ESTATE DISTRIBUTION IN BLENDED FAMILIES

Spreading the Wealth and Avoiding Disputes

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Introduction

Achieving equity. How can it be achieved? In essence that is what we are all talking about.

Blended families come in *all shapes and sizes* but the common thread with most difficult estate planning activities can be summed up by that phrase.

Most clients want to provide a majority of their wealth to their children after their death. The difficulty and guidance they require is usually how to provide for their spouse and how to prevent conflict between children.

As we all know, even in a "traditional family" this can easily become compounded. When an estate is settled we see old wounds to be reopened and family provision claims to be launched - so what happens when step children or adopted children enter the mix?

It is our role as estate specialists to help our clients implement prudent asset protection and succession planning measures, to mitigate the impact of disputes on the deceased's wishes.

As lawyers, we face increasingly complex estate planning issues, owing to a number of factors:

- increased wealth in the hands of the older generations of Australians (the Baby Boom is becoming an estate boom as this generation)
- more Australians utilising trusts and other wealth-building strategies
- growth in "non-traditional" families, i.e., blended families, multiple divorces, surrogate children, etc.

Matters can become even more acrimonious where the majority of wealth to be split is in the form of a business or a large non-divisible investment asset.

Careful advice needs to be given to clients outlining their obligations, risks and the consequences of their instructions and intentions. In this context, estate planning advisors are required to consider and where relevant draw the testator's attention to:

- the wishes and needs of those making the wills and estate plan;
- the needs (and expectations) of the next generations (natural and step);
- asset protection concerns in relation to those next generation family members;
- a variety of structures and issues (including superannuation funds, family trusts, business interests, overseas assets, overseas resident family members, tax and duty);
- potential claims on the estate and family relationships generally;
- tax profile and potential tax outcomes, and of course;
- the clients' desire for 'simple' planning.

So how do we help our clients strike a balance between providing for a spouse and children in complex family relationships? This is a challenge more of us will encounter as estate planning becomes an increasingly specialised field of practice.

Understanding the dynamics

There is no typical family in Australia anymore. Long gone are the days of a husband, wife and 2.3 children. Today we are much more likely to see divorcees entering new marriages or long-term de facto relationships which can include stepchildren, adopted or foster children. For an estate planner, specific challenges arise when the testator, their spouse (or both) have children from previous relationships.

This means that estate planning, more than ever, is not a "one size fits all" proposition. What might be a suitable approach and plan for one client could well be a disaster for another; every client has a different set of circumstances and personal goals, which ultimately will shape their estate plan.

Family dynamics an estate planner in 2018 might encounter include:

- Husband and wife each marry for the second time. Both have children from their first marriages and then they have two more children;
- A widow with two children marries for a second time and has another child with their new partner;
- Husband and wife do not divorce, but husband enters into de facto relationship and has a child outside the marriage;
- A same sex couple with children from outside that relationship. They marry and have a child via IVF (sperm donor or surrogate mother).

Unfortunately, blended families are more prone to estate disputes than those where the children share common biological parents. And, while many blended families work well, it is not uncommon for a child to dislike a new step parent or their new legal siblings.

This is simply illustrated in *the Will of Fernando Masci*[1]. Not only had the will been written with a will kit (never good news when you're an estate lawyer), but Mr Masci had appointed his son from a previous marriage and his new wife's daughter (also from a previous marriage) as executors. The two were unable to work together and the matter landed in the Queensland Supreme Court.

So, what are some of the unique dynamics we will encounter as estate planners, and the relevant laws governing them by state?

Foster children

Foster children are children who are under the protection of a person other than their parents and at a place other than their usual home. The foster arrangement is often temporary but can sometimes be long-term. This arrangement is done under the regulation of the relevant state or territory child welfare authority.

Adopted children

An adopted child is a child who has been adopted by a person under the relevant state or territory legislation:

- Australian Capital Territory - *Adoption Act 1993;*
- New South Wales - *Adoption Act 2000;*
- Northern Territory - *Adoption of Children Act 1994;*
- Queensland - *Adoption Act 2009 and Adoption Regulation 2009;*
- South Australia - *Adoption Act 1988 and Adoption Regulations 2004;*
- Tasmania - *Adoption Act 1988;*
- Victoria - *Adoption Act 1984;* and
- Western Australia - *Adoption Act 1994.*

[1] [2014] QSC 281

Broadly, under the above legislation, at the moment of adoption the child ceases to be the legal child of the biological parents and becomes the legal child of the adoptive parents.

Stepchildren

Stepchildren are children from a parent's previous relationship who are brought into the newly established family.

