Estate Planning Tasmania News

Issue 36 July 2013

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Our Firm News

Asset Protection Seminars

Our third and final Asset Protection Seminar on *Asset Protection Strategies in Estate Planning* was held on 24 July 2013.

Promotions

The Directors of Worrall Lawyers, Sam McCullough and Peter Worrall, are pleased to announce the appointment of Hayley Mitchell and Alex Bobbi as Associates of Worrall Lawyers. The promotion reflects the increasing regard in which they are held by clients, colleagues and the firm.

Hayley works in the areas of Wills, Probate and Estates, and Alex works in the areas of Tax, Commercial, Agri-business and Conveyancing

Asset Protection and Superannuation: When Superannuation Will be an Effective Asset Protection Option

The focus of this article is superannuation asset protection considerations and bankruptcy. However, it is important to note that superannuation asset protection considerations are relevant in other contexts such as family provision claims from a deceased estate. Superannuation is a complex area of the law, so legal advice should always be sought when considering your own circumstances.

Once a person becomes bankrupt, the *Bankruptcy Act 1966* (Cth) ("the Act") provides that the property the bankrupt owns as at the date of bankruptcy and the property acquired by the bankrupt after the date of bankruptcy is available to the Trustee in Bankruptcy to pay off creditors and costs associated with bankruptcy. Not all of a person's property is available to the Trustee; the Act provides for what property is included and excluded from the available property to the Trustee.

A bankrupt's interest in a regulated super fund is generally excluded from the property available to the Trustee, subject to the "claw back" provisions in the Act.

The reasons for excluding super funds include first the public policy consideration, that is the purpose of super is to encourage individuals to provide for their own retirement, and secondly at law a member does not have a beneficial or legal ownership in their super fund. However, these considerations need to be balanced with providing an avenue for the Trustee to recover assets where a person has done the wrong thing.

The "claw back" provisions relating to super contributions were amended so that contributions made after 27 July 2006 are considered differently to contributions made before this date.

Currently the legislation provides that a bankrupt's interest in a super fund is not available to the Trustee unless the bankrupt made the contribution to their super fund for the main purpose of preventing the property being made available to creditors. If it is found that the bankrupt made the contribution for the main purpose of avoiding creditors, the Act allows the Trustee to "claw back" the contribution.

If the circumstances reasonably infer the bankrupt was bankrupt, or was about to become bankrupt, at the time of the contributions then it is presumed that the bankrupt's main purpose was to avoid creditors.

Amongst other things, the bankrupt's pattern of contributions will be looked at when determining what the main purpose was at the time of the disputed contribution. This does not mean that one off large contributions are not necessarily going to be void and "clawed back", however having well documented legal and financial advice will be helpful to show that the main purpose was not avoidance.

There is not a lot of case law to provide examples of what will be considered a void contribution, so a degree of caution needs to be exercised when considering your own circumstances. For this reason we highly recommend that you seek legal and financial advice before making any arrangements for your superannuation.

Hayley Mitchell

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Casewatch - Removal of Trustees

The decision of the New South Wales Court of Appeal in *Tjiong v Tjiong* [2012] NSWCA 201 provides a recent example of the willingness of Australian Courts to remove a Trustee who has engaged in misconduct, including dishonesty in their dealings with the beneficiaries of the Trust.

Beneficiaries of a Trust established by the Attorney of their Uncle, with $1.3M of their Uncle's property, sought to have the Trust set aside on the basis of fraudulent misrepresentations by the Attorney. Alternatively, they sought to have the Attorney removed as Trustee, because of his conduct towards them, including fraudulent misrepresentations about matters material to the establishment and operations of the Trust.

In the absence of any provisions in the Trust Deed empowering or requiring their removal, a Trustee can only be removed by the Supreme Court exercising its inherent jurisdiction to supervise Trusts. Part way through being cross examined, having publicly had his evidence shown to be false, and the Judge finding that the Trustee had fabricated evidence, the Trustee "voluntarily" resigned as Trustee of the Trust.

Sam McCullough

A note from our Commercial Practice Group - Aged Care Accommodation

It is unavoidable for many of us that, at some point, we will not be able or willing to continue living in our family homes. A move into a retirement village or other retirement accommodation is a big step and can cause considerable emotional stress. This can often result in important legal and financial aspects of what are essentially serious commercial transactions being overlooked.

Here are a few things that any person considering entering into retirement accommodation should be aware of:

1. a **large capital commitment** is typically required, as well as other ongoing fees and charges. The nature of the "ingoing contribution" is peculiar to this type of accommodation, and often accompanied by a complex payment framework. You should be aware of and understand the particular fee structure that applies and ensure that the fees are within your budget. Independent financial advice is essential;
2. living in a retirement village is likely to **significantly change your lifestyle**, and each village will have different things to offer. Consider what facilities and social activities are available and whether they suit you. There is no substitute for physically going to the village and speaking to the existing residents;
3. entry into retirement accommodation **involves lengthy legal documents** and governing legislation which impose rights and obligations on you and the village operator. Legal advice is essential to ensure that you understand the complex legal and other implications of the proposed move; and
4. legislative reform is underway that will result in **significant changes to accommodation payments in residential aged care from 1 July 2014**. These changes will make obtaining independent legal advice even more important.

Our recommendation? Obtain legal advice *before* making a financial commitment or signing any documents. Our experienced commercial lawyers can assist you to make an informed decision about your future. If you have any questions or require any further information please contact Maggie Keeling on 6223 8899 or by email at maggie.keeling@pwl.com.au.

Maggie Keeling

Recent/Pending Legislation & Cases

The *Charities Act 2013* received Royal Assent on 29 June 2013.

The Act defines "charity" and "charitable purpose" for the purposes of all Commonwealth legislation.

