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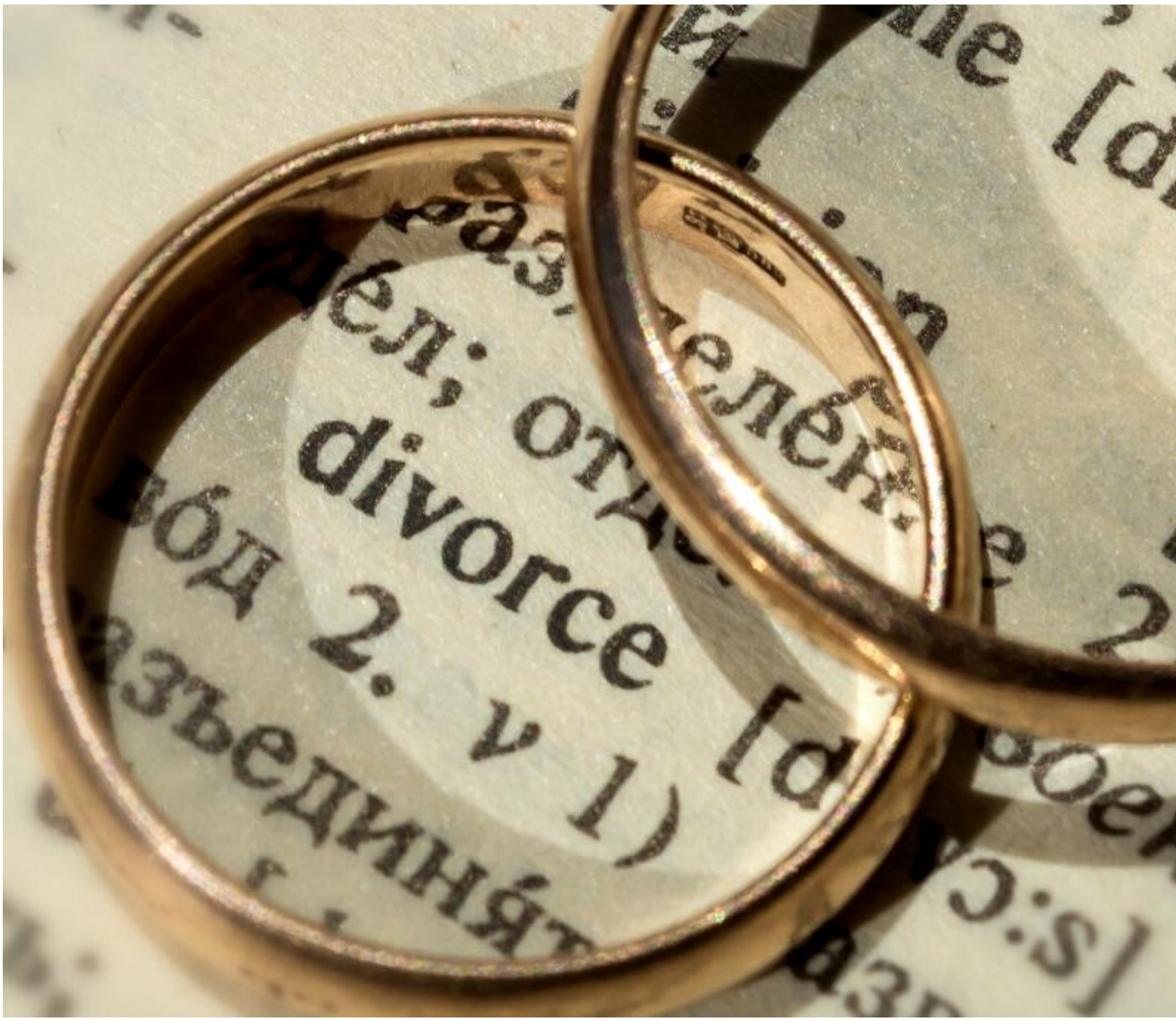
DIVORCE

Everything you need to know



Written by Maria Rigoli
B.A. LLB. (Melb) Acc.Spec (Fam)
Principal Lawyer and founder of Rigoli Lawyers