In Victoria, this includes stepchildren from marriages and de facto relationships following the decision of *Scott-Mackenzie v Bail*[2], which held that it was unlikely parliament intended to treat stepchildren from marriages and de facto relationships differently. However, a question still remains in respect of the application of the case in other states and territories.

Non-biological children

An individual's biological parents are the persons from whom the individual inherits his or her genes. There are therefore a number of different types of non-biological children (including stepchildren, adopted children and foster children as discussed above).

However, what would appear to be a straightforward question is not nowadays, as the list of people with claims to parenthood includes not only traditional parents who provide genetic material, give birth to and then raise a child, but also:

- parents who provide genetic material but who do not give birth to a child (artificial conception);
- mothers who give birth to but are not the biological mother of a child (surrogacy); and
- adoptive parents, stepparents and foster parents.

The issue is further complicated by the differences between state and territory law.

Parenthood under State and Territory Law

Each state and territory has legislation to guide decisions about who is a parent, but these differ significantly between jurisdictions.

In NSW, section 5 of the *Status of Children Act 1996* states that for the purposes of any law of the state by or under which the relationship between any person and the person's father and mother (or either of them) arises, that relationship and any other relationship (whether of consanguinity or affinity) between the person and another person is to be determined regardless of whether the person's parents are or have been married to each other.

Section 6 then goes on to provide that unless a contrary intention appears in a Will, a reference (however expressed) to the child or children of a person includes a reference to an ex-nuptial child of whom that person is a parent.

When a married woman has undergone a fertilisation procedure and becomes pregnant:

- her husband is presumed to be the father of any child born as a result of the pregnancy even if he did not provide any or all of the sperm used in the procedure, but only if he consented to the procedure, and
- the woman is presumed to be the mother of any child born as a result of the pregnancy even if she did not provide the ovum used in the procedure.

If a woman (whether married or unmarried) becomes pregnant by means of a fertilisation procedure using an ovum obtained from another woman, that other woman is presumed not to be the mother of any child born as a result of the pregnancy.

[2] [2017] VSCA 108

Estate planning for families with various dynamics

Through a logical investigation of the clients' circumstances, estate advisors can easily begin to plan for the most complex of family situations and estate needs.

Identifying the source of wealth

The source of the wealth has an important bearing on the ability of the testator to achieve their estate planning objectives. Are we addressing wealth held personally or alternatively controlled and held by other entities, i.e. trusts? Further, does that wealth belong to or is controlled by only one of the parties to the current relationship?

With the source of the wealth identified, it is easier to establish a relationship between any children and their potential entitlement to that wealth in the future.

Identify the circumstances that led to the new relationship

By establishing how and when the previous relationship dissolved, it is much easier to pinpoint what considerations may have already been made for children of that former relationship.

I.e., if the former relationship ended due to a spouse's death, there may be an expectation that the inheritance (or a large proportion of it) is to be provided to the children of that former relationship. Alternatively, those children may already be provided for through the establishment of testamentary trusts under the will of the former spouse or through direct gifts made to them.

In the case of a divorced spouse, consideration needs to be given as to whether there has been a formal property settlement already, and whether it is anticipated that that former spouse will be providing for the children of the first relationship in their estate planning.

Identify previous disposals of wealth

It is vital in any estate planning process to establish where wealth has previously been distributed, whether that be through a property settlement with a former spouse or through the establishment of testamentary trusts where capital is reserved for the benefit of lineal descendants.

These are not the only disposals of wealth that should be considered, and the context of any disposals also needs to be accounted for. Were the disposals in the forms of loans? If so, the question then becomes whether that is a valid loan such that the asset remains with the individual (or a controlled entity) rather than the children, or is the loan arrangement defective such that the amount is actually now an asset held by the children?

Finances of the spouse and children: status vs need.

The financial status and needs of the spouse and children are critical questions for estate planners, particularly in the context of anticipating and heading-off future family provision claims.

As a general rule, providing for the accommodation and lifestyle of the spouse is prudent in estate planning, particularly given much of a family's wealth is often tied up in non-liquid assets like the family home. This then allows for greater provision for any children through the immediate inheritance of easily transferable wealth such as superannuation or shares, while the spouse continues to live in the family home. This also may provide the spouse with surety entering old age, as the family home is more commonly used to fund the payment of an aged care Refundable Accommodation Deposit.

A further consideration is the needs of the children. Adult children from previous marriages may already have a life of their own – a house, some investments and a completed education, whereas young children from a new marriage may still need schooling and therefore greater provision from an estate should their parents die prematurely.

This then leaves all the usual considerations; family business structures, joint investments - matters that are already complex for a regular family that are compounded by the blending of two families in a new marriage.

