



MUTUAL WILLS

Clients (particularly in second marriages) often wish to ensure that their wills reflect proposed arrangements whereby each party in a relationship makes their will in a particular form, in consideration of the other party making their will in a particular form (e.g. each to each other during the lifetime of the survivor, and then providing that the estate of the first to die passes to their children by a former marriage).

This was quite a common arrangement until the decision of the High Court of Australia in *Barns v Barns* in 2003.

In that case the husband died leaving his estate to his wife, and making no provision for his adopted daughter or his son.

The deceased, his wife and son executed a deed in which the deceased agreed with his wife and son to make a will in a particular form, and the wife agreed to make a will in a particular form.

The adopted daughter subsequently applied to the court seeking provision out of the estate of the deceased, and the High Court ultimately held that the deed signed by the parties did not have the effect that the property of the deceased was not available for a court to make a family provision order making provision to another person (- in this case the daughter).

A deed providing that the parties will make their wills in a specific form is still binding and effective upon the parties to the deed, but may not prevent a claim by one of the parties to the deed, or by another party (e.g. a child) for a family provision claim against the estate.

The only ultimately effective method of preventing a family provision claim is to ensure that the relevant assets do not form part of the estate of the deceased on his or her death (e.g. by transferring them away during the lifetime of the deceased, or making them subject to valid liability), however such deeds may be of considerable assistance, and will certainly be taken into account by courts in considering any future family provision claim.

Matters to be borne in mind in preparing such deeds are:

- C whether they are to apply to all assets of the deceased (e.g. assets acquired after the execution of the deed, or after the death of the spouse);
- C the effect of inter vivos transfers (i.e. transfers during the lifetime of the deceased);
- C the effect of relationship breakdown;

- C bankruptcy;
- C life estates;
- C whether there should be a sunset clause.

Consideration should also be given to the questions of:

- C superannuation proceeds (which will not form part of the estate of the deceased unless the subject of a binding death benefit nomination);
- C testamentary trusts;
- C life insurance.

Obviously transfers during the lifetime of the deceased will have financial consequences and involve some risks (e.g. capital gains tax, stamp duty, the risk that the transferee of any such asset will not act in accordance with the wishes of the deceased during their lifetime.)

Consideration of the use of such deeds must always be in the context of careful and thorough estate planning.