PROPERTY (RELATIONSHIPS) ACT 1976 ELECTION PROCESS

Section 61 Overview

Section 61 of the Property (Relationships) Act 1976 (the "PRA") allows the surviving partner or spouse to choose either option A or option B.

Option A is to elect to make an application under the PRA for a division of relationship property.

Option B is as follows:

- to elect **not** to make an application under the PRA for a division of relationship property; and
- if the surviving partner is a beneficiary under the deceased spouses will, to receive that property; and
- if the surviving partner is entitled to a beneficial interest on the intestacy or partial intestacy of the deceased spouse or partner, to receive that interest.

How to make a choice

Under section 65 PRA the choice must be made by written notice in the prescribed form accompanied by a certificate signed by a lawyer, certifying that the lawyer has explained to the person making the choice the effect and implications of the notice. The notice must be lodged with the administrator of the deceased's estate but if administration was not granted in New Zealand then in the registry of the High Court in which an application for a grant of administration of that estate would, under the High Court Rules, be required to be filed.

Minor can give notice as if they were of full age.

Who is to be notified of the choice when lodged at High Court?

If the Notification of choice is lodged with the High Court, the surviving spouse or partner must give a copy or copies of the notice as follows:

- if at the time of his her death the deceased was the registered holder of any government stock or local authority stock (as defined in section 64(2) of the Administration Act 1969):

    (i) any person who has been registered as the holder of the stock in reliance on that section; or

    (ii) the registrar of that stock (if paragraph (i) doesn't apply);

- if at the time of his her death the deceased was the registered holder of shares or debentures (as defined in section 64A of the Administration Act 1969):

    (i) any person who has been registered as the holder of the shares in reliance on that section; or

(ii) the directors of the company that issued the shares (if paragraph (i) doesn't apply).

- if the death of deceased means that any sum of money may be paid, under section 65 of the Administration Act 1969 by any person:

    (i) any person to whom such payment has been paid in reliance on that section; or

    (ii) the person authorised to make such payment under that section (if paragraph (i) doesn't apply).

Time Limits for making choice

Section 62 of the PRA places time limits on choosing option A or option B.

If the deceased's estate is small (currently defined as less than $15,000) the choice must be made before the later of: 6 months after the date of death of the deceased; or if a grant of administration is made in New Zealand no later than 6 months after the grant of administration.

In all other cases the choice of option A or option B must be made no later than 6 months following the grant of administration in New Zealand.

However the Court has the power under section 62(2) to extend the time for making a choice after hearing the Applicant and any other persons the Court considers should be heard.

Any application for extension of time **must** be made before the final distribution of the estate.

Proceedings

Under section 63, a surviving spouse or partner can only bring proceedings under the PRA if they have first chosen option A or if section 64 applies.

Under section 64 a surviving partner or spouse may apply under the PRA for division of relationship property without first choosing option A or B in any of the following situations:

a) a separation order is in force in relation to the marriage or civil union and the deceased partner or spouse died intestate;
b) the marriage was ended while both parties were alive by legal process whether in or out of New Zealand;
c) the civil union was ended while both parties were alive by legal process in New Zealand.

Failure to make a choice

If the surviving spouse does not make a choice of option A or B in the manner required and within the time limits, the surviving spouse is deemed to have chosen option B – section 68 PRA.

Court can set aside choice of option

Under section 67 PRA once a choice has been made it is irrevocable.

However, section 69 allows the party who made the choice (or failed to make a choice at all) to apply to have the choice set aside.

The Court may only set aside a choice if it is satisfied that **any** of the following apply:

a) the choice was not freely made;
b) the party who made the choice did not fully understand the effect and implications of the choice;
c) the party who made the choice has subsequently become aware of new relevant information in relation to the choice;
d) since the choice of option was made, another person has made a Testamentary Promises and/or a Family Protection claim against the deceased's estate; and

and having considered all the circumstances the Court is satisfied it would be unjust to enforce the choice of option.

The Court must have regard to:

a) the circumstances in which the choice was made;
b) the length of time since the choice was made;
c) any other relevant matters.

No choice can be set aside if final distribution of the estate has been effected (section 70).

Case Law

Leenman v Mulder unreported, Family Court Waitakere, FAM90/864, 9 March 2009, Mather J

In this case the surviving partner and the deceased had been in a relationship for 37 years. The surviving partner chose not to make a choice of option A or B. Therefore option B was deemed to be her choice pursuant to section 67 of the Act.

The surviving partner then applied to the Court for an order setting aside her choice by relying on section 69(2)(a)(i), (ii) and (iii) and for an extension of time to commence proceedings under the Act.

The Judge found that the surviving partner quite clearly made the choice freely and understood the effect and implications of the choice. It was clear that her lawyer had canvassed the issue with her in letters to the other side. The claim in respect of new relevant information also failed as it was found not to be new and the surviving partner was aware of the information within a few months of the grant of probate. The proceedings to set aside the choice were struck out.

Sanders v Trustees Executors and Agency Co of New Zealand Ltd (2004) 26 FRNZ 202.

In this case the surviving partner did not make a choice, therefore option B applied under section 62 of the Act. The survivor applied to have the option set aside under section 69 of the Act. Because the deceased's daughter had applied under the Family Protection Act 1955 section 69 (2)(a)(iv) clearly applied.

The case turned on the exercise of the Courts discretion in section 69 (2)(b) and (3).

The surviving partner needs to satisfy at least one of the four criteria in section 69(2) before the Court can consider the criteria in section 69(2)(b) and (3).

Public Trust v *Albert Nicholas (Senior) and Albert Nicholas (Junior) as Executors of the Estate of Robert Anapa Taripo* HC AK CIV 2004-404-005549 [30 June 2005]

In this case the deceased's partner (the surviving partner) died one day after the deceased. It was argued that because the surviving partner did not elect option A or B prior to his death that option B was deemed to be elected.

Therefore it was submitted that the personal representatives of the surviving partner (who was now also deceased) could not bring an application under the PRA for a division of relationship property as to do so the surviving partner must have chosen option A.

The High Court decided that the legislation could not have intended the surviving partner's right to make a choice under the PRA to cease on death. That right must continue for the benefit of the surviving partner's estate. The Court decided that the personal representatives of the surviving partner were entitled to make an application under s 69 of the PRA to have the choice of option B set aside.