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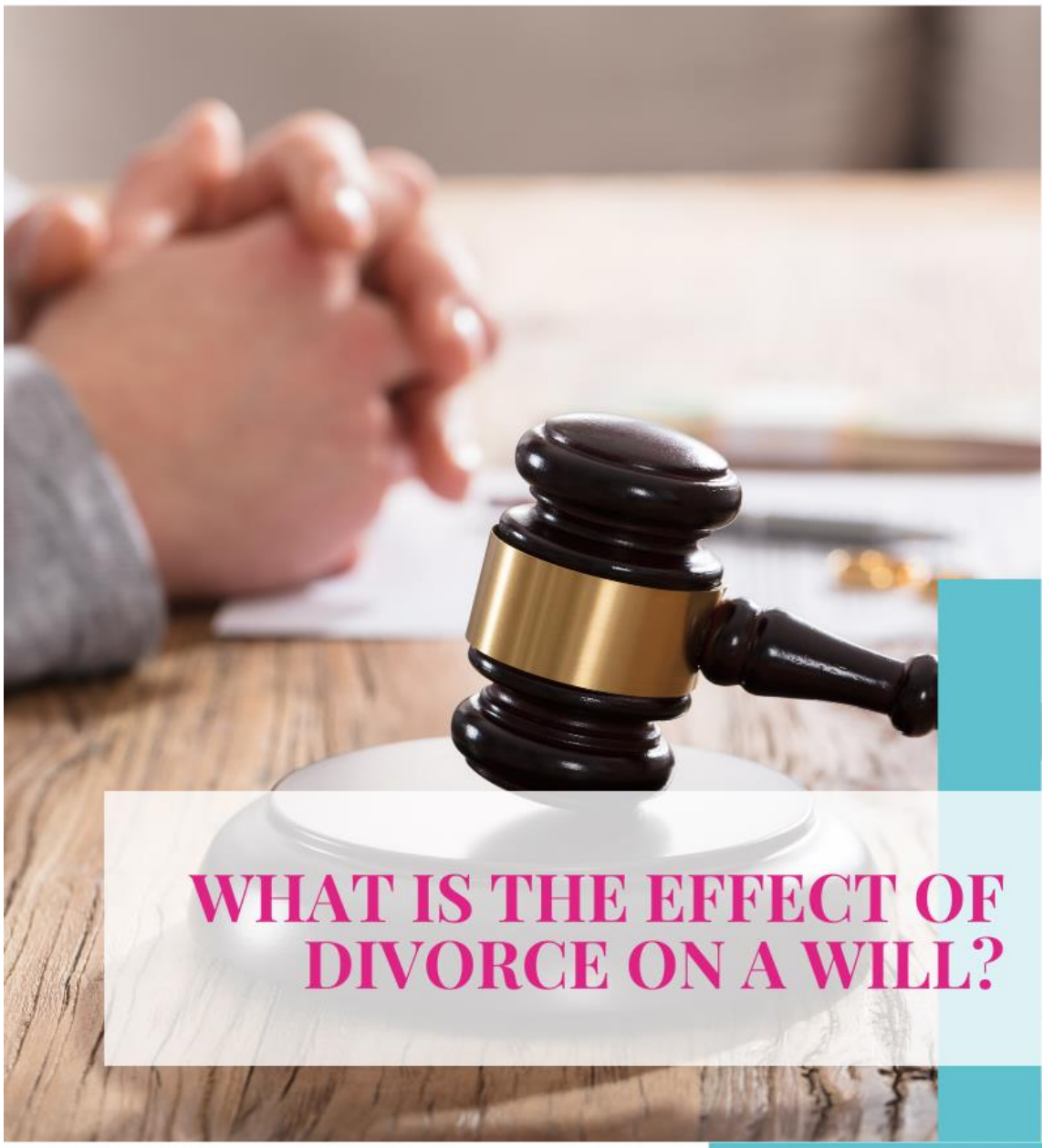

WHAT IS THE EFFECT OF DIVORCE ON A WILL?

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WHAT IS THE EFFECT OF DIVORCE ON A WILL?

According to the Victorian Wills Act 1997:

(1) The divorce of a testator revokes—

(a) any disposition to the divorced spouse of the testator, made in a will in existence at the time of the divorce; and

(b) the grant of a power of appointment by the will exercisable by or in favour of the spouse, other than a power of appointment exercisable by the spouse only in favour of persons who are the children of both the testator and the spouse; and

(c) any appointment made by the will of the spouse as an executor, trustee, advisory trustee or guardian other than the appointment of the spouse as a trustee of property left by the will upon trust for beneficiaries that include the children of the spouse.

I HAVE A WILL ALREADY BUT JUST GOT DIVORCED. HOW DOES THIS AFFECT ME?

Basically, it means that if a disposition was made to your spouse in a previous will, it is then revoked or cancelled. Much depends on the wording of the original (there are some exceptions if it is clear that the will maker intended the disposition to stay regardless of divorce) but otherwise this is the general rule. Divorce can also cancel grants of appointment in a will e.g. executor or trustee unless the spouse is only in that capacity to benefit children.

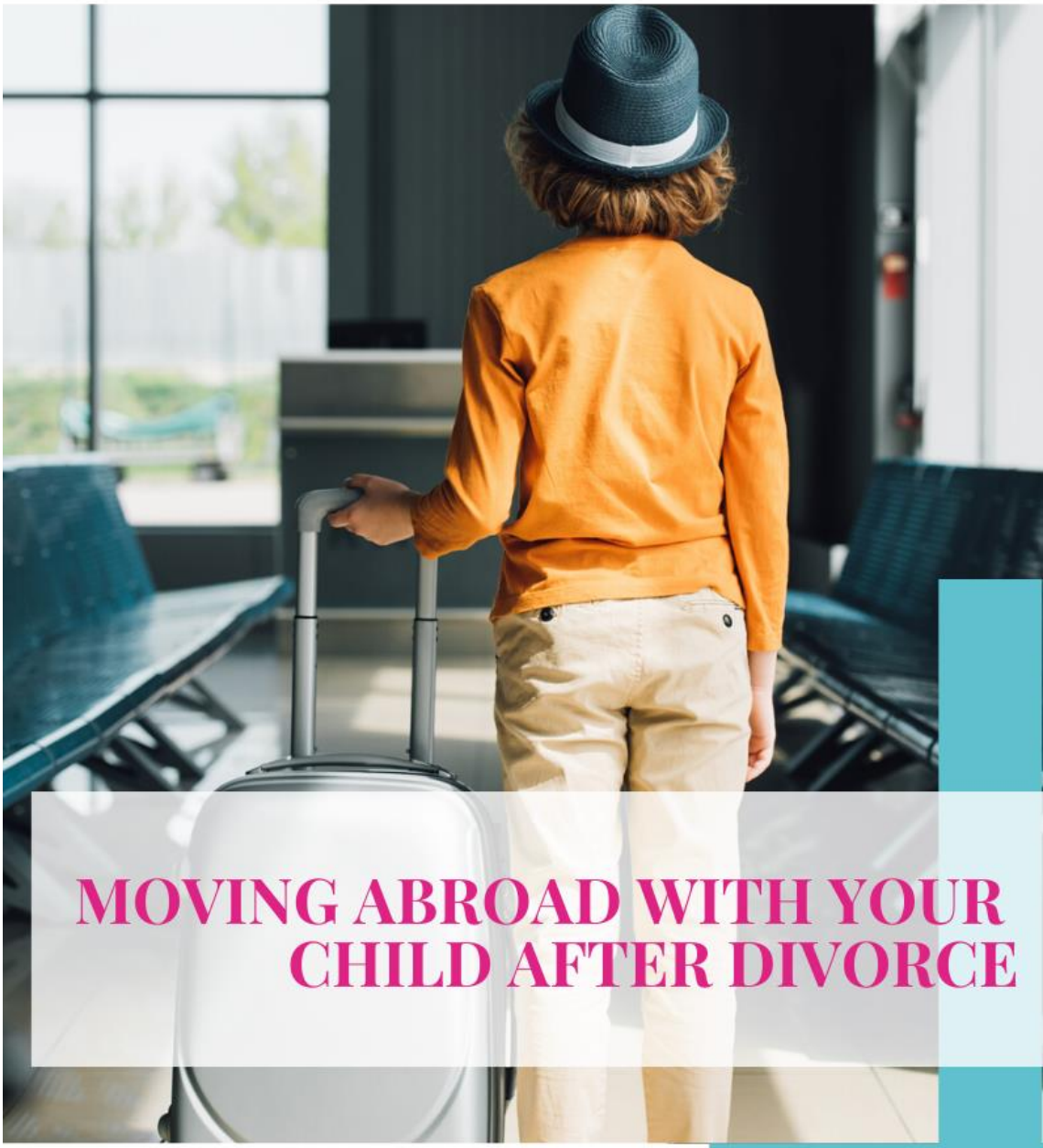
This can obviously get confusing and may lead to a result that the will maker did not want. For example, the will maker may not want to total exclude his ex-wife from all benefits if they can supplement what he has already provided in his will for his children. He may also want the ex-wife just to be trustee for grandchildren or nephews and nieces even though the ex-wife is cut out.

