SOLARI & STOCK
LAWYERS

MID YEAR NEWSLETTER 2023

Welcome to our mid year client newsletter. We have selected a number of articles by our Solari and Stock lawyers and our guest author, Simon Boylan from Zenith Aged Care Consulting. If you would like to discuss any of these articles further, or require an appointment with one of our Team, please contact us on 8525 2700 or send an email to law@solariandstock.com.au. Alternatively if there is a topic that you would like us to discuss please let us know and we would be happy to cover the topic.

THE ASSESSMENT OF ASSETS FOR AGED CARE AND AGED PENSIONS

In previous articles we have explained that certain assets are assessed differently for Aged Care purposes. Some are also treated differently when it comes to the Age pension. This article will explore some of these differences.

The Family Home

The assessment of the family home is probably the most misunderstood asset with regards to aged care and the age pension. Generally speaking, the former home will be assessed as an asset for Aged care purposes unless occupied by a protected person on the date of permanent entry to care.

A protected person is defined as:

- A spouse;
- A dependant child
- A close personal relative who has lived in the home for at least 5 years **and** *is entitled to Centrelink income support*
- A Carer who has lived in the home for at least 2 years **and** i*s entitled to Centrelink income support*

When the home is not occupied by a protected person (or ceases to be) the home will be assessed for Aged care purposes at $193,219.20 (current 1/3/23).

For the purpose of the Age Pension Asset Test, the home is not assessable (under the Principal place of residence exemption) for the first 2 years following entry to care, regardless of whether occupied or not. Importantly, this exemption only continues beyond 2 years when it is occupied by the Spouse or dependant Child. Otherwise after 2 years the resident is considered a non home owner and the home is assessed at full market value.

Often this will mean the resident can get a better financial outcome (in the first 2 years at least) by retaining the home for 2 years, firstly through a reduced means tested fee and secondly by retaining access to the Age Pension. Whether the resident can afford to do this however will depend on the level of liquid assets available to fund the ongoing expenses.

Whilst the concessional asset testing of the home applies whether it is rented or not, care should be taken when deciding to rent the family home as income generated will be assessed for both Age Pension and Means Tested fees. The income received will also be taxable and, depending on the value of the property, may result in a liability for land tax.

Refundable Accommodation Payment

Where a resident chooses to pay a Refundable Accommodation Deposit (or a Refundable Accommodation Contribution), this money is still assessable against the residents Means Tested Fee. As the RAD generates no income however, it does not contribute to the income component of the MTF calculation and can sometimes result in a lower MTF.

The RAD (or RAC) however is not assessable against the Aged Pension. Often, careful planning around how much RAD to pay can result in significantly higher Age Pension payments. In some cases, the

(continued on next page)

Our team of experienced lawyers can provide you with expert legal advice for all your legal needs including

- Family Law property and parenting matters
- Divorce
- Estate Planning-wills, powers of attorney and enduring guardianships
- Deceased estates and estate disputes
- Sale and purchase of businesses
- Commercial and business law
- Leases
- Property law and conveyancing
- Civil litigation

THE ASSESSMENT OF ASSETS FOR AGED CARE AND AGED PENSIONS cont....

resident can actually find themselves in a better financial position by buying into a more expensive room!

Investment Properties and holiday homes

As for Age Pension assessment, Centrelink will assess the market value of the property as well as the net taxable income received. Where a tax return is not available, Centrelink will generally assess 66% of the net rent and where no rent is received, there is no assessable income.

Cash, shares, super (if over Age Pension age), personal assets, cars etc.

These assets are all assessable at market value, as they are for the aged pension. It is worth mentioning however that where an individual is below Age Pension age, superannuation in accumulation phase is not assessable against either Aged care Fees or a partners age pension. These assets are also subject to Centrelink Deeming (see below).

In the relatively rare circumstances where a resident (or their partner) is under age 67, this can provide some significant planning opportunities to optimise aged care and pension outcomes. Specialist advice should be sought in this circumstance.

Gifts

For both Aged Care and Aged Pension purposes, gifts made in the last 5 years above $10,000 are assessable and subject to deeming. A gift is defined as an asset given away or transferred for less than it's market value. Amounts above $10,000 per financial year and $30,000 in a 5 year period are considered assessable.

What is Centrelink Deeming?