Some of the issues to be considered include:

- Who is involved in the business/investment?
- How are those not involved to benefit?
- What proportion is the business/investment of the total family assets?
- Are there other non-business assets held by the entities conducting the business?
- What tax or stamp duty considerations must be made?
- What other risks does the business face in dividing the estate?
- How should the business/investment be valued in allocating the pool?
- What is the expected future value of the business/investments?

Who is to benefit

When forming an estate plan for a blended family, consideration must be given to:

- The spouse.
- Children of the **current** relationship (second children).
- Children of the **former** relationship (first children).
- Any step-children.
- The former spouse.

Estate planning for blended families is highly-complex, and perhaps no case better illustrates the pitfalls than *Hitchcock v Pratt.*[3]

Aside from being scandalous tabloid fodder, the case highlighted the need for extremely careful estate planning for those with complex business, family and trust arrangements.

The case involved the family of the late Richard Pratt, a well-known Melbourne businessman. His wife Jeanne Pratt was executrix of his estate when he died in 2009, but he was also survived by his mistress, Sharilea Hitchcock and her daughter Paula Hitchcock.

Mr Pratt died in Victoria. His estate was comprised of no real estate and all his personal estate assets were located in Victoria. The Hitchcocks, the plaintiffs, who lived in NSW, claimed that they were entitled under family provision orders to a share of the estate. Further, they claimed that four properties, which were located in NSW and had corporate owners, should have formed a part of the notional estate of Mr Pratt pursuant to the *Succession Act 2006* (NSW).

The question in relation to the notional estate issue was whether or not there had been a "relevant property transaction" pursuant to s75 and s76 of that Act.

The argument advanced by the plaintiffs was that Mr Pratt had sufficient de facto control over the properties that, for the purposes of s76(2)(a), he had not exercised a power to appoint or dispose of those properties with the result that another person continued to be entitled to exercise that power.[4]

The four properties which were the subject of the litigation were held by various subsidiary companies in a complex corporate structure and overseen by Pratt Group Holdings Pty Ltd. Mr Pratt was not a director of PGH Ltd, though he did beneficially own the two shares in that entity, in the sense that they were held by other companies on trust for him.

Brereton J determined that it was "at least arguable" that Mr Pratt had the legal capacity to control PGH Ltd through his beneficial shareholding.[5] This meant that Mr Pratt had an entitlement to exercise discretions as to distributions of income and capital of the ultimate trust. However, this entitlement extended only to trust income and to the capital, which consisted of shares only (property located in Victoria).

For these and other reasons, the plaintiffs' claims were ultimately dismissed.

To speculate on whether this dispute could have been mitigated by an open style of family meeting may be spurious, particularly given the complicated nature of the Pratt corporate structure, and the subsequent claims made against the estate by other individuals. Indeed, in July 2015, it was reported that the Hitchcocks had reached a settlement with Jeanne Pratt for an undisclosed sum in relation to Mr Pratt's estate.

[3] [2010] NSWSC 1508
[4] Ibid [25]
[5] Ibid [37]

Who are you obliged to provide for in your will?

Although testators are not obliged to provide for anyone in their will, all estate planners know the need to counsel clients on the common grounds that children or former spouses will use to challenge a will.

Family Provision Claims

Each State and Territory in Australia has legislation which allows Family Provision Claims, where certain categories of eligible persons, usually family members, can bring a claim against the estate of a deceased person where he or she has been left without adequate provision. The relevant legislation, for each state and territory is as follows:

- New South Wales - *Succession Act* 2006;
- Victoria - *Administration and Probate Act* 1958;
- Queensland - *Succession Act* 1981;
- South Australia - *Inheritance (Family Provision) Act* 1972;
- Tasmania - *Testator's Family Maintenance Act* 1912;
- Western Australia - *Family Provision Act* 1972;
- Northern Territory - *Family Provision Act* 1970; and
- Australian Capital Territory - *Family Provision Act* 1969.

As estate planners we sometimes encounter people who use their will as a means to settle scores or deny a family rival. Capricious will making is common throughout the world, and each jurisdiction has their own responses to the problem. Although these questions vary in each jurisdiction, the determinations that the Court must make are largely the same; has the eligible person been left with adequate provision for their proper maintenance, education and advancement in life?

When is provision necessary?

The question is known as the "discretionary question" because it involves the court making a subjective determination on the basis of all of the relevant matters in that particular case.

These determinations are entirely subjective, and dependent on all the circumstances of the case. There is no "scale of fairness" and provision must be determined with reference to the individual facts of the particular claim.

