted in the birth of a child, will be treated in the same way as if the de facto spouse had been legally married to the deceased. Under the previous laws, there was no such qualification requirement of a 2 year relationship or birth of a child for a de facto spouse to have such powerful rights, so the new laws may be regarded as an improvement in that regard.

Another situation that may commonly arise is where the deceased lived with a de facto spouse for more than two years before the deceased's death, but did not legally divorce their previous legal spouse. Under the new laws, even though the previous legal spouse might not be as worthy a recipient as the current de facto spouse in this situation, the legal spouse may be entitled to share equally the total spouse entitlement of the estate with the de facto spouse. That is the outcome, unless the de facto spouse challenges this outcome

within the relevant 3 month period. Under the old laws, the de facto spouse here would have displaced the separated, but not divorced, legal spouse.

In relation to *multiple* spouses - the spouse provisions of the new laws seek to also deal with the situation where a person leaves more than one current spouse or qualifying de facto spouse at the time of their death. Again, the new laws have a default position of equal sharing between all spouses, of the spouse entitlement of the estate (in the absence of any any challenge within the relevant 3 month period or formal complying agreement to the contrary).

If a person is a spouse or de facto spouse of a deceased person, in a situation where it is suspected or known that there is more than one such spouse or de facto spouse, it will be imperative for that person to obtain good legal advice very soon after the death of their deceased partner.

Other spouse rights: If there is only *one* surviving spouse or qualifying de facto spouse, that spouse will have the right to acquire, at market value at the date of death, virtually any part of the estate they wish to. This right will normally need to be exercised by that spouse within the relevant 3 month period provided by legislation. In such a case, however, basically unless there are children of the deceased (or descendants of those children), that are *not* children of that spouse, then that spouse will be entitled to the whole of the estate in any case, so the right will not be important.

Lastly, on the subject of spouses. If you are a de facto spouse of a living person, it is worthwhile to consider registering your relationship, under the separate new legislation permitting this, as it will save having to prove the de facto relationship and may help to assist working out when the relationship started in the event of death.

Rights of children: The rights of children have been substantially affected by the new laws.

As noted above, if a solitary spouse or qualifying de facto spouse survives the intestate, and if the child of the deceased is also a child of the spouse or qualifying de facto spouse, then the child will receive nothing, as the spouse or qualifying de facto spouse will receive it all.

If however there are children of the deceased, but the children are not those of the surviving spouse or qualifying de facto spouse, then that spouse's benefits (or between them if there is more than one such spouse) shall be limited to the statutory legacy (basically an amount of $350,000 adjusted for inflation changes since 2005) plus "personal effects" of the deceased and one half of the residue of the estate. The other half of the residue will be shared equally between those children.

By the way, "personal effects" is very widely defined and, as a general comment, may include all tangible personal assets except business assets, cash, pledges, precious items such as gold used for some investment types.

If children are entitled, and there is a single spouse, the children will need to be aware of that spouse's right to buy at market value assets of the estate referred to earlier.

Under the new laws, the children are entitled to receive their shares immediately – they do not have to wait until they reach the age of 18 years to be legally entitled to receive their shares. This would often be another good reason to have a will, as an even older age than 18 can be nominated, and as now it is often preferred in our experience to state for children to have to be at least 21 years of age before they can legally claim their full entitlement of an estate.

Rights of other relatives: If there are no spouses or qualifying de facto spouses or children (or their descendants) of an intestate under the new laws, then the estate (like under the old laws) will be divided equally between such of the parents of the deceased that survive.

If there are no parents, then similar to the old laws, more and more remote categories of relatives are respectively considered – in order - siblings (and their descendants), grandparents, uncles and aunts (and their descendants) – until at least one person is found fitting into a category who can benefit.

In relation to these lower categories, there are a couple of important subtle changes in the new laws.

