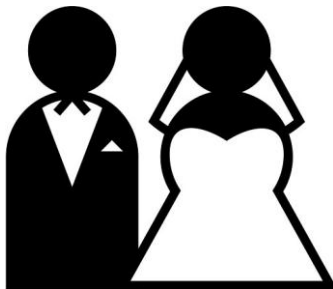




What's a marriage (and other relationships)?

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In a short time Australian society has come a long way in recognising unmarried relationships. It was not until 1977 that courts in New South Wales gave legal recognition to de facto relationships. (The thinking before then was that, to do so, would undermine the sanctity of marriage, an institution that the State had an interest in preserving and therefore something which courts should support by not legitimizing rights arising from comparable but non-married relationships. In 1977 that approach was abandoned as it was considered inconsistent with the thinking of contemporary Australian society.) Less than 40 years later the High Court has held that the Constitutional reference to "marriage" includes relationships between same sex couples.



Common residence is not essential for de facto relationship

There is now little legal difference between married and non-married relationships. However, in the absence of a marriage, establishing a de facto relationship is important to obtain legal rights. This is not always easy. The Supreme Court was required to do so as recently as December 2013. It was asked to decide whether Maurice McGrath and Ethel Clarke, persons who spent each Saturday night together but otherwise lived in different residences, lived in a de facto relationship. The Court held that a permanent commitment that is mutually acknowledged and of an emotional kind is more important in determining the nature of the relationship than the existence (or absence) of a permanent shared residential setting. As a consequence, McGrath was entitled to inherit at least part of Clarke's estate after she died intestate.

Relationship transmitted debt

All types of relationships can produce exploitation, including married ones. That was the relationship of Mr and Mrs Taheri when Mrs Taheri made a power of attorney appointing Mr Taheri as her attorney. The power of attorney contained no conditions or limitations on the attorney's power to act. Mr Taheri signed a guarantee on Mrs Taheri's behalf as her attorney. The guarantee supported a contract made by a company, Estate Homes Pty Ltd, of which Mr Taheri was sole director and shareholder.

The company did not honour the contract. Mrs Taheri was sued on the guarantee. She resisted the claim on the basis that the guarantee was not signed by her, but by her attorney. And because she obtained no benefit from the guarantee as the benefit was obtained by the husband or his company.

The Court was emphatic that the power of attorney allowed Mr Taheri to give the guarantee on her behalf. She was therefore liable to pay the money guaranteed, a sum of \$881,082.00 plus interest. This case emphasises the importance of:

- carefully choosing attorneys,
- properly selecting the circumstances in which the attorney can act, and
- adequately stating the conditions and limitations on the attorney's actions.

Not so super Super

Great care is needed with estate planning around superannuation death benefit entitlements, even with self-managed superannuation funds, as Mrs Conti's situation demonstrates.

At her death Francesca Conti had \$648,586.00 death benefit in her superannuation fund. The trust deed for the fund provided that that sum would be paid pursuant to a valid binding direction. In her Will Mrs Conti expressed the desire that her death benefit be paid to her children, and definitely not to her husband, Augusto. However, the Will was not considered to be a valid binding direction. In that circumstance, the death benefit was payable to the person decided by the trustee of the fund.

The fund originally had two trustees, being Mrs Conti and her husband, but after her death it had one trustee, the husband. That trustee decided to pay the whole of the superannuation entitlement to himself.

Mrs Conti's children unsuccessfully brought Supreme Court proceedings to overturn the Trustee's decision. They failed because:

1. in the absence of a valid direction, the decision about the recipient of the death benefit was made solely by the trustee of the superannuation fund;
2. the trustees' decision was validly made; and
3. the Supreme Court had no ability to overturn a valid decision of a trustee of the superannuation fund.



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