The issues which this causes were succinctly stated by Palmer J in *Sherborne (No2): Vanvalen & Anor v Neaves & Anor; Gilroy v Neaves & Anor*[6], in the context of deciding on the question of costs and the effect of a Calderbank offer:

> *"A claim under the FPA is not quantifiable by the parties' legal advisers prior to judgment with anything like the prescience possible in a claim for a liquidated sum such as a contract debt, or even in a claim for unliquidated damages for personal injury or for future economic loss. There are statutory and judicial guidelines for the range of damages appropriate for various types of personal injury; expert accountants attempt to quantify damages for future economic loss by reference to historical financial information.*
>
> *However, in a claim under the FPA the Court has to quantify what provision "ought to be made" for the applicant out of the deceased's estate "having regard to the circumstances at the time the order is made": s.7. Inevitably, that question involves a large element of subjective assessment by the Judge. Inevitably, on any particular set of facts, there would be a variety of answers given by different Judges. The decided cases offer broad parameters as to what provision "ought to be made" in certain kinds of circumstances but there is no formula and there is no yardstick on which the degrees of measurement are not etched by the Judge's own experience of life.*

[6] [2005] NSW 1003 at 57- 58

There will be some FPA cases in which the applicant's claim is so unreasonable that the applicant is clearly unjustified in commencing the proceedings let alone prosecuting them to a conclusion. In such a case indemnity costs might well be ordered. There will be many cases in which an applicant only just fails to qualify for further provision before one Judge when the same applicant would have only just succeeded in qualifying for provision before another Judge. There will be cases in which the applicant obtains an order for further provision which one Judge would regard as appropriate, another would regard as generous and a third would regard as niggardly."

To combat this uncertainty practitioners, search out rules and guidelines with which to measure claims. In New South Wales some of these include that widow's claims have "primacy" or able-bodied adult children will not succeed in a claim. However, as soon as these rules gain currency or are relied upon, the Court rejects such an approach as lacking any legislative basis.

This was addressed by Bryson JA in *Bladwell v Davis & Anor* [7] where he stated at 12:

"There have been many statements in judicial decisions, including decisions in the Court of Appeal, generally to the effect that primacy of some kind is accorded to claims of widows for proper maintenance and advancement in life, including continuance of housing arrangements which they enjoyed during the lifetimes of their late husbands. These statements are not altogether uniform in expression and should be understood as made in each case in relation to the facts under consideration; and those facts vary widely and in truth are unique to each particular case. "Widow takes all" is not a rule which has been or could be established by judicial decisions: the Court cannot resign the functions which it has under s 7 of the Family Provision Act 1982 in favour of rules of thumb. A rule which was once followed which practically prevented ordering provision for an adult son who was fit to work has been abandoned."

Another consideration when handling family provision claims is the impact of property settlements from divorce on subsequent estate claims. As we can learn from *Lodin v Lodin* [8], as a general rule spouses who have already received a property settlement will not be successful in Family Provision Claim.

The deceased, Dr Mohammad Masoud Lodin died in June 2014, aged 65 years. He did not leave a will and Letters of administration were granted to his daughter, the Defendant, Rebecca Lodin. She was entitled to the whole of his estate which was worth more than $5 million. The deceased's former wife (the Defendant's mother), filed a Family Provision Summons seeking provision out of the estate. The Plaintiff married the deceased on 19 September 1988, and divorced on 29 December 1995, having separated on 5 April 1990 after a cohabitation of only about 18 months.

The Plaintiff also had a daughter, Alana, by an earlier relationship.

The circumstances in which the deceased and the Plaintiff met and formed a relationship were relevant, as the Plaintiff had originally been a patient of the late doctor. In May 1984, the Plaintiff consulted the deceased as a medical practitioner. Between June and December 1984, she and the deceased commenced playing squash together. By December 1984 the relationship between her and the deceased had become sexual. The Defendant, Rebecca, the child of the Plaintiff and the deceased, was born on 8 February 1986. The Plaintiff and the deceased married and commenced to cohabit on 1 September 1988. On 5 April 1990, the Plaintiff and the deceased separated under the one roof, after a period of cohabitation of only 18 months. From then until November 1990 the deceased paid maintenance for Rebecca in the sum of $100 per week. Thereafter until 22 April 1992, he paid child maintenance of $60 per week, in addition to paying all of Rebecca's school fees and some other expenses.

[7] [2004] NSWCA 170
[8] [2017] NSWSC 10

There was a financial settlement in the Family Court of Australia on 28 April 1992, the deceased applied for orders by way of adjustment and settlement of property interests, including that he pay the Plaintiff $50,000. The following matters were considered:

- The deceased's superior future earning capacity;
- The Plaintiff would have the primary care for two young children, one of them a child of the marriage; and
- By comparison with the deceased, the Plaintiff was in a markedly inferior economic situation.

The result was that the Plaintiff received about 54% of the asset pool, including a s75(2) adjustment for the superior earning capacity of the deceased. The Plaintiff appealed the decision and the appeal was dismissed.