Of the full blood and of the half blood: One that may be controversial is that in the case of two categories – siblings and uncles and aunts – relatives of the half blood in those categories

are treated the same as relatives of the full blood. The effect - an example – for an intestate leaving no spouse child or parent, but leaving one full blood brother and one half blood brother - the two brothers will have the same entitlements. The deceased intestate person however (and their surviving full blood brother) may not have expected that their half blood brother would have an equal entitlement.

Cousins may benefit: Another change in these categories is that, in the lowest category of uncles and aunts, cousins can now benefit if their parent (who would otherwise be a qualifying uncle or aunt) predeceased the intestate deceased. This would normally be beneficial, as it opens up another possible category of family relative who can benefit before an intestate estate may be forfeited to the government due to lack of qualifying relatives.

If there is a lack of qualifying relatives: Then the estate may go to the government, similar to the old laws. An improvement though is that there is an increased discretion for the estate to be paid to someone closer to the deceased, such as to a dependant of the deceased or to a person with a just and moral claim to the estate or part of it (perhaps like a unpaid carer).

Aboriginal or Torres Strait Islanders: In relation to an Indigenous (as that term is defined in the new laws) intestate, the new laws note that a personal representative of an Indigenous intestate, or a person claiming to be entitled to share in an intestate estate under the *laws, customs, traditions and practices* of the Indigenous community or group to which an Indigenous intestate belonged, may apply to the Court for an order for distribution of the intestate estate..which must be accompanied by a scheme for distribution of the estate in accordance with the laws, customs, traditions and practices of the community or group to which the intestate belonged.

That application can be made within about 12 months of the grant of administration, and the estate should not be distributed before that period expires in any such case unless it is clear that no order of distribution will be applied for.

Conclusion: Depending on the family situation of an intestate, there are about 26 different possible distribution outcomes that could occur upon that person's death. It is much better to have a will. Even if you are not sure about who you want to leave it all to, it might well be better to

have a will put in place, to review it least every few years, rather than leave it to intestacy laws which, although carefully drafted, cannot take into account your specific personal or financial circumstances. Once you start carefully thinking about who you might leave your estate to, you might find that your testamentary wishes are clearer than you expected.

FAMILY LAW – the de facto reforms You will recall that in our 2009 Newsletter, we reported that, from 1 March 2009, property division matters of de facto couples (including same-sex couples) who separate as from that date will be covered by the Family Law Act, like married couples.

The changes meant that the same types of parliamentary laws relating to matrimonial property adjustment will apply to property division proceedings relating to de facto relationships.

The new laws still state that, generally speaking, unless there is a de facto relationship for at least 2 years, there can be no claim for property adjustment upon the relationship ending. There are some exceptions, such as if there is a child of the relationship.

Also, de facto property division cases will now be mainly heard by the same courts that hear matrimonial property division cases.

Early decisions relating to these new de facto property division laws have come through.

In an early series of cases, there were arguments as to whether there existed a de facto relationship or some lesser relationship.

Is there a de facto relationship? A judgment of Mushin J has been giving some guidance. In it, his Honour discussed the issue of what it means for a couple to be "living together", saying at paragraph 140 of his judgment:-

"..In my view, if a couple do not live together at any time, they cannot be seen as being in a de facto relationship. However, the concept of "living together" does not import any concept of proportion of time. In particular, it does not require that a couple live together on a full-time basis. On the basis that one or both members of the couple may also be legally married or in another de facto relationship at the same time as they are in the subject relationship, it must follow that it is feasible that the subject relationship might involve the parties

living together for no more than half of the time of that relationship. Further, there is nothing to suggest that it must be even as much as half of that time."

Outcome not easy to predict? Another case shows that determination of the issue of when there has been a de facto relationship might not always be easy to predict, and how broad in scope it might be. In that case, there was a 7 year relationship of some kind. For the first 5 of those years, relating to years 2002 to 2007, the couple both lived in Melbourne, but in separate residences. From the judgment, there appeared to be many facts in dispute about this Melbourne period, but it seems to be agreed that the parties dined together 5 nights a week.