Quite simply, deemed interest is an assumed return earned on assets regardless of the actual income or capital growth. It is used to more simply assess the income from certain assets. The current rates are 0.25% on the first $60,400 ($100,200 for couples) and 2.25% for any amount above that.

Note: This information, whilst current at the time of writing is subject to change. It is intended as general information only and should not be relied on as advice.

Article by Simon Boylan from Zenith Aged Care Consulting | Photo by Alexander Andrews on Unsplash

VARIATION OF PARENTING ORDERS

Generally, a final parenting order applies to the relevant child until they turn 18 years of age. However, if the child is very young when the orders are made, in reality, as the child grows older and their needs change, the orders may no longer be in their best interests. This can be problematic if the original orders do not provide sufficient flexibility for the child into the future.

It is accepted that it is not in the best interests of the child for parties to constantly re-litigate issues in parenting proceedings. For this reason, the Court will not entertain an application to vary a final parenting order lightly. In what circumstances then, may a party to final parenting seek to vary or change those parenting orders? The case of *Rice v Asplund* (1978) addresses these questions. The principles in this case are commonly referred to as "the rule in *Rice v Asplund*".

In *Rice v Asplund*, the Full Court of the Family Court determined that before it would review final parenting orders, it would first need to be satisfied that there had been a significant change in circumstances since the making of the orders. This is now referred to as the "threshold test". Chief Justice Evatt said the Court"...should not lightly entertain an application ... To do so would be to invite endless litigation for change is an ever-present factor in human affairs ... there must be evidence of a significant change in circumstances."

To determine whether there has been a significant change of circumstances, the Court will consider the facts of each matter. There are no specific circumstances that will satisfy the rule, however the following examples will be relevant:

- A party is seeking to relocate with the child;
- The current Orders were made without all the relevant information having been made available to the Court;
- One or more of the parties has re-partnered or remarried;
- There has been abuse of the child; or

The Court may still be reluctant to vary final parenting orders, even if there has been a significant change in circumstances and the threshold test has been met. The Court will first need to consider what is in the best interests of the child and whether a variation of the Orders is desirable.

One option available to parties to reduce the potential for further litigation to vary parenting orders is to set out an agreement by the parties in relation to parenting matters by way of a Parenting Plan. A Parenting Plan should detail parenting arrangements, anticipate future events and should include a procedure to resolve future parenting disputes. It is important to note that a Parenting Plan

does not constitute an order of the court. Although a Parenting Plan is not binding or enforceable, it will likely be afforded weight as evidence of the parties; intention and agreement at the time that it was entered into.

Article by Kirstin Attard | Photo by Anvesh on Unsplash

I DO... I DON'T YOUR WEDDING HAS BEEN CALLED OFF... SO, WHAT HAPPENS TO THE ENGAGEMENT RING?

The engagement ring is surrounded by beautiful and romantic memories of couples proposing amongst a beautiful backdrop and perhaps flowers and champagne. Unfortunately, things may not work out and your engagement may be called off, so what happens to the engagement ring?

There has been much debate on this issue after an Australian woman listed her $23,600 Tiffany engagement ring for sale on Facebook marketplace after her relationship ended. The public questioned the legality of whether the woman was allowed to sell the jewellery after ending an engagement. Many people remarked whether the woman was legally entitled to sell the ring, or was she required to return the ring to the ex-fiancé. Did the woman do the right thing?

The partner who gifted the ring claims that they should get it back, but the person who received the ring claims that it was a gift, and it belongs to him/her. Who is correct? Well, this depends on whether it was a gift or a conditional gift.

In the case of Papathanasopoulos v Vacopoulos [2007] NSWSC 502, Mr Vacopoulos (Mr V) instituted proceedings in the Local Court to recover an engagement ring or its value from his former fiancée Ms Papathanasopoulos (Ms P). On 6 August 2005, at their engagement party they exchanged rings. The engagement ring which he gave her cost about $15,250. Relations between Mr V and Ms P deteriorated between the end of that party and about 16 August 2005.

Ms P said words to the effect of *"the wedding is off, here take the ring, I don't want it."* Ms P took off the ring and placed it on the table in front of Mr V, to which he responded words to the effect of *"I do not want the ring it is a gift for you, you can keep it."* At no time did Mr V attempt to pick up or take the ring.