Following the dismissal of her appeal, the Plaintiff telephoned the deceased, threatening him with a complaint to the NSW Health Department Complaints Unit and to "destroy his life" if he didn't provide the sum of $60,000.

The complaint was subsequently made, alleging that the deceased had engaged in an inappropriate sexual relationship with the Plaintiff while she was his patient. The complaint was heard by a professional standards committee and the deceased was found guilty of unsatisfactory professional conduct, reprimanded, and ordered to undertake a course in ethics.

The Plaintiff made several complaints about the deceased to the police. She also commenced proceedings in the Supreme Court for an extension of time in which to sue the deceased for damages for breach of professional duty. This action was not prosecuted and was dismissed.

The Plaintiff brought her Family Provision Claim within time and was an eligible person under s57(d) of the *Succession Act (NSW) 2006*, which includes as an eligible person "a former wife or husband of the deceased person". However, a category (d) Plaintiff must also satisfy the Court that there are factors which warrant the making of the application.

Although the Plaintiff was originally awarded $750,000, from her late husband's estate, on appeal the provision was revoked as it was demonstrated that although the Plaintiff was eligible, there was no moral obligation on the testator to provide additionally for his former spouse following their original property settlement.

The *Lodin* decision broadly reflects society's expectation that, in most cases, a final property settlement in the Family Court will be the end of any entitlement of a former spouse to provision from the estate of his/her deceased ex-spouse.

There have been other cases where it was held that where there were final property settlement orders made by the Family Court that the intention was to bring all financial matters between the parties to an end, and that there should be "a clean break". However, that is not to say that every former spouse would not succeed in a claim. It was recognized that there would be a number of instances where a family provision claim by a former spouse would succeed.

An example of this reasoning was given by Justice Young in *O'Shaughnessy v Mantle*[9], where he provided a non-exhaustive list of circumstances which may give rise to a moral duty upon a testator to provide for a former spouse. Justice Young first identified four classes of case where a clear consideration of provision could be warranted, namely:

- where there has been a divorce but a spouse has died before financial matters have been resolved by the Family Court;
- where the husband and wife have not finally settled all their property dealings at the time of the divorce;

[9] (1986) 7 NSWLR 142

- where maintenance was being paid to the ex-spouse as at the date of the deceased's death, and the orders for maintenance were inadequate to provide for the ex-spouse after the death of the paying spouse; and
- where despite the divorce, there was some dependency on the deceased as at the date of death, such as where some years after the divorce the present Plaintiff fell grievously ill and because of a residue of affection the now deceased spouse provided moneys for medical treatment or living expenses.

In providing this list of considerations, His Honour commented that:

> *"Clearly on the other side of the line is a case where there has been a determination between the spouses on a final basis by a competent court, and the orders of the court or the agreement between the parties sanctioned by the court have been performed and there has been no material change in circumstances other than the death of one of the parties. Somewhere between this type of case and the other five classes of case which I have discussed, the line must be drawn in respect of applications by ex-spouses – just where, may be able to be determined with more precision after there have been a larger number of cases before the court."*

His view was that where there were final property settlement orders and no material change in circumstances then there would be no basis for a subsequent Family Provision Claim, owing to the view that a property settlement is intended to bring about finality to the parties' financial affairs.

In the case of *Mulcahy v Weldon*[10], Bryson J expressed that it would be exceptional for an order for provision to be made in favour of a former spouse if they had been provided with a property settlement, on the basis that according to community standards, a former spouse who has had a property settlement does not have any continuing entitlement to maintenance and is not generally regarded as a natural object of testamentary recognition.

[10] [2001] NSWSC 474

Claims in Blended Families - Eligible applicants

In order to bring a claim, the applicant must firstly prove that they are an eligible person. The classes of eligible persons differ between states and territories and this is where the problem lies of whether they fall within the class.

Considering classes only just for NSW, SA and Victoria shows how different this can be.

New South Wales - Succession Act 2006

Section 57(1) of the *Succession Act 2006* provides that the following persons are eligible to apply:

- a person who was the wife or husband of the deceased person at the time of the deceased person's death,
- a person with whom the deceased person was living in a de facto relationship at the time of the deceased person's death,
- a child of the deceased person,
- a former wife or husband of the deceased person,
- a person:
- who was, at any particular time, wholly or partly dependent on the deceased person, and
- who is a grandchild of the deceased person or was, at that particular time or at any other time, a member of the household of which the deceased person was a member,
- a person with whom the deceased person was living in a close personal relationship at the time of the deceased person's death.