Other problems arise if there was no alternative executor appointed and the ex spouse is still alive and willing but no one else is appointed to act as executor. I often recommend in estate planning to have a couple of “back up executors” named in your will for this reason.

WHAT HAPPENS IF I DIE WITHOUT MAKING ANY WILL AT ALL?

When a person dies without a will (“intestate”) it means that the laws of the state apply in relation to who is to get the inheritance and generally it is a set formula of

priority of blood relatives. Although legitimate applicants can challenge that in court, it would involve an expensive court battle at times without certainty of winning and of course a lot of legal and court costs in doing so. Safer for your loved ones to have you do a proper will straight after you are divorced so there is no mistake as to who you want your assets to go to after you die.



MOVING ABROAD WITH YOUR CHILD AFTER DIVORCE

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MOVING ABROAD WITH CHILD AFTER DIVORCE

WHAT HAPPENS WHEN THE PARENTS ARE SEPARATED AND DON'T AGREE?

The High Court of Australia has recently confirmed that children's wishes although relevant, are not the only deciding factor in parenting cases.

In the recent case of a wealthy family, the Boldemontes – there were 3 children, two sons and a daughter. The parties had separated in 2010, and in 2014, interim parenting orders had been made by consent in the Family Court. The 2014 interim parenting orders allowed for the parents to take the children for international holidays provided that relevant information was given to the non-travelling parent like tickets and itinerary etc.

RELOCATION DISGUISED AS A "HOLIDAY"?

On 14 January 2016, Mr Boldemonte and the parties' two sons travelled to New York for a holiday despite not complying with the 2014 interim parenting orders. Ms Boldemonte reluctantly agreed to the holiday as a result of pressure from Mr Boldemonte. The parties' daughter did not attend the holiday.

On 26 January 2016, Mr Boldemonte decided that he wished to remain living in New York and on 29 January 2016, his solicitors advised the mother that the boys also wished to remain living in New York. After hearing of this Mrs Boldemonte started court proceedings in the U.S. for the return of the boys in accordance with the Hague Abduction Convention.

Mr Boldemonte in defending his case filed further evidence to the effect that Ms Boldemonte was too frail to care for the boys and that they may not elect to live with her if compelled to return to Australia.

CHILDREN'S WISHES DIDN'T DECIDE THE CASE EVEN THOUGH THEY WERE IN THEIR LATE TEENS

Interim parenting orders were made by the Family Court of Australia requiring the boys' return. At that time, the parties' sons were nearly 17 years old and nearly 15 years old. The parties' daughter was nearly 12 years old. It was accepted that the boys had lived primarily with Mr Boldemonte and the parties' daughter primarily with Ms Boldemonte following the making of the 2014 orders. Further, the parties' eldest son was effectively estranged from Ms Boldemonte.

After appeals were exhausted the matter went to the High Court who dismissed the father's appeal. stating that the views or wishes of children "are but one consideration of a number to be taken into account in the overall assessment of a child's best interests" and that the Court will "take into account not only the views expressed by the child but also "any factors…that the Court thinks are relevant to the weight it should give to the child's views." The factors that the provision gives as relevant are the child's maturity or level of understanding, but plainly the Court may consider other matters to be relevant."

BE CAREFUL BEFORE SIGNING THE KID'S PASSPORTS AND GIVING TO YOUR EX!

The case also highlights the problems with a parent attempting to relocate their children overseas -while deceptively making out to the other parent that they are just going on a holiday with the kids. the parent left in Australia not travelling has to be careful before allowing passports to issue for overseas holidays. Some countries are not a signatory to the Hague Convention which means their government or enforcement agencies will not get involved in enforcing any Australian orders for the return of the children.

WHO GETS THE PETS AFTER DIVORCE OR SEPERATION?

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WHO GETS THE PETS AFTER DIVORCE OR SEPERATION?

Pet cases are rare in the family law courts – most of the time lawyers warn their clients not to push the point on the issue of with whom the pet will live.

However, to some clients, the ownership of the family pet will be as important, if not more so, than any other aspect of their property settlement.

Most states have a Companion Animals Act or equivalent, which provides for a time limit in which companion animals must be registered after ownership. If a pet has been registered under the state legislation, a party may be seeking an order that the registration of the animal be transferred to the other party. If there has been no registration of the pet, one party may be seeking a declaration by the Family Law Courts to be made as to the ownership of the pet.