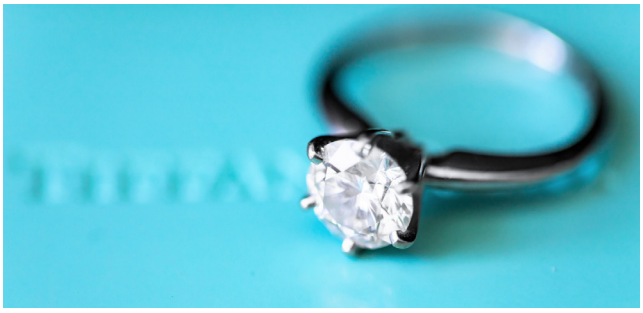
The Magistrate held that the ring was a conditional gift and given to Ms P in contemplation of marriage. *"It is something that was given as a symbol, if nothing else, of the expected ongoing relationship between the parties. If she was rejecting him, then that quite plainly should have been returned."*

The Court referred to and summarised the principles from *Cohen v Sellar* which were as follows:

- If a woman who has received a ring in contemplation of marriage refuses to fulfil the conditions of the gift, she must return it.
- If a man has refused to carry out his promise of marriage, without legal justification, he cannot demand the return of the engagement ring.
- It is irrelevant that the repudiation of the promise may turn out to the advantage of both parties.
- If both parties agree to dissolve the engagement, then in the absence of agreement to the contrary, the engagement ring and like gifts must be returned, by each party, to the other.
- In the event that a woman is subjected to violence or if the man is having an affair, the woman can raise this as a legal justification for her decision to refuse to carry out her promise of marriage.

Mr V was successful in recovering the value of the ring.

The situation is slightly different when parties are married and decide to separate. In this case, the engagement ring forms part of the property pool. There is no onus on the party to return the engagement ring in these circumstances. However, whoever retains the ring, it will form part of their share of the asset pool.



Article by Shweta Kumar | Photo by _drz_ on Unsplash

CHILD IMPACT REPORTS

Many times, when you are before the Court, you might hear the Court ordering a Child Impact Report. You might wonder what this means and what it involves.

Child Impact Reports are ordered by a Registrar or a Judge. On most occasions this will be early in the proceedings.

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Who is it prepared by?

These reports are prepared by a Court Child Expert. These experts are qualified psychologists or social workers who specialise in child and family issues after separation. There are experts in the Court but there are also experts who do these reports on a private basis when there is a long waiting period for the Court.

What is the purpose of such a report?

The purposes of a Child Impact Report is to provide information about the experiences, needs, views and opinion of the children whose best interests are being considered.

The Assessment Process

The assessment takes place in two stages. Firstly, the expert will have a meeting with the parents. The expert will meet each parent separately and find out information about the children. You may be asked questions in relation to any of the following:

a. The relationship between the children and each parent;
b. The age/maturity or developmental stage of the children;
c. Any family violence and other risk issues such as drugs, alcohol and mental health; and
d. The ability to co-parent with the other parent following separation and the impact this might be having on the children.

It is important to note that any information you provide to the Court Child Expert is not confidential and may be used as evidence in Court proceedings.

The second stage involves the Court Child Expert meeting with your children. If there is more than one child, the expert may meet with the children together and separately. The children are asked questions in relation to how they feel about the family situation following the separation of their parents. The children are given the opportunity to talk about their feelings and experiences. The expert will not force a child to express their views or wishes if they do not wish to do so.

The expert may also observe the children together with each parent. Following the interview with the children, the Court Child Expert may wish to speak with the parents again.

What should I say to my children?

Children should not be told what to say to the Court Child Expert. If you have to attend upon an expert, explain to the children that they are going to meet someone who would like to talk to them. Explain to the children that this is a person to whom they can express their views, opinions and feelings. You should also tell them that if there is anything they do not wish to discuss then that is fine. Children should feel comfortable.

Do I need to take anything with me to the meeting?

You do not need to bring anything with you to the meeting. The Court Child Expert will be provided with all documents that have been filed by both parties and will read any documents ordered by the Court.

What happens when it is over?

Once the Court Child Expert has completed the interviews and prepared the Child Impact Report, the report will then be provided to the Court. The Court will release it to the parties or their legal representative if they have one.

Article by Shweta Kumar | Photo by Max Goncharov on Unsplash

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