Section 57(2) then goes on to provide that a reference to a child of a deceased person includes, if the deceased person was in a de facto relationship, or a domestic relationship within the meaning of the *Property (Relationships) Act 1984*, at the time of death, a reference to the following:

- a child born as a result of sexual relations between the parties to the relationship,
- a child adopted by both parties,
- in the case of a de facto relationship between a man and a woman, a child of the woman of whom the man is the father or of whom the man is presumed, by virtue of the *Status of Children Act 1996*, to be the father (except where the presumption is rebutted),
- in the case of a de facto relationship between two women, a child of whom both of those women are presumed to be parents by virtue of the *Status of Children Act 1996*,
- a child for whose long-term welfare both parties have parental responsibility (within the meaning of the *Children and Young Persons (Care and Protection) Act 1998*).

However, section 59(1)(b) also provides that in the case of a person who is an eligible person by reason only of paragraph (iv), (v) or (vi) of 57(1), there must be factors which warrant the making of the application.

South Australia – Inheritance (Family Provision) Act 1972

Section 6 of the *Inheritance (Family Provision) Act 1972* provides that the following persons are eligible to apply:

- the spouse of the deceased person;
- a person who has been divorced from the deceased person;
- the domestic partner of the deceased person;
- a child of the deceased person;
- a child of a spouse or domestic partner of the deceased person being a child who was maintained wholly or partly or who was legally entitled to be maintained wholly or partly by the deceased person immediately before his death;
- a child of the child of the deceased person;
- (a parent of the deceased person who satisfies the court that he cared for, or contributed to the maintenance of, the deceased person during his life time;

- a brother or sister of the deceased person who satisfies the court that he cared for, or contributed to the maintenance of, the deceased person during his lifetime

Victoria - Administration and Probate Act 1958

Prior to the amendments to this Act in the *Justice Legislation Amendment (Succession and Surrogacy) Act 2014*, any person could apply to the Courts for a family provision order.

Now only an 'eligible person' may apply. There are effectively two tiers of claimants under sections 90 and 91:

Tier One – spouses and children which include:

- the spouse or domestic partner;
- a child, stepchild, or person who believed they were a child; and
- a former spouse or domestic partner who would have been able to commence proceedings under the *Family Law Act 1975 (Cth*).

Tier Two – other eligible persons who can only make a claim if they can also show they were wholly or partly dependent on the deceased for their proper maintenance and support:

- a grandchild;
- a registered caring partner;
- a spouse or domestic partner of a child of the deceased;
- a member of the deceased's household.

Significantly, for adult children over 25 years of age, a Court, when making a family provision order must consider the degree to which the adult child is not reasonably capable of adequately providing for their own proper maintenance and support. This is intended to limit claims made by adult children who are capable of providing for their own proper maintenance.

Step Children

Under state and territory laws, a stepchild can make a family provision claim against a deceased's estate if certain criteria are satisfied. However, the criteria differs from state to state.

- ***New South Wales*** - There is no express provision for stepchildren. However, a stepchild can qualify if they can prove they were a member of the household of the deceased, wholly or partly dependent on them and there are factors which warrant the making of the application.
- ***Victoria*** - Stepchildren are eligible to make a family provision claim. The decision of *Scott-Mackenzie v Bail* also makes it clear that this applies to both stepchildren of a spouse and stepchildren of a de facto partner.
- ***Queensland*** - Stepchildren are eligible unless the parent has divorced the deceased.
- ***South Australia*** - Stepchildren are eligible provided they are being maintained by the deceased or be entitled to be maintained.
- ***ACT*** - Stepchildren are eligible if they were maintained by the deceased immediately before the deceased's death or it the relationship can be considered a domestic relationship.
- ***Western Australia*** - Stepchildren are eligible if they can show they were being maintained or eligible to be maintained by the deceased or if the deceased received or was entitled to receive property from the estate of the stepchild's parent of a value greater than $517,000.
- ***Tasmania*** - Stepchildren are eligible to make a family provision claim.
- ***Northern Territory*** - Stepchildren are eligible if they were being maintained by the deceased immediately prior to death.

Death of natural parent before stepparent - Breaking the Step Relationship

In today's society with many blended or melded marriages there is a rule of law that a "step" relationship will only persist whilst the marriage, by reason of which it arises, remains undissolved. Upon the end of that marriage, either by death or divorce, the "step" relationship ceases to exist although there is a query if there are children born of the marriage. The issue was addressed in the reasons of Deane J in the decision of *R v Cook ex Parte C*[11] where His Honour, referring to step-children, stated that the relationship between step-parent and step-child is one of affinity as distinct from consanguinity. The basis of the relationship is the marriage of the step-parent with the natural parent. He also stated that it had been recognised that the relationship would only arise if the marriage of parent and putative step-parent was a valid one. It had been held that the relationship would only persist while the marriage, by reason of which it arises, remains undissolved, at least if there are no children born of the marriage. His Honour then set out examples where the relationship was recognised for various statutory purposes.