The *Charities (Consequential Amendments and Transitional Provisions) Act 2013* received Royal Assent on 28 June 2013.

This Act makes consequential amendments to 13 Acts and the *Charities Act 2013*, repeals the *Extension of Charitable Purpose Act 2004*. It also makes transitional arrangements for the registration of new subtypes of entities with the Australian Charities and Not-for-profits Commission and to preserve the charitable status of certain entities.

Glossary

Instrument Appointing an Enduring Guardian

A document appointing a person to make medical and lifestyle decisions when you are incapable of doing so. A person appointed as your Guardian is not allowed to make your business and financial decisions. The person acting in this capacity must act in your best interest and in accordance with any directions given to them by you.

Power of Attorney

A document appointing a person to make business and financial decisions when you are incapable of doing so or when you require them to do so. A person appointed as your Attorney is not allowed to make decisions about your medical and lifestyle decisions. The person acting in this capacity must act in your best interest and in accordance with any directions given to them by you.

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The Appointment of Alternative Decision Makers During a Person's Incapacity

Unfortunately there are times when people lose capacity without properly planning for that incapacity. If a person has not completed valid and effective Enduring Powers of Attorney and Instruments Appointing Enduring Guardians, and they become unable to make their own decisions in relation to their personal circumstances and financial affairs, then it is the role of the Guardianship & Administration Board ("the Board") to consider the appointment of an alternative decision maker to act for that person.

Those alternative decision makers are an "Administrator" (to manage a person's financial, property, and business affairs), and a "Guardian" (to make decisions in relation to the person's personal circumstances, including their health, medical and lifestyle matters).

Any interested person can make application to the Board seeking the appointment of a Guardian and/or Administrator. In this article, we look at the way in which an Administrator may be appointed by the Board as an alternative decision maker able to act for a person in relation to their business, financial, and property affairs. In a later edition, we will discuss the appointment of a Guardian to make health, medical, and lifestyle decisions for a person during the period of their incapacity.

An Administrator has a similar function to an Attorney – the major difference being that a person appoints an Attorney, whilst the Board appoints an Administrator. In general terms, an Administrator has the general care and management of the estate of the represented person.

In order to be successful in an application for the appointment of an Administrator, it must be established that:

1. the person has a disability, as defined in the *Guardianship & Administration Act 1995* (Tasmania) ("the Act");
2. by reason of their disabilities, the person is unable to make reasonable judgments in respect of matters relating to all or part of their estate; and
3. there is a need for an Administrator to be appointed.

In our experience, a major reason that an application for an Administrator fails is due to their being a lack of need for an Administrator to be appointed. One of the guiding principles of the Board, set out in section 6 of the Act, is that the powers of the Board must be performed by "the least restrictive" means. In other words, if there is another method of ensuring that the person's affairs are managed and their best interests are upheld, without the appointment of an Administrator, then the Board will not intervene and make Orders.

If the Board is satisfied about the three tests set out above, then it will look to the qualities of the person applying to be Administrator, to consider whether or not it is appropriate to appoint that person. In conducting that assessment, the Board will consider:

1. whether or not the person will act in the best interests of the represented person;
2. that the Applicant is not in a position where their interests conflict or may conflict with the interests of the represented person;
3. that the Applicant is a suitable person to act as the Administrator, which includes the review of a National Criminal Record check; and
4. that the Applicant has sufficient expertise to administer the estate. This requirement is relative to the particular estate in question, and the size, nature and complexities of the estate.

If the Board is not satisfied as to these matters, then it will appoint the Public Trustee to act as Administrator of the person's financial affairs. Often this is not desirable, due to the associated fees, and the fact that it moves the decision making process away from the family.

It is our strong recommendation that a person considering making an application to the Board for the appointment of an Administrator obtain our assistance, at least in the preparation of their application to the Board, as in our experience, the Board appreciates applications that are fulsome, based on legal argument, and address all relevant matters. A person also has the choice to obtain legal representation to appear for them at a hearing of the Board, or they may decide to represent themselves at the hearing.

If you would like any further information, please do not hesitate to contact our Estate department.

Kate Hanslow

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Family Loan Agreements and Estate Planning

Have you made an informal loan to a family member? In our experience, it is increasingly common for parents to make a loan to their children to help them buy their first home or start a small business. If you have entered into this sort of arrangement or are thinking of doing so, you should consider documenting the loan to protect both you and them.

There are numerous advantages to documenting a loan. The documentation sets out the rights of the lender and the obligations of the borrower, which can help reduce family conflict in the future.

Loan documentation is also useful in matrimonial or estate disputes. It provides evidence of who owes what to whom. This can allow an estate or matrimonial property settlement to move forward in a timely and efficient manner.

The loan document can also provide evidence that the financial accommodation is a loan rather than a gift. Without proper documentation, a former spouse has a greater chance of making a successful claim that the loan was in fact a gift to your child and they may make a claim against it.

As with any loan, adequate security (and guarantees from other parties if appropriate in the circumstances), should be obtained from the borrower. If the loan is to purchase a certain asset (for example, a house or a piece of business equipment which will retain its value) then security can be taken over that asset. Security may be by way of a charge or mortgage over real property, or by a security interest over other types of property.

Investing in property documentation can provide peace of mind and help protect your family's assets.

Alex Bobbi

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Further Information

Our Website: A wealth of information in relation to estate and commercial matters can be found at our website **www.pwl.com.au**

Contributions: Contributions and suggestions from Estate Planning News readers are always appreciated. Email us at sam.mccullough@pwl.com.au

Caution: This newsletter contains material for general educational purposes and is not designed to be advice to any particular person in relation to their own affairs as it does not take into account the circumstances of the reader as an individual. It is recommended that appropriate professional advice be obtained by each reader so that reliance can be taken upon that advice.

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