REGISTRATION OF PETS

In the recent case of Downey & Beale [2017] FCCA 316. The dog was purchased by the husband during the marriage. The wife said as a gift for her, was living with the wife post-separation, had vet bills which were paid for by the wife (the bills also referred to the wife as “owner”) and the wife sought an order that the husband transfer the registration. The husband after receiving the wife’s affidavit asserting ownership of the dog, went ahead to legally register the dog in his name with the authorities. Despite registration being in the husband’s name, ultimately the wife was successful, with the court declaring the wife the owner of the dog and ordered that the husband transfer ownership to the wife.

CHILDREN AND PETS

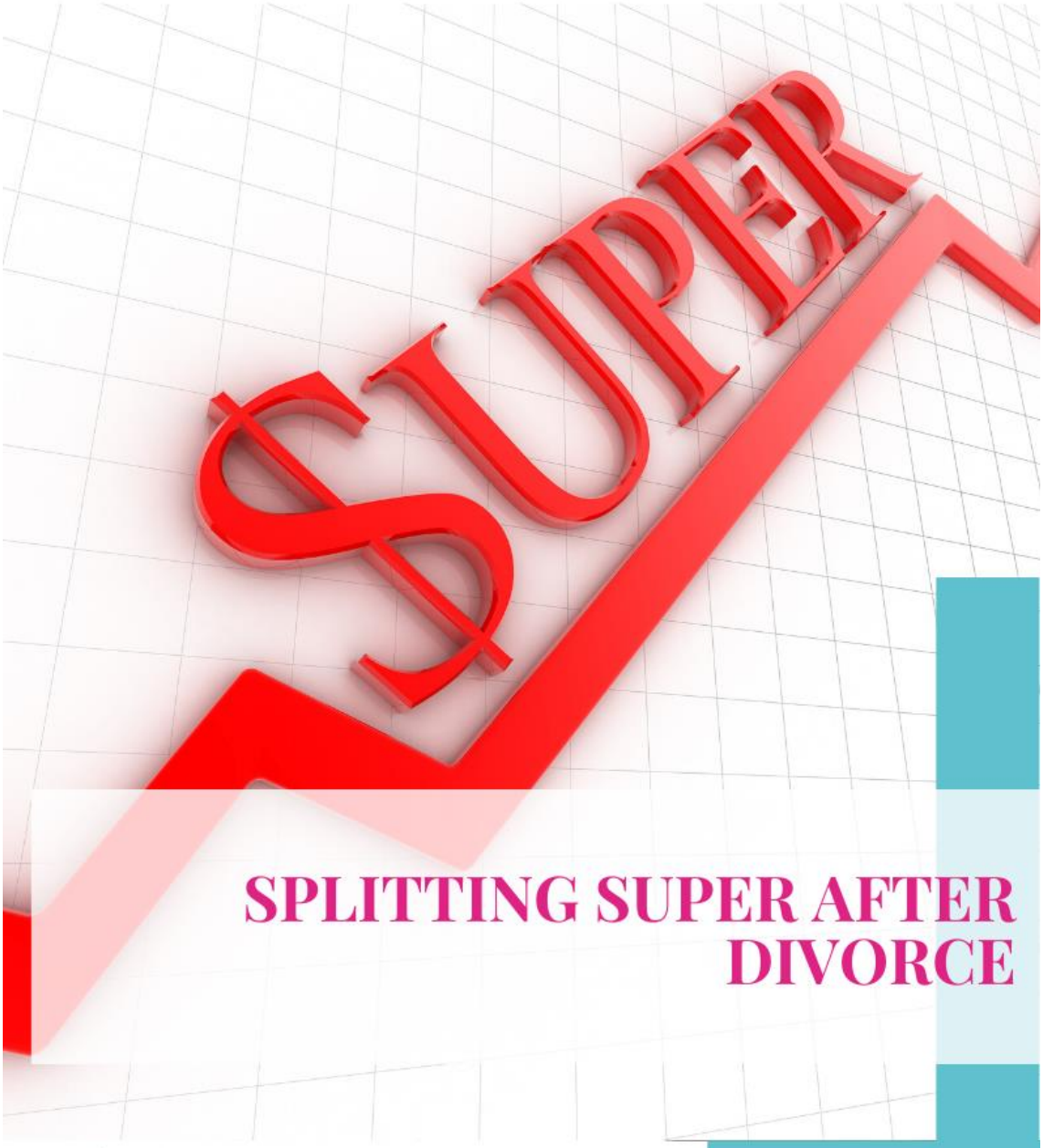
In family law cases where there are children and the child has an attachment to the dog, arguably these cases are easier as the court can determine that the dog living with the child is in the best interests of the child.

FACTORS THE COURT WILL TAKE INTO CONSIDERATION REGARDING YOUR PET

1. Look to registration, which gives some guidance but is not determinative of ownership;
2. Consider who purchased the animal and for what purpose;

3. Ascertain who was responsible for the care and day to day cost for the animal; and
4. Evaluate the post-separation arrangements for the animal.

While most separating couples can come to an agreement in relation to the care of their pets, for those who cannot they can be assured that the court can, and will make orders when necessary one of the spouses applies.



SPLITTING SUPER AFTER DIVORCE

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SPLITTING SUPER AFTER DIVORCE

HOW IS SUPERANNUATION DEALT WITH IN FAMILY LAW?

Superannuation is treated as property and can be divided between the parties after the breakdown of a marriage or the breakdown of a de facto relationship. Rather than cashing out the super is "split" and assigned to the spouse who is entitled to a top up.

Superannuation interests can be divided either through a judge made court order, a consent order without appearing at court, or by a binding superannuation agreement (either stand-alone or part of a financial agreement).

CAN ANY SUPER FUND BE SPLIT AFTER DIVORCE?

The answer is no. There are some funds that cannot be immediately split due to the nature of the fund or certain restrictions on the fund. You can still enter into an agreement to divide it to come into effect once the fund's restrictions change.