The common law basis of the relationship has been considered in a number of court decisions which usually relate to inheritance claims. The matter was considered in a number of Queensland cases relating to the Succession Act where "step-child" was defined in relation to any person as "a child by a former marriage of that person's husband or wife."

In Re Burt[12], decided in 1986, the Full Court overruled two previous single judge decisions in Queensland to hold that the relationship of step-child and step-parent does not subsist after the termination of the marriage which created it and consequently the claimants were not "step-children" of the testatrix at the time of her death. The judges determined that the reference to a "husband" or "wife" meant a person who remained married as at the date of death and not one where the relationship had previously terminated. Regard was also had to an American decision and a New Zealand case of *Mander v O'Toole*[13] (which was a compensation case). This decision was followed in *Re Marstella*[14] and *Re Monkton, Zeith v Public Trustee of Queensland*[15] where an application for special leave to appeal to the High Court was refused by majority. *Re Burt* was followed in Tasmania by Underwood J (as he then was) in *Basterfield v Gay*[16] and by Zeeman J in *Connors v Tasmanian Trustees Ltd*[17].

Implications of this rule

There are a number of implications which arise from this rule. In considering how to deal with estate planning issues, consideration has to be given to the range of persons who can benefit from a variety of funds and the fact that a person may no longer be entitled to receive certain benefits by reason of the order of death of the parent and stepparent needs to be taken into account.

Drafting of Wills

A problem can arise if a testator leaves gifts, particularly residue, to "my children and step-children" without identifying the step-children by name. If the step relationship has been terminated prior to the death of the testator, there are no step-children to take the gift. The natural children may well contend that the gift has failed and that the gift should be distributed only amongst the natural children. In the case of persons with step-children who wish to provide for those children, the better practice would be to name the children who are to share in the gift. The court can look at circumstances where the testator had no children of his own but treated step-children as his children and made a gift to his "children". *In the Will of Ahchay*[18] a gift to "my children" was found to be valid to give to 3 of 7 step-children whom the testator had treated as his own children having no natural children himself. The court found that in the circumstances which existed the testator intended to benefit the children of his wife who had

[11] (1985) 156 CLR 249 at 262 –263
[12] [1988] 1 Qd.R 23
[13] [1948] NZLR 909
[14] [1989] 1 Qd.R 638
[15] [1995] QCA 321
[16] (1994) 3 Tas.R 293
[17] (1996) 6 Tas. R 263.
[18] (1996) 6 Tas. R. 369

comprised the family following his marriage to the children's mother. The solicitor who prepared the will knew the family well and did not realise that the children were not the testator's natural children

Inheritance Claims

By way of example, section 6(g) of the South Australian *Inheritance (Family Provision) Act* includes those entitled to claim a benefit "a child of a spouse or domestic partner of the deceased person who was maintained wholly or partly or who was legally entitled to be maintained wholly or partly by the deceased person immediately before his death". A person ceases to be a spouse upon the death or dissolution of marriage of one of the parties. Thus, based on the Queensland authorities, a "child of a spouse" is not entitled to claim if the natural parent has died or been divorced thereby ending the relationship between the spouses.

The matter becomes even more complex in the case of "domestic partners" because such a relationship may end in other ways without necessarily the certainty of death or dissolution by the formality of divorce. Upon the death of one party the relationship can no longer exist and a child of the deceased partner would no longer be in a position to claim.

Superannuation

Persons whose natural parent has predeceased a deceased member of a superannuation fund are not eligible to be treated as dependants for the purposes of distributions from the fund unless an "interdependency relationship" exists. Section 62 of the *Superannuation Industry (Supervision) Act* 1993 provides that the fund must be maintained amongst other things, solely for the provision of benefits in respect of each member of the fund. On or after the member's death the benefits can only be provided to the member's legal personal representative, or to any or all of the member's dependants, or to both. A "dependant" is defined to include any "child" of the person. In turn a child in relation to a person includes "a step-child or a child of the person's spouse or someone who is a child of the person within the meaning of the Family Law Act 1975." If the spousal relationship has been terminated, then such a child will no longer be a step-child or a child of the person's spouse and the person does not fall within the definition of "child within the meaning of the Family Law Act."