At paragraphs 78 and 79 of the judgment, it states "During this period, both parties maintained independent residences. The respondent's former partner and his children lived in a house owned by him at the rear of where he was living..his former partner, it would appear in lieu of rental, performed all his domestic duties including cleaning and washing. During this period the respondent was a full-time [omitted] as well as the owner of [P] Pty Ltd. The respondent owned, sold and bought a number of properties, both in Melbourne and Geelong, as well as the boat "[N]". These businesses and enterprises would appear to have been successful in this period, enabling the respondent to live a very comfortable lifestyle as well as enabling him to pay the applicant's rent and to gift her substantial sums of money from time to time."

At paragraphs 49 and 50 of the judgment, it states:-

"I accept the applicant's evidence that her relationship with the respondent was an "exclusive one". I found the respondent's evidence that he had other relationships less than convincing.

However "exclusivity" is not necessary for a finding that the parties have been in a de facto relationship under the Family Law Act 1975. The definition of "de facto relationship" under section 4AA of the Family Law Act 1975 does not require exclusivity and makes it clear that such relationship can be established even if one or other of the parties is married or in another de facto relationship"

The Federal Magistrate deciding the case found that there had been a de facto relationship during that 5 year Melbourne period. At paragraph 171 of the judgment, her Honour stated:-

> "Whilst the Melbourne phase of their relationship was unconventional in that the parties did not have a shared residence, I accept that they spent time together almost every day of the week in circumstances that accommodated the realities of their personal commitments and their mutual decision not to conduct their relationship by adjoining their disparate family circumstances. By April 2003 the applicant was financially dependent upon the respondent as he was paying her rent and a substantial portion of her living expenses."

Conclusions: It can be seen from the cases above that a couple should, as much as it is practicable to do so, clarify with each other at an early

stage the nature of their relationship. If the couple consider that they are, or have, commenced a de facto relationship, there would appear to normally be substantial benefits gained from registering that relationship using the new registration laws. Still, as the registration of the relationship has several legal effects, we would recommend that good legal advice be obtained before registering it.

In NSW, registration is achieved with the NSW Registry of Births Deaths and Marriages. Information can be obtained at http://www.bdm.nsw.gov.au/Relationships.htm. The site also indicates that either or both of the parties can later apply to revoke the registration of the registration of the relationship. It is not necessary for both parties to agree to the revocation, although an application to revoke by just one party must be served on the other.

Early property division decision comments: In relation to de facto property issues, there have now been several decided cases, at Federal Magistrates Court level, about division of de facto relationship property.

As stated in our 2009 newsletter, the laws relating to property division between married couples has for many years taken into account "future needs" factors. In recent years, this has meant that a previously married homemaker parent who has less employment prospects and who is left to look after the children might receive more than half of the matrimonial property in a matrimonial property adjustment case.

By the *previous* de facto law not taking fully such "future needs" factors into account in property adjustment matters, it meant that the de facto homemaker parents may have previously received a less generous property division settlement than their married counterpart.

While it is still early days, these early decisions appear to be applying the same type of legal analysis in terms of the *steps to be taken* in reaching a decision, as for division of matrimonial property decisions. They also appear to be applying a similar analysis of relevant issues, such as contribution and need, as for division of matrimonial property decisions.

In the new de facto property adjustment legislative regime there are very similar new legislative provisions which require the court to now consider those future "needs" in de facto relationship property adjustment matters.

Examples: In at least two of the early decisions, there has been a significant adjustment of matrimonial property due to "needs" factors. In one early decision, the de facto wife was left with the primary care of 3 children of the relationship (including one with special needs) and the de facto wife had a lower income earning capacity. In a small asset pool case, there was a considerable 25% adjustment in favour of the de facto wife for the needs factors. In another case, in a 10 year relationship, the needs factors in favour of the de facto wife were less compelling (although the de facto husband's income was much higher and he was considerably younger), and there was a 10% adjustment in the de facto wife's favour for needs.

These are still early decisions, may be subject of appeals, so should be considered with caution, nevertheless the early decisions indicate that consideration of needs will be an important factor in de facto cases, as it has been in marriages.