If the superannuation interest cannot be divided at the time orders are made, "a payment flag" can be imposed by either a court order or a superannuation agreement. Superannuation flags were more common shortly after the 2002 amendments as not all interests could be split. The reality in most family law cases is that superannuation interests can be split, and the use of superannuation flags is not commonplace. In some circumstances, the super fund characteristics have changed so much that it cannot be considered property to divide and only a financial resource to be taken into consideration. For example, if the super is in the form of a pension that cannot be converted to cash at any time, then it will usually be considered a financial resource and relevant more in terms of income and spousal maintenance.

WHAT'S THE FORMULA TO SPLIT UP SUPER FUNDS AFTER SEPARATION?

Because super has so many different manifestations it is impossible to formulate an overall approach to be taken in determining the role either party's entitlements are to play in the division of the asset pool. There are two general approaches that may be taken when dealing with superannuation:

A. **The two asset pool approach** involves identifying two separate assets pools: (1) non-superannuation assets and (2) superannuation. Each of the pools is

divided in accordance with the considerations in the Family Law Act in s 79 or s 90SM for de facto couples. This approach will usually result in a superannuation split to give effect to the appropriate division of superannuation.

For example, Sally and Peter have separated and the children are living with Sally. They have a non-superannuation asset pool of $500,000 which includes an unencumbered property worth $350,000, cash of $50,000 and a share portfolio of $50,000. Peter has superannuation of $200,000 and Sally has $50,000 super. Sally wants to retain the house if possible as she isn't working and can't service a mortgage if she has to encumber the property to pay Peter out. The agreed division is 60% to Sally and 40% to Peter. Under the two pools approach, the outcome would be:

Sally retains her $50,000 superannuation and receives $112,500 from Peter's superannuation to result in her retaining 60% of the superannuation pool.

Sally is entitled to $300,000 of the non-super pool and Peter is entitled to $200,000. Sally cannot pay Peter out and therefore the house is sold and the parties divide the proceeds, the cash and the share portfolio to give effect to the agreed split.

B. **The alternative approach** is where there is no difference drawn between superannuation and non-superannuation assets. This approach may be used if one party wants to retain the non-superannuation assets and the other party has a larger amount of superannuation.

Applying this approach to the above example, the asset pool including superannuation is $750,000. Sally is entitled to 60%, being $450,000. She keeps the house and the cash along with her superannuation.

Peter retains his superannuation and the investments. This is not the likely approach which the court would take because in many ways this is unjust to Peter as he retains superannuation but little else to re-establish himself. However, this may be a negotiated outcome if the party retaining the superannuation had a significant income and therefore didn't have the same need for a cash settlement as the party who is earning little or no income.

SPOUSAL MAINTENANCE

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SPOUSAL MAINTENANCE

CAN I CLAIM SPOUSAL MAINTENANCE (PLUS A WARDROBE ALLOWANCE)?

The 2018 case of **DODT & ELEI (see below)** decided a dispute on this very issue. This was an appeal against a spousal maintenance order. We discuss this spousal maintenance Australian example.

Mr Elei had been ordered to pay Ms Dodt **$1,450 per week** and to cover her private health insurance. The amount took into account costs to re-enter the workforce including a wardrobe and car. It was a hefty weekly bill that he did not want to pay, so he appealed but lost.

WHAT IS SPOUSAL MAINTENANCE?

In some countries it is called “alimony” and other countries similar names that refer to *spousal financial support post separation.* It is usually paid on a weekly/monthly basis and continues either for a specific period e.g. until the property settlement case is finalised OR for number of years after property settlement, allowing the payee to financially get on their feet. Although it is rare, orders can be made for payment from one ex-spouse to the other to be ongoing for life.

These are the considerations the Court takes into account:

1. *Can the Applicant support themselves adequately?*

2. *If not, what are the Applicant’s reasonable needs?*

3. *Can the Respondent afford to meet those needs?*

4. *What order is reasonable having regard to s90SF(3) of the Act?*
   (numerous factors including the age and health of the parties, their income or financial resources, the care of any children they may have and responsibility to care for others, a reasonable standard of living, their eligibility for any pensions or benefits, duration of the relationship and how that impacted on their financial capacity, etc.)

Mr Elei's positon

In March 2018 – the Judge ordered spousal maintenance of $1,000 per week based on his capacity to pay. However, he had not made the lump sums previously ordered ($22,000 owing to Ms Dodt).

He claimed to have $3,200 per week incoming, but $5,700 per week outgoing in expenses. He could not explain how he could afford his legal fees allegedly paid.

It was found that he had significant access to his late mother's estate, including a $1.8mil mortgage-free property, currently rented out for $2,000 per week.

Ms Dodt's position

By the time of the rehearing (June 2018) she had not taken any steps to re-enter the workforce. She explained that she had initially worked in hospitality, and then moved in to a managerial role in a service industry, which required a car. She did not want to return to hospitality (given her age and qualifications). She had not worked in her chosen field for about 5 years.

In May 2018 – her father had bilateral hip replacement surgery, and she had been caring for him since. However, this was not a valid reason on its own to claim the spousal maintenance.

The Court found she did not meet requirements for 1 or 2 of the criteria. Therefore, the question was – was there any other adequate reason that the applicant could not support herself? She was originally receiving Centrelink benefits, but this had ceased by the time of the appeal. Her savings were approximately $12,000. Her savings were largely from the spousal maintenance previously paid by the Mr Elei as ordered.

In her financial statement, she claimed weekly personal expenditure of $900. This is exclusive of rent, as she was living with her parents. It was calculated that she would need an additional $550 for a modest rental apartment.

His lawyers argued that $800 was a more realistic figure. They also argued that she could remain living with her parents and did not need rental assistance.

