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LEGAL SERVICES

The importance of dependency in superannuation estate planning

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The Superannuation Complaints Tribunal has given further understanding to financial dependency in the context of superannuation death benefits. A de facto spouse lent money to her partner. When the relationship ended the obligation of the borrower to repay the former partner was recorded in Court orders. Regular fortnightly repayments were made but at the borrower's death an amount of $45,000.00 was still owing.

Was the borrower a financial dependant of the former partner? The answer was important because, if she was dependent, the former partner was eligible to receive the whole or part of the deceased member's death benefit of about $150,000.00. The Superannuation Complaints Tribunal said that the relationship was one of creditor and debtor and did not constitute financial dependency for superannuation purposes. Accordingly the former partner was not able to claim any part of the death benefit.

Use a will to give assets and not give reasons

Some will-makers chose to use their wills to explain the reason for a gift or, more commonly, the failure to make a gift to a beneficiary. In a word: DON"T. Here are two reasons:

Firstly, Neda Duracic included a clause in her will stating that she didn't want to make further provision for her boyfriend as she had already given him one third of her home. The boyfriend brought a family provision claim in any event and was awarded an extra $76,400.00 from her estate. The words didn't stop the claim or prevent it from succeeding.

Secondly, Michael Welsh included a statement in his will that he'd not made further provision for his wife as their marriage had broken down irretrievably, they had been separated for over

Leura "Ballygowan"
Tel 02 4784 2177 Fax 02 4784 2145
21 Grose Street Leura 2780
Email info@browne-link.com.au

twenty (20) years and the wife was a "compulsive and addictive gambler". Naturally, the wife was unimpressed with the words of condemnation. She asked the Court to remove them from the Will to which Probate would be granted. That process resulted in substantial legal costs. The interests of neither the willmaker nor his intended beneficiary were advanced.

In both these situations there is a much better approach available to willmaker's.

The relevance of domicile

When giving instructions for a will the will-maker will often be asked for his/her place of birth. Other questions will follow, depending on the answer. Why is this? A court decision involving the estate of David Coomber provides part of the answer. Coomber was born in Australia but was a long-term resident of Thailand. He made a Will in 1997. At the date of his death in 2012 that was his latest Will. However, between the 1997 will and his death the deceased married. By the law of South Australia, where Coomber had some personal assets at his death, the marriage revoked his 1997 Will. He would have died intestate, and there'd be different beneficiaries of his estate.

By the law of Thailand, the marriage had no effect on his Will. It was therefore crucial to decide which law applied. The relevant law was the law of Coomber's domicile at the date of his death. It was in this context that his place of birth and his citizenship were relevant.

The importance of correctly naming beneficiaries

Two recent Court decisions emphasise the importance of fully and correctly naming beneficiaries in a Will. In the first, Justin Callaghan left money to his sister's "children". At his death his sister had only one child, David. However, she had three step-children. She had had those step-children for almost 50 years and referred to them as her children. The Court had to decide whether the reference to the sister's children meant her child David or David and the three step-children. After a contested hearing more than two years after Justin's death, the Court found that, in the context of the Will, "children" meant David only, and not the step-children.

In the second decision, Cathreine O'Connor left the whole of her estate to the Charity Daughters. No such organisation existed. The Court received evidence that convinced it that the beneficiary should have been the Daughters of Charity of St Vincent de Paul. More than 11 months after Cathreine's death, the Court rectified her Will.

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21 Grose Street Leura 2780
Email info@browne-link.com.au