Other principles: There is a (now) longstanding family law principle that initial much higher financial contributions by or on behalf of one of the parties is still likely important, in matrimonial property division, even where the parties separate many years later. It seems that this principle is also being used in the early de facto decisions, which is assisting the party making a heavy initial financial contribution.

Finally, in these early decisions, superannuation is often being considered part of the property "pool" of assets available for division, just as it would be for matrimonial cases.

Final Conclusion: It is even more important than ever to obtain good legal advice before commencing a de facto relationship with another person (or even moving in with another person where the status of the relationship is not patently clear).

FINANCIAL AGREEMENTS: Family law "Financial Agreements" are basically binding agreements that are entered into before, during or after breakdown of a marriage or de facto relationship that usually provide for division of matrimonial or relationship property in the event of breakdown of marriage or relationship.

Of course, such Financial Agreements that are entered into before the marriage or relationship starts are colloquially known as "pre-nups".

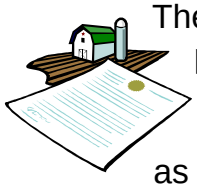
Formalities: In the past, it has been difficult - for even some good lawyers - to comply with all the formalities required in the making of these agreements. As a result, the courts have invalidated some of those agreements that did not meet those strict formality requirements.

Reform: Parliament recognized that the formality requirements were causing some difficulty. Parliament passed some amendment laws making the formality requirements a little less difficult to satisfy.

Also, Parliament has now passed a savings provision which states that where such an agreement fails a required formality, but where it would be "unjust and inequitable" if the agreement were not binding on the parties to it, that the agreement may still be held to be binding.

We note that this saving provision does not mean that those type of Agreements can be carelessly prepared. Those types of Agreements must still be very carefully prepared to ensure that they are enforceable, as there are still quite a few other ways in which courts may override these types of Agreements other than due to non compliance with formalities.

WILLS AND ESTATE LAW ESTOPPELS: The law relating to "estoppel" is becoming a more important part of will and estate law.



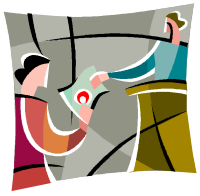
There is now a body of law building up as to what happens when a person, who later dies, says to someone else "If you do.. , when I go, all this (*usually meaning a home or farm*) will be yours." It seems that cases are more frequently indicating that promises such as this may be enforceable.

A leading case ending in the NSW Court of Appeal last year found such a promise enforceable.

In that case, the leading judgment of Handley AJA quoted another case which explained this type of estoppel, known as proprietory estoppel, as follows:-

"... if A under an expectation created and encouraged by B that A shall have a certain interest in land, thereafter, on the faith of such expectation and with the knowledge of B and without objection by him, acts to his detriment in connection with such land, a court of equity will compel B to give effect to such expectation".

The facts: In the Court of Appeal case, during a matrimonial breakdown property settlement, a wife's husband, who later died, create such an expectation in the wife. In the case, the wife was keen to obtain a certain inner city property standing in the husband's name, and to receive a payment of $50,000 from the husband. In the case, the husband had created an expectation that, if the wife gave up a claim for immediate payment of the $50,000 by him, that the husband would use the $50,000 to build a granny flat on the inner city property in his name, gain better income from that property for himself while he lived, then leave the property after his death to the wife.



Accordingly, a "notation" (in short, a non binding – but indicative - comment at the end) was made with the family law property consent orders, made on 13 June 2002, between the husband and wife that:-

> "1) The parties have entered into this agreement on the basis that the husband:
>
> a) will retain the wife as a beneficiary in his will and will bequeath the [subject] property ... unencumbered to her; and
>
> b) will use his best endeavours to have a granny flat/combined garage erected on the said property ..." (paragraph 18 of judgment)

The husband and wife divorced six months later. About five years later, in mid 2007, the husband died after making a will a few months early which did not honour the "agreement" made with the wife.

The decision: The Court of Appeal found for the wife, and confirmed an order of a lower court that the executor of the estate had to transfer the property unencumbered to the wife.

