

FAMILY Flyer



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COURT REVERSES A TRANSACTION AFTER THE HUSBAND'S DEATH

If someone is trying to rid themselves of property in a divorce, they had better think again. The Family Court has broad powers to protect property. The Court can set aside a transaction that is designed to defeat an existing or anticipated family law order.

The Court recently dealt with a case where a husband tried to dispose of real estate.

Background

The husband, upon discovering that he was terminally ill, transferred a house owned by him to his 2 children (from a previous relationship). The wife learned about the transfer and commenced Family Court proceedings

The husband passed away before he could be served with the Court Application, and was therefore represented by the executor of his estate at trial.

The wife sought that the transfer be set aside, on the basis that if the husband was still alive the Court would have made an order for property settlement. The executor argued that the Court should not make an Order for property settlement as the husband and the wife were not separated.

Court Decision

The Court found that it was likely that both parties could foresee that the wife would apply for property settlement Orders following the transfer of the property and it was not necessary for the proceedings to have commenced at the time of the transfer.

There was evidence that the husband and his children kept the transfer secret from the wife and this implied that the

husband was, in fact, attempting to avoid a claim by the wife to the property.

The Court was satisfied that as a result of the circumstances of the transfer, the wife having obtained legal advice previously and the fact the wife brought the application, that the marriage was not "continuing in the normal way".

The Court agreed with the wife's argument and exercised its power to reverse the transfer of the property.

NULLITY OR DIVORCE?

A divorce is legally defined as a dissolving of a marriage. The legal requirement for a divorce is 12 months separation.

A nullity of a marriage, is totally different. A nullity is an Order of the Court that a marriage never existed.

Court Orders for nullity of a marriage are rare as there are only limited circumstances in which they can occur. Besides fundamental issues, such as duress or fraud, it usually requires that the marriage ceremony has been conducted incorrectly or that the person conducting the ceremony is unqualified.

RELATIONSHIPS AND WILLS

It is important to be aware of the effect of relationships upon a Will, particularly whether the relationship is a marriage or a de facto relationship.

Marriage revokes a Will, unless the Will is made in contemplation of marriage, but the commencement of a de facto relationship has no such impact on a Will.



Divorce revokes any gift to a former marital spouse under a Will, but breakdown of a de facto relationship does not.

APPEALING AN ORDER

Once a court order is made (either at an Interim or Final Hearing) if one of the parties is dissatisfied with the decision they can Appeal, and try and set aside the decision. An Appeal is not a rehearing of the matter (not hearing all the evidence again) but it requires the Appeal Court to be convinced that the Trial Judge made an appealable error. The Appeal Court must be persuaded that the Trial Judge:-

- applied a wrong principle of law; or
- made a finding of fact on an important issue which could not be supported by the evidence; or
- exercised his or her discretion to arrive at a decision which was clearly wrong.

A Notice of an Appeal must be lodged within 28 days of an Order being made. It is possible to apply for leave to Appeal 'out of time', although there is no guarantee the court will grant such leave. The relevant factors the court will consider in granting leave include:-

- the length of the delay;
- the reasons for the delay;
- any disadvantage it has caused the other party;
- the merits of the proposed appeal; and
- the overall justice of the case.

Filing an Appeal does not automatically affect the Orders made by the Judge. This means that both parties must obey the orders, even if an Appeal has been filed. If a party wishes to stop the operation of the court order until the Appeal is decided, that party must make an Application before the trial

judge seeking a 'stay of the order'. An Application to Stay an Order can only be filed after the Appeal has been filed.

SPOUSE MAINTENANCE – HOW MUCH AND HOW LONG?

In a recent property settlement case the Court, considered an application by the wife for spouse maintenance. The couple had been together for 16 years

The wife sought payment from the husband in the amount of \$600 per week, to continue indefinitely. The husband proposed to pay the wife \$500 per week for a period of 2 years only.

The wife's argument was that there was a vast income disparity between her and the husband. This was true, as the husband was earning about \$500K per year and the wife had no income as she was studying. On top of this, English was the wife's second language and, although she was finishing study in Australia and hoped to obtain work following completion of that study, given her language difficulties it was unlikely she would ever earn a significant salary. The Judge agreed that the wife's employment options were limited.

The husband argued that the court should have regard to the "clean break" principle, and should ensure that there was finality and an end point to financial ties between them.

The court also considered various other factors of the relationship, for example the wife was to receive a substantial amount of cash from the sale of the matrimonial home, which she intended to use to purchase a new property. The wife also had primary care for the couples' youngest child who was 8 years of age. The 15 year old child was cared for by the husband's mother, and the husband on weekends, at the expense of the husband.

The court weighed up the competing factors and ordered that the husband pay \$600 per week to the wife for 3 and a half years. The court determined that this would be enough time to allow the wife to complete her studies and obtain employment.

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