Court allows maintenance to assist moving out of parents' home, and re-entering workforce

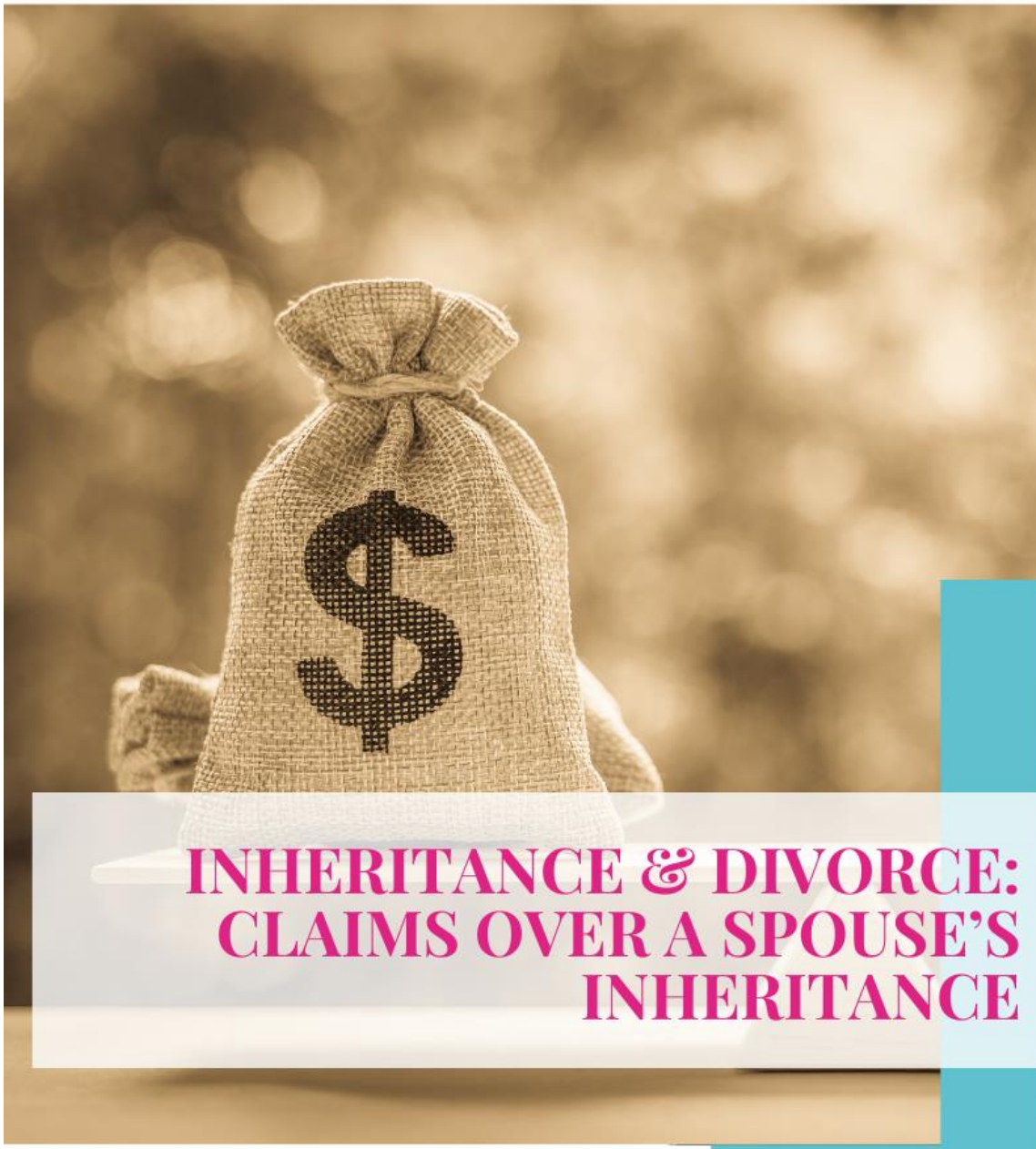
As this was a request for interim maintenance, the Court decided that Ms Dodt "should have the opportunity to pursue employment in her chosen field, which reflects her qualifications and experiences and in the long term maximises her

earning capacity.” In other words, she does not need to return to hospitality for income. The court found that in order for her to return to her ‘chosen field’ (as a manager in the service industry) she required certification, a business wardrobe and a reliable car. The judge was critical that she had ample time to become certified and had not. This was not an adequate reason for being *unable to support* herself.

However, she had only recently been able to buy a business wardrobe and did not yet have a car, which meant she could not return to her chosen field. Therefore, there were adequate reasons why she was unable to support herself.

The Court agreed that $800 was appropriate but disagreed that she should remain with her parents. She had been living independently for many years and was entitled to continue to do so. Accordingly, more weekly funds would be required to meet those needs.

Interim Orders were made for Spousal maintenance of $1,350 per week ($800 plus $550 rent) to be paid by Mr Elei to Ms Dodt.



INHERITANCE & DIVORCE: CLAIMS OVER A SPOUSE'S INHERITANCE

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INHERITANCE AND DIVORCE: CLAIMS OVER A SPOUSE'S INHERITANCE

Whether your inheritance will be counted in the divorce assets to be split depends on each case. There is no "one rule for all cases". Where the inheritance has already been received these are some relevant factors taken into account in a divorce case:

Time since the inheritance – If a long time has passed between the inheritance and the separation, the asset is more likely to be treated as part of the family assets.

The intentions of the deceased – If the deceased had specific intentions for how the beneficiary should use the inheritance, then this may be relevant to how to how it is divided. For example, they may have intended the inheritance to benefit the whole family, not just the named beneficiary.

Who helped care for the deceased – If the spouse of the beneficiary also helped to care for the deceased, for example if the deceased lived with them, then it's more likely that the assets will be treated as belonging to the family.

WHAT IF I DIVORCE BEFORE MY SPOUSE GETS HIS/HER INHERITANCE?

The law says that it is not "property" when it has not come into the hands of the spouse. In other words, it has not yet materialised and there is not a guarantee anyway they will get it because the testator may change their will or live for another 40 years.

However, in some cases in the Family Law Courts it can be argued that judgement on how to split the assets should be made only in part and otherwise postponed for the "expected additional asset or financial resource". Such cases are rare.

