September 2015 Newsletter

Phillips | Family Law Bulletin

LawAustralasia Special Interest Group Conference

In August our Director, Tony Phillips, two Senior Associates, Sarah Bastian-Jordan and Fiona Caulley, Associate, Kylie Perkins and Lawyer, Olivia Phillips had the opportunity to attend the LawAustralasia Special Interest Group conference held at the Gold Coast. The LawAustralasia group (of which Phillips Family Law is a continuing member) is an association of independent Australasian law firms who are committed to achieving best practice in the legal industry and collaboratively share knowledge on practice management issues, as well as specialised areas of law including family law. Each year a Special Interest Group conference is held for family and estate planning lawyers, which provides an opportunity for the members to hear from fantastic speakers and expand their knowledge on these specialised areas.

This year's family law section of the conference commenced with a comprehensive presentation by Mr Richard Friend, a specialist tax consultant on "Tax issues impacting on Family Law Settlements". Mr Friend's presentation provided everyone with up to date information on the tax issues that impact on family law settlements as well as innovative ideas to minimise the effect of tax on our client's. The Phillips Family Law team took away valuable lessons from Mr Friend's presentation which we will explore further within our practice.

A highlight of the conference was a combined session for the family and estate planning lawyers, which was a panel presentation that focussed on estate planning and family law in the context of "blended families". Our Director, Tony Phillips and Senior Associate, Sarah Bastian-Jordan were both on the panel.

Sarah delivered an engaging presentation on Binding Financial Agreements and blended families which provided everyone with useful tools to implement to ensure that specialised care is taken when dealing with a blended family situation. The joint session provided everyone with an insight into how family and estate planning law interact which is especially relevant in the context of a blended family.

The final presentation was an interactive and engaging session from Mr Bob Milstein on "Plain Language drafting". Mr Milstein is a lawyer, plain language trainer and document writer. This session provided us with writing techniques to help hone our skills to deliver clear and concise legal writing. As lawyers, we are aware that it can be easy to fall into writing in legalese and Mr Milstein's session was an important reminder of the value of plain English drafting when communicating with our client's and the Court.

The Special Interest Group conference was particularly valuable as it offered innovative and informative presentations in specialised streams in family law, as well as the opportunity for our team to catch up with the other LawAustralasia members from throughout Australia. We enjoyed the opportunity to hone our knowledge in many facets of family law practice and look forward to devising ways to adapt this new knowledge to enhance the services we offer to our clients at Phillips Family Law.

Written by Olivia Phillips - Lawyer

Family law planning avoids messy estate battles

With the accumulation of significant family wealth, it is becoming more common for unhappy beneficiaries to challenge the Wills of their deceased family members. That challenge will be successful (and thus they obtain a greater share of the estate) if they are able to prove that the Will-maker (also referred to as the testator (m) or testatrix (f)) did not adequately provide for their proper maintenance and support. The assessment is done by the Court putting "itself in the position of the testator" to "consider what he ought to have done in all the circumstances of the case" (Bosch v Perpetual Trustee Co [1938] AC 463). The Court will take into account as part of the 'circumstances' any previous agreements between the Will-maker and the unhappy beneficiary about their financial arrangements – for example, a prenuptial agreement or financial agreement.

Pre-nuptial or financial agreements are especially useful in defending claims by disappointed spouses. The Courts have held that a prenuptial agreement or financial agreement "though not of itself directly decisive" is "significant to the assessment to be made by the court" because it is "a voluntary statement of the parties of their mutual intentions and expectations in a form intended to be binding" and therefore it is "a reliable conspectus of the totality of the relationship of the parties and of their respective relationships with others who have a claim on their bounty." The case law provides that "the court should have regard to such a voluntary statement by the parties of their intentions and expectations, unless there is good reason for the court to conclude that these intentions and expectations would not have shaped the thinking of the wise and just testator or testatrix postulated by the Act."

In the Queensland case of Hills v Chalk [2008] QCA 159, the Court refused a husband's application for a greater share of his deceased wife's estate, because among other things, they had a pre-nup which said that they would each keep the separate property they each had before their marriage and would keep their finances separate. The pre-nup also foreshadowed that they would give priority to their respective children from previous relationships, rather than each other. The Court said [at 209]:

"The strength of a pre-nuptial agreement as one of the relevant factors must of course vary from case to case: in this case, the brief summary of the evidence I have given suggests that this pre-nuptial agreement provides considerable support for the view that the provision in the will was "adequate" for the "proper" maintenance and support of the respondent."

Pre-nuptial or financial agreements are an integral part of estate planning, particularly in second-time marriages where the parties have children from a previous relationship. Our practice works in conjunction with specialist estate planning lawyers to ensure full-spectrum cover for clients considering re-marriage or re-partnering.

Written by Sarah Bastian-Jordan - Senior Associate

CASE IN POINT

Husband earns more in the period after separation than the value of the entire asset pool – Wife receives 60%.

This month, the Full Court in Trask & Westlake [2015] FamCAFC 160, upheld a trial judge's decision to apportion 60% of the property in favour of the wife because she contributed to the husband's ability to earn significant income post-separation.

The parties had been together for 13 years and had four children aged 15, 13, 11 and 9. They separated in February 2009. The trial judge heard the matter in November 2013.

During the marriage the parties had "embraced roles … agreed between them" — the husband worked as a professional and the wife as homemaker and parent.

The pool of property for division was valued at around $7M.Four years had passed since the parties' separation. During that time the husband had earned almost $9M from his work — $2M in 2010, $3.4M in 2011 and $1M in 2012. He was retrenched in 2013 and received $2.5M.

At the time of trial the husband remained unemployed and the wife continued to parent the children.

The trial judge determined the parties' contributions were equal during the marriage and post-separation, and found that there should be a further adjustment of 10% to the wife on account of the husband's earning capacity and a financial resource (share units) worth around $187,000.

The husband appealed — he argued that he had earned more money in the years since separation than the value of the entire pool of assets. He argued that it could not be fair for the wife's post-separation contribution as a parent to be considered as equal to his, when her role was diminished because of the growing independence of the children, the husband's absence from the household and the substantial period since the parties separated.

The Full Court disagreed with the husband. The Court said that the "husband had arrived at his [career] position by dint of his talents, dedication and hard work but also by dint of the contributions made by the wife across the years preceding that employment." The Court also said that whilst a calculation of the "percentage of the total value of the property represented by the husband's post-separation cash injections…can be a useful measuring stick" the "assessment of contributions remains a matter of judgment and not of computation" because whilst the husband's contributions could be quantified tangibly from his income, the wife's contributions "are much less tangible" and "the lack of tangible recognition, or the fact that they are not susceptible to a dollar calculation, does not render them less important".

Written by Sarah Bastian-Jordan - Senior Associate

For further information on these or other legal issues please contact:

Tony Phillips
Family Law Accredited Specialist
tony.phillips@pflaw.com.au

Sarah Bastian-Jordan
Senior Associate
sarah.bastianjordan@pflaw.com.au

Kylie Perkins
Associate
kylie.perkins@pflaw.com.au

Olivia Phillips
Lawyer
olivia.phillips@pflaw.com.au

Fiona Caulley
Family Law Accredited Specialist
fiona.caulley@pflaw.com.au

Sophia Bookallil
Senior Associate
sophia.bookallil@pflaw.com.au

Rebecca O'Brien
Associate
rebecca.obrien@pflaw.com.au