In the Court of Appeal, it was unsuccessfully argued to the effect that the property was worth considerably more than the monetary amount of $50,000 that the wife gave up in the family law settlement. It seems to have been argued that the $50,000 was the only proven "detriment" undergone by the wife to have a more valuable property left to her.

Principles: In the leading judgment however, Handley AJA stated his opinion (at paragraph 77) that, to be successful, the detriment suffered just needed "*not to be disproportionate*" to the enforcement of the expectation.

In this case, Handley AJA said (at paragraphs 50, 52 and 93):-

> "In my judgment therefore the plaintiff's detriment was not limited to the loss of the $50,000, but included the loss of the chance of obtaining an enforceable order giving her a right to the subject property after the death of the deceased. There is therefore no basis for limiting the plaintiff's relief, as…contended, to the sum of $50,000 appropriately indexed.
>
> "…the capital gain since the deceased acquired the property for $259,000 in 1992. His cost base was later reduced by the net gain from the sale of the surplus land for $55,000. If the plaintiff acquired the subject property, she would inherit the reduced cost base of the deceased, and, if and when she sold it, 50% of the net capital gain since 1992 would be taxable in her hands at marginal rates. ..the true value of the subject property to the plaintiff is much less than its market value."
>
> "The beneficiary under the deceased's will is a volunteer with no other claim, and in any event he will inherit property worth some $2 million. There are no countervailing equities, there is no hardship, and there are no practical difficulties. Subsequent events have not inflated the value of the expectation beyond that in contemplation when the deceased made his promise. The Judge has enforced the expectation in the very circumstances envisaged when the deceased created and encouraged it.."

A contrasting example: The judgment helpfully referred to previous cases in the area. At paragraph 62, his Honour referred to a 2003 English case where the claimant was not wholly successful:-

> "Relief may also be limited where the enforcement of the plaintiff's expectation would be out of all proportion to the detriment..This is

particularly so where the expectation was not defined and the Court has a broader discretion..A gardener had looked after an elderly widow and been promised that “he would be alright” and “this will all be yours one day”. He was awarded £200,000, and the Court of Appeal rejected his claim to the house and contents worth £435,000.”

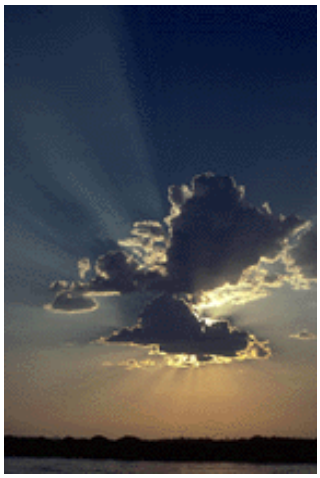
His Honour’s judgment also briefly touched on at least one other way such a promise may become unenforceable.

Another legal test: The Judge also cited (at paragraph 81) with favour an English test of when such a promise should be enforceable:-

“... equitable estoppel [by contrast with contract] ... does not look forward into the future [it] looks backwards from the moment when the promise falls due to be performed and asks whether, in the circumstances which have actually happened, it would be unconscionable for the promise not to be kept.”

Conclusion: It can be seen that this case has lessons for those considering making “rash” promises, those having suffered due to a breach of promise, executors of estates, as well as for family law settlements and orders and capital gains tax considerations. It is likely that the word estoppel will come up more frequently for deceased estates.

THAT’S IT FOR NOW! May you always have glorious relationships….



This newsletter is published for the information of the clients of KR Hewlett and Co, Solicitors and Attorneys, Cabramatta. It contains general comments or opinions, does not give legal advice AND MUST NOT BE RELIED UPON IN ANY WAY. No responsibility is taken for any errors or omissions. Should any reader have any legal or other problem, they should obtain proper independent advice from a suitably qualified person. If you wish to obtain further information about any of the topics discussed in this newsletter, please contact me Keith Hewlett, the Principal on Ph 02 9726 2266 or email krhewl@ozemail.com.au