EXPECTATION OF INHERITANCE

If one party has an expectation of a significant inheritance, the other party may argue that this should be relevant in proceedings under the Family Law Act 1975. However, the issue is far from clear and a great deal would depend on the individual facts. The grounds on which an expectation of an inheritance could be relevant would be:

(a) Section 79(2) of the Family Law Act requires the court to only make an order if "it is satisfied that, in all the circumstances, it is just and equitable to make the order".

(b) Section 79(5) enables the court to adjourn section 79 proceedings provided the requirements of the section are met if “there is likely to be a significant change in the financial circumstances of the parties to the marriage or either of them”: s 79(5)(a).

(c) Section 75(2)(b) requires the court to consider the “financial resources of each of the parties”.

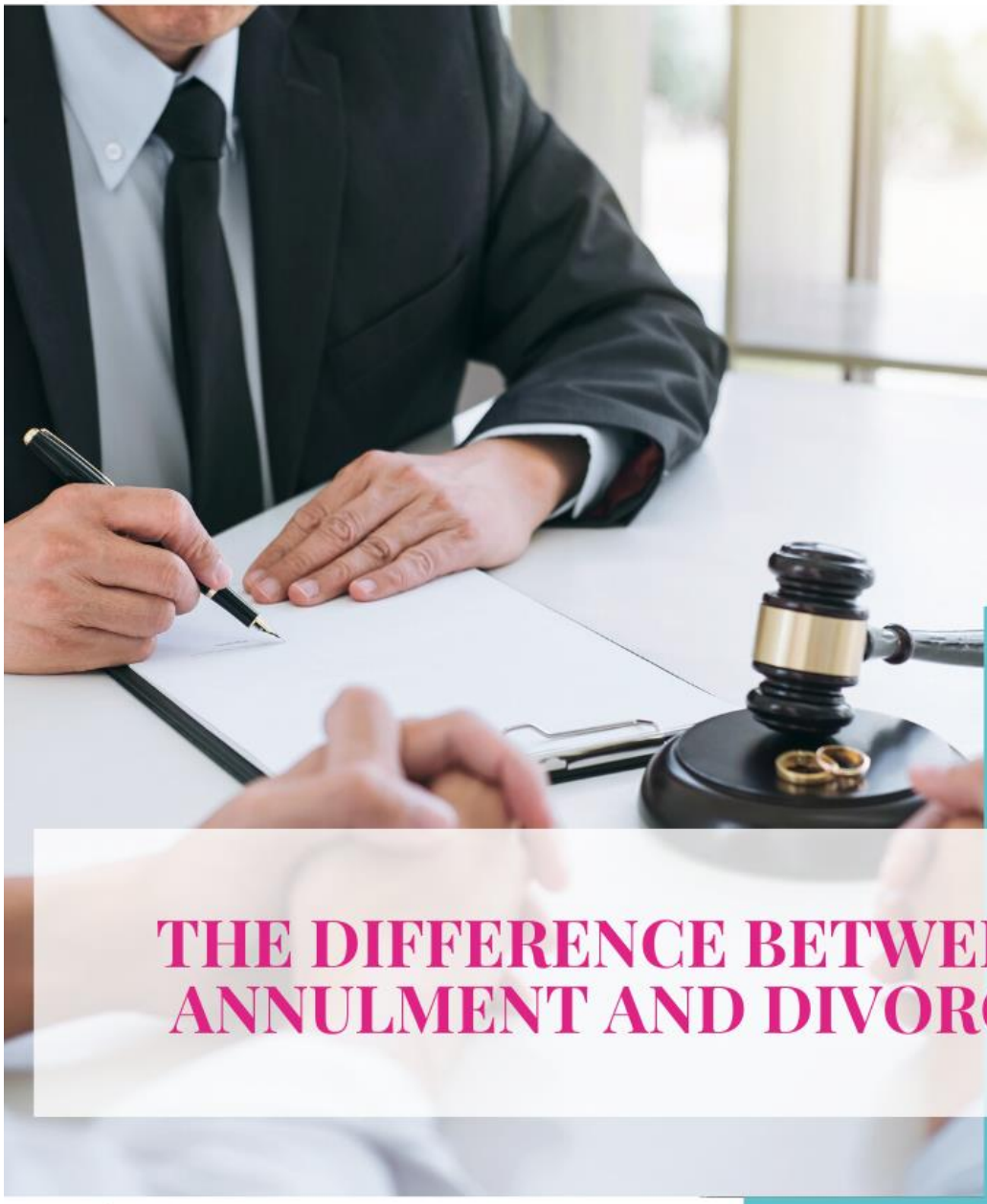
(d) Section 75(2)(o) requires the court to consider “any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account”.

WHAT THE FAMILY LAW COURTS JUDGES SAY ABOUT EXPECTED INHERITANCE

The case of White and Tulloch v White (1995) the Court rejected the argument that a prospective inheritance was a financial resource however stated:

> *It is ultimately a question of fact and degree... In a case where the testator had already made a will favourable to the party but no longer had testamentary capacity and there was evidence of his or her likely impending death in circumstances where there may be a significant estate, and where there was a connection to s 75(2) factors, it would be shutting one’s eyes to realities to treat that as irrelevant.*
>
> *On the other hand, the bald assertion that one of the parties has an elderly relative who has property and is or is likely to benefit that party is so speculative that it would be inappropriate to contemplate it as relevant in a s 79 determination, it being too remote to affect the justice and equity of the case in any worthwhile way.*

To be sure what your position is it would be prudent to seek the advice of an Accredited Family Law Specialist.



THE DIFFERENCE BETWEEN ANNULMENT AND DIVORCE

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THE DIFFERENCE BETWEEN ANNULMENT AND DIVORCE

Some of my clients who have separated a very short time after their wedding, ask about getting an annulment instead of divorce. It's not as easy as some think.

