Family Matters

Congratulations to Arna Bingham

Arna became a member of the Berry Family Law team in 2011. Last year Arna met the criteria for and then applied to the Law Institute of Victoria to be recognised and accredited as a Family Law Specialist.

Her successful accreditation was confirmed on 5 October 2017.

Before applying for specialist accreditation, a lawyer must prove they have a minimum of five years experience in family law. Their application must be seconded by referees of recognised competence and impeccable reputation.

Once an application is accepted, the Law Institute of Victoria requires the applicant to complete a rigorous accreditation process.

This involves passing:-

- A three hour written exam;

- A completed mock file for a complicated and detailed fact matrix including the preparation of advice letters and court documents; and

- A difficult client interview.

More than half of all applicants for accreditation fail. The process is intended to ensure that only the best eligible lawyers receive accreditation.

Arna's success is a credit to her and she joins the ranks of our team of well regarded and specialist family lawyers.

Financial Agreements – recent High Court case provides important guidance

In Australia, married and de facto couples are able to enter into Financial Agreements about the division of their finances:-

1. Before they marry or start living together as a de facto couple (often referred to as "Pre-nuptial Agreements");

2. During their marriage or de facto relationship; and

3. After they separate.

Financial Agreements, if prepared and executed properly, can provide parties with certainty as to how their assets will be divided upon separation. The current law requires that strict requirements be met for Financial Agreements to be legally binding, including that parties:-

1. enter into such Agreements voluntarily and free from duress or unconscionable conduct; and

2. each receives independent legal advice regarding the effect of the Agreement on their rights and the advantages and disadvantages of entering into it.

The High Court decision of Thorne v Kennedy

In November 2017, the High Court of Australia handed down the decision of Thorne v Kennedy. The case provides guidance about Financial Agreements in Australia.

The Husband was a 67 year old property developer with assets valued at over $18million. The Wife was an Eastern European woman living in the Middle East with minimal assets. The parties met online in 2006, had a brief courtship, and then became engaged to be married. The Wife came to Australia to live with and marry the Husband.

Shortly before their marriage, the Husband provided the Wife with a Financial Agreement that he had commissioned and told her that if she did not sign it, their wedding would not go ahead. By this stage, the Wife's parents and other family members had travelled to Australia from Europe, guests had been invited, the dress made and the reception booked. The Financial Agreement detailed that the Wife would receive nothing if the parties separated within the first three (3) years and beyond that time, she would receive the sum of $50,000 indexed with inflation.

The Wife received legal advice about the Agreement that she should not sign it. Despite this, the Wife signed the Agreement four days before the wedding.

The parties did not have any children together and separated after less than four years of marriage. After separation, the Husband sought to enforce the terms of the Financial Agreement. The Wife rejected this and ultimately commenced proceedings in the Federal Circuit Court seeking to set aside the Financial Agreement and receive a greater property settlement.

The Wife successfully obtained a decision at first instance to overturn the Financial Agreement. The Husband passed away during those proceedings and his Estate appealed the decision to the Full Court of the Family Court of Australia. That Court overturned the single Judge's decision and found the Financial Agreement was valid.

The Wife then appealed to the High Court. The High Court set aside the Financial Agreement. In arriving at their decision, the High Court agreed that in light of the power imbalance and circumstances in which the Financial Agreement had been signed, the Wife had been deprived of free will to decide whether to enter the agreement.

The High Court upheld the various factors that the Trial Judge considered to be relevant in evaluating whether someone is subject of undue influence:

1. Whether the agreement was offered on a basis that it was not subject to negotiation;

2. The emotional circumstances in which the agreement was entered into including any explicit or implicit threat to end a marriage or to end an engagement;

3. Whether there was any time for careful reflection;

4. The nature of the parties' relationship;

5. The relative financial positions of the parties; and

6. The independent advice that was received and whether there was time to reflect on that advice.

Financial Agreements must be prepared carefully and entered into in appropriate circumstances. A well prepared Financial Agreement which is fair should remain binding.

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