HEMMING+HART LAWYERS

Family Law Fact Sheet

Financial Agreements
Divorce proofing
Line of Descent trusts and generational succession planning

There is an understandable reluctance amongst couples considering entering a de facto relationship or getting married about signing a Financial Agreement.

Financial Agreements, if drafted correctly, can exclude the ability of parties to go to Court and litigate property settlement entitlements in the event of a separation. Financial Agreements instead set out an agreement, made before or during the relationship about how assets and liabilities are to be divided in the event of a separation.

Succession planning

We are increasingly seeing parents of the baby boomers or retiree generation with adult children encouraging those children to enter into a Financial Agreement so that family businesses and potential inheritances which have been grown through the efforts of the family as a whole can be protected in the event of a separation.

Often family businesses have been established in a structure which includes discretionary family trusts.

Family trusts

Even where adult children are only beneficiaries of a discretionary family trust, the assets of the trust could be challenged and treated as property to be divided between separating spouses in the event of a relationship breakdown.

This can be the case even if the trust is controlled by the older generation and even though the adult children starting new relationships have only a minority interest in the structure as a whole.

Family businesses

We are increasingly providing advice to the older generations of families in the context of protecting family businesses from the adverse effects of a relationship breakdown between their adult children and their current partners.

Whether family businesses can be vulnerable in a dispute between a family member and their spouse, in the event of the couples separation depends on a number of factors. These factors include:

- Legal ownership of the business structure as a whole;
- The control of the business structure as a whole;
- The history of income distributions (whether by dividend or trust distribution) paid to the children;
- Details of any employment relationship between the separating spouse and various entities;
- The manner in which management decisions have been made during the course of the relationship;
- The nature of interest that the separating spouse has in the business structure;
- Where the control and management responsibility of the business rests with the older generation, the age and life expectancy of those in owner/manager roles.

Part of a succession plan for any family business should include Financial Agreements to guard against the adverse effects upon the business in the event any business owners, beneficiaries, shareholders, partners or unit holders separate from their spouses.

If these issues are considered in the context of a wider succession plan, then the cost, delay and angst which is often associated with family law disputes can often be avoided and businesses protected.

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