DIFFERENCE BETWEEN ANNULMENT AND DIVORCE

A "decree of dissolution of marriage" is what is commonly known as divorce.

A "decree of nullity" however is made if the marriage is void, e.g. when one party was already married, or the parties were within a prohibited relationship, or where there was mistake, duress or fraud, or where a party was not old enough to marry, or some other reason to void the marriage as if it never occurred.

WHEN CAN A MARRIAGE BE ANNULLED?

The Family Law Courts may declare a marriage void and invalid on the following grounds:

- At the time the parties were married, one of them was married to someone else.
- The parties are in a prohibited relationship eg: underage or a direct blood family member.
- The parties did not comply with the laws in relation to the marriage in the place they were married.
- Either of the parties did not give their real consent to the marriage because
    a) consent was obtained by duress or fraud or
    b) one party was mistaken as to the identity of who they were marrying or the nature of the ceremony or
    c) one party was mentally incapable of understanding the nature and the effect of the marriage ceremony.

THE COURT WILL NOT DECLARE A MARRIAGE INVALID ON THE FOLLOWING GROUNDS:

- Non-consummation of the marriage
- Never having lived together
- Family violence or
- Other incompatibility situations.

WHAT IF I WAS DECEIVED TO MARRY SOMEONE WHO JUST WANTED TO GET INTO THE COUNTRY?

This is a common question asked. It depends on the circumstances at the time of the wedding/marriage ceremony.

Generally, if there was no deception of the identity of the person and the marriage was carried out legally in accordance with procedures and you were in sound mind on that day, then you cannot seek an annulment just because you find out later on that your husband or wife had a hidden agenda to marry you. It's same as marrying for money instead of love or failing to notify the spouse earlier about the 5 kids to another ex-spouse and loads of child support to pay.

Unfortunate but you cannot apply for an annulity just on those grounds; the criteria for a divorce instead should be looked at and separation for 12 months would be required. However, you may be assisted if you seek legal advice about your spouse's visa status.

CONSEQUENCES OF NULLITY DECREES

A decree of nullity is an order from the court stating that there is no legal marriage between the parties, even though a marriage ceremony may have taken place.

An annulment granted by a church is not the same as a court-issued annulment and does not demonstrate that a person is legally free to marry.

SELF-MANAGED SUPERANNUATION FUNDS IN FAMILY LAW DISPUTES

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SELF-MANAGED SUPERANNUATION FUNDS IN FAMILY LAW DISPUTES

The rules of compliance for self -managed superannuation funds (SMSFs) are heavy. Many mums and dads who are members or trustees of such funds, are not aware of what they need to comply with and can make innocent mistakes that could lead to financial penalty or in some cases prosecution. But as they say ignorance of the law is no excuse.

CASE SCENARIO – HUSBAND TAKES OFF OVERSEAS WITH THE SUPER FUNDS

In the case of *Shail & AAT* the husband and wife had $3.5m in their SMSF. They separated and the husband withdrew the majority of the funds illegally and left Australia. The AAT accepted that the wife had no knowledge of and did not consent to the withdrawal. As neither party had met a condition of release, the Fund was declared by the ATO to be non-complying. The parties were then declared by the ATO to be jointly and severally liable for about $3m in tax and penalties. The AAT upheld the decision.

DID YOU KNOW THAT OBLIGATIONS OF SMSF MEMBERS TRUSTEES CONTINUE AFTER SEPARATION?

As a typical case scenario, both parties to the marriage/domestic relationship are trustees of the fund or directors of the corporate trustee of the fund, as well as being members of the fund. Each trustee or director is jointly and severally liable for breaches of the obligations imposed on trustees. That means that if one makes a mistake of non- compliance, it will potentially lead to the other getting the blame as well.

COMMON BREACHES OF SMSF OBLIGATIONS TO BE AWARE OF:

- Taxation returns not done; or
- Use of fund bank account for personal purposes; or
- Not investing properly — simply having the funds sitting in a bank account. This is not, in itself, necessarily a breach although the fund is required to have an ”investment strategy” and so, this may be an indication that there is no investment strategy, or it is not being followed.

In these cases, especially in a low-interest-rate environment, parties may be financially better off using an accumulation fund instead of an SMSF unless they have a good investment strategy and actually implement it; or

- Use of fund assets for personal use, e.g. holiday house and even the family home; or
- Incorrectly categorising the taxation status of funds; or
- Investing in assets which are not approved for super funds.

WHAT TO DO IF YOU SEPARATE AND HAVE AN SMSF?

If both parties to the marriage/domestic relationship are members of an SMSF, then it follows that both parties must continue to be involved in the trusteeship of that fund after separation until the parties are no longer members of the same fund.

This is important to know- just because one partner was responsible for doing all the book work for the fund and continues it after separation, it doesn't let the other partner off the hook if they separate. It is important to get disclosure of all the SMSF bank accounts, balance sheets, and SMSF tax returns immediately after separation. In case of suspicious circumstances this is particularly important.

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ABOUT US

Rigoli Lawyers are your trusted experts in family law. With over 25 years of experience helping Australians through the difficulties of separation and divorce, we know the right solution for your legal problem. Our team are Accredited Family Law Specialists, which means we've devoted extra time to gain knowledge and experience regarding family law matters. If you need us to help in the process, you know you'll get the best outcome with us.

While our experience gives us the confidence of knowing what to expect… we know that this is all new to you, which is why we support and guide you through every step of the way.

OUR OFFICE LOCATIONS

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WHAT TO DO NEXT?

If you want to know more, please contact us on (03) 8742 3199 and take advantage of our free half hour legal consults. They can be done in person, via Skype or telephone conference. You will be surprised how much can be accomplished in this time and how easy it will make it for you to decide on what to do next – having a plan is the key to getting the right outcome.

Warmest Regards,
Maria Angela Rigoli
B.A. LLB. (Melb) Acc.Spec (Fam)
Principal Lawyer and founder of Rigoli Lawyers

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