Schweizer Kobras
LAWYERS & NOTARIES

NEWSLETTER

Legal Up-Date

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DIVORCE – WHAT HAPPENS TO YOUR WILL?

We all want to make arrangements to provide for and protect our loved ones, especially after we die. This is one of the main reasons why we make a Will. If we are married, we usually appoint our spouse as executor of the Will, and also usually make various provisions for the benefit of our spouse.

But what if we get divorced? Will our former spouse still have a claim on our estate under the Will if we do not make a fresh Will after the marriage is terminated?

Termination of marriage takes place legally when the decree of dissolution becomes absolute.

If you make a Will before marriage the Will is automatically revoked once you marry unless the Will was expressed to have been made "in contemplation of marriage". Curiously however, the law does not provide that termination of marriage revokes the Will, as one would expect. Rather, termination of marriage only affects gifts to the former spouse and the appointment of the former spouse as executor, trustee or guardian. This means that if you are divorced, have not updated a Will that was made while you were married, and you appointed your former spouse as executor of your Will, then on termination of the marriage, the appointment is taken to have been omitted. One consequence of this is that the appointment becomes invalid and the Court will not grant probate of the Will, if no default executor has been nominated in the Will.

Another consequence is that in order to transfer your assets into the names of your beneficiaries (other than your former spouse), the beneficiaries would need to apply to the Court for Letters of Administration. This may result in additional costs and delay.

Further, any gifts you have made in the Will in favour of your former spouse will be revoked. This means that the gift would fail and you would die intestate (i.e. without a will), at least as to that part of your estate. The relevant assets in your estate would then pass according to the rules of intestacy; perhaps not to the beneficiaries you would want to benefit, but to someone entirely different!

If you are involved in a divorce you should make a fresh Will as soon as you apply for a Dissolution of Marriage, given the likely effect of the divorce on your current Will. At the latest, you should make the new Will when you obtain a Decree of Dissolution of Marriage, in order to avoid difficulties for your beneficiaries. It is also advisable to clarify in the fresh Will that your former spouse should not have any claim on your estate if a property settlement has already been agreed or ordered by the Court. If you have any questions in this regard, please contact our office to discuss.

CHANGING EMPLOYERS UNDER AN EMPLOYMENT SPONSORED VISA

What would happen if a person is sponsored for a 457 visa by an overseas parent company to set up or to expand an already existing Australian business which, although a separate legal entity, forms part of a group of affiliated companies? Once the Australian company is set up or is running smoothly, it may be desirable to employ the visa-holder through the local company. Is this "change of employer" a breach of condition 8107?

If you are the holder of a 457 visa and you are the main visa applicant (as opposed to a secondary visa applicant such as a spouse or a dependant child) you will probably know that your visa is subject to condition 8107. Condition 8107, among other things, says that the visa-holder must not cease to be employed by the original employer.

When it comes to changing to an entirely different employer, the position is clear. Such a change is not permissible without lodging a fresh sponsorship, nomination and visa application.

As to changing employers within a group, according to the Department of Immigration and Multicultural and Indigenous Affairs ("DIMIA") Procedural Advice Manual, it is not a breach of condition 8107. If the new employer is a related company, there is no breach of condition 8701.

Yet, despite what is stated in DIMIA's own Procedural Advice Manual, in practice, DIMIA seems to take the view that overseas parent companies do not

in fact qualify as a related company of a local subsidiary. Therefore, a fresh sponsorship, nomination and visa application would be required if the visa-holder wants to change employment from the parent company to the Australian subsidiary.

This illustrates the consequences of not informing DIMIA of such changes or simply making uninformed changes. The consequences can indeed be severe for the parties involved. They can go so far as visa cancellation and the cancellation of the parent company's approval as a business sponsor.

It is therefore advisable to give adequate thought to any proposed change of employer, including inter- and intra-company transfers, and to discuss the proposed changes either with a registered migration agent or DIMIA prior to implementation, in order to avoid any unwanted surprises.

Please note that at Schweizer Kobras, we have a qualified registered migration agent specialising in business migration, who can answer your questions. If we can assist you in this regard, please do not hesitate to contact us.

DEALING WITH INSOLVENT COMPANIES – WHAT ARE THE RISKS?

These days when corporate collapses are prevalent, not only do we need to know how to protect our businesses from going bust, but we must also be aware of the risks to which we may be exposed in our dealings with companies that are subsequently declared insolvent.

An example of this might be where a trade debtor becomes insolvent. How do we know whether any monies paid to us by the trade debtor in the course of business are not at risk of being declared a void transaction. If such transactions are declared void, you will have to pay the money back to the debtor's insolvency administrator.

The purpose of the liquidation process is to ensure, as far as possible, that each creditor gets its fair share of the proceeds once all the assets of the company have been liquidated.

The Corporations Act proscribes two types of pre-liquidation transactions that are voidable. These are:

- unfair loans (s588FD); and
- insolvent transactions (s588FC).

An insolvent transaction may be a transaction which results in unfair preferences from the point of view of other creditors of the insolvent company or it may be an uncommercial transaction.

The most likely type of transactions that an innocent party may be caught by are transactions which result in unfair preferences to that party. This is despite the fact that the innocent party had no intention to gain an advantage over other creditors.

A transaction will be an "unfair preference" if a company and a creditor are parties to the transaction and the transaction results in the creditor receiving more than the creditor would have received if the creditor had to prove for the debt in the winding up of the company. Further, the transaction must have occurred within 6 months prior to the time the company became insolvent (the relation-back period).

An example of this is where the trade debtor company makes full payment for goods or services to one creditor but not another. The creditor would then have to repay the money and prove in the winding up of the company along with the rest of the creditors. The creditor would then most likely only receive a fraction, if anything, of its entitlement.

There is a defence to a transaction being declared an "unfair preference". The defence can be established if the creditor can prove that:

(a) it received no benefit because of the transaction; or

(b) in relation to each benefit it received because of the transaction:

  (i) it received the benefit in good faith; and

  (ii) at the time when it received the benefit:

    (A) it had no reasonable grounds for suspecting that the debtor company was insolvent at that time or would become insolvent; and

    (B) a reasonable person in the creditor's circumstances would have had no such grounds for suspecting that the debtor company would become insolvent.

Certain procedures and checkpoints may be implemented in your dealings with trade debtors to ensure that you can avail yourself of the defence if a trade debtor becomes insolvent. If you wish to discuss any of these, we would be happy to meet and help assess the best options.

YOUR FEEDBACK

If you have any comments about this newsletter, suggestions for improvement or would like to see any particular areas of law which interest you covered, please drop us a line at:

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