In Determination Number D04-05/186, the Superannuation Complaints Tribunal applied the decisions of *Re Burt, Basterfield v Gay and Connors v Tasmanian Trustees Limited* to state that "the traditional common law position is that a step-child of the marriage ceases to be a step-child of the step-parent at the time that the natural parent dies". The Tribunal stated that the common law position was reflected in a variety of legislation covering issues relating to step-children, such as legislation dealing with administration of probate of deceased estates, family law and immigration laws. Although the deceased member of the fund had referred to his step-children in his will prepared some years after the death of his wife who was the natural mother of the children, the Tribunal found that it was bound by the common law view. The trustee of the fund could only pay a benefit to the former step-children if they were wholly or partially dependent on the deceased member.

This determination may have significant impact upon an estate plan, where a testator takes into account the fact that a substantial amount of the superannuation fund may be paid to persons whom the testator regards as "stepchildren". The fund will have no power to pay any benefit to those persons. A trustee cannot make the payment to the former "step-children" even if there is a binding death benefit nomination. The money payable from a superannuation fund, even if payable through the estate, can be subject to death benefits tax if it is payable to a non-dependant such as a former step-child.

Family Trusts

The terms of a family trust deed have to also be considered in connection with the relationship. The Deed may provide for distributions of capital and income to be made to "children of a spouse". When upon the death of the spouse that relationship ceases, those children no longer qualify as potential beneficiaries.

The issue here is whether the stepchild relationship survives the death of the natural parent. In Victoria, the decision of *Bail v Scott-Mackenzie*[19] makes it clear that it can.

The Plaintiff's mother had been the domestic partner of the deceased for over 40 years. The Plaintiff's mother died in 2001 which brought the relationship between her mother and the deceased to an end.

The deceased then formed a new relationship and in 2004, he executed a will leaving his estate to his new partner. The relationship continued until his death in 2016.

The questions before the Court were, firstly, was the Plaintiff a stepchild even though her mother was in a domestic relationship with the deceased and not married to him; and secondly, if so, did the Plaintiff continue to be his stepchild after the death of her mother?

In relation to the first issue, the Court noted that the legislation does not distinguish between a spouse and a domestic partner as to eligibility with the intention "to give effect to societal attitudes that married and unmarried couples are afforded the same, or near identical rights."

On the second issue, the Court held that "if the marriage remains undissolved at the time of death of the natural parent, the relationship of affinity between stepparent and stepchild will continue."

The Court therefore held that the Plaintiff was eligible to make a claim.

This decision was appealed on the issue of whether the relationship of stepchild only existed if there was a marriage and not in the case of a domestic relationship, however the appeal was dismissed.

This was followed in the case of *Trembath v Trembath*[20] where the Court refused the strike-out application, saying that the prospect that the claimants might be a stepchild of a 'former' relationship was not so 'fanciful' as to attract a strike-out. The Court considered lines of authority in Queensland and Tasmania which had held that a relationship of 'stepchild' did not survive the death of the natural parent. However, the Queensland Act now provides that, whilst a stepchild relationship does not survive the termination of a marriage relationship, it does survive death.

The position in states and territories where stepchild is not expressly defined is somewhat less straightforward, but if the child could still be considered a member of the household and/or dependent on the deceased stepparent, it could be possible that the natural parent dies but the stepchild remains reliant on the stepparent.

Spata v Tumino; Estate of Gina Spata[21] dealt with the questions that arise when assets of a natural parent pass to a step parent.

The deceased died in 2014 and left her estate to her nephews. She had been married, however, her husband predeceased her. She did not have any children but her husband had three children from his first marriage. One of those children, John, applied to the Court for a Family Provision order out of his stepmother's estate.

The issue in the case was eligibility. As a stepchild, John had to satisfy the Court not only that he was a member of the household, but also that he was dependent upon the deceased. It was accepted by the Court that John had lived for about six months in 1980 with his father and the deceased, and also from about 1995 to 1999.

The Court affirmed that to be "dependent" meant: "*the giving of financial or other material assistance by the deceased over a significant period of time in order to meet a need of the eligible person, with the result that the recipient has come ordinarily to rely upon that assistance*", and that dependence was not limited to mere financial dependence.

[19] [2017] VSCA 108
[20] [2017] VSC 369
[21] [2017] NSWSC 111

The Plaintiff asserted that he was dependent upon the deceased for the carrying out of household duties such as cooking, washing and cleaning for his benefit. However, the Court did not accept that these services constituted dependency as intended by the legislation. Justice Brereton stated [at 70 and 71]:

> *"The provision by Gina of services such as putting clothes in the washing machine, hanging them out to dry, preparing meals and shopping for groceries is an aspect of the arrangements of mutual living that makes a household, and reflects the division of labour and responsibilities within the household, but does not constitute a dependency – at least in the case of an adult child who is capable of performing the activities of daily living himself.*
> *…*
>
> *Nor did Gina's provision of comfort and solace when he was distressed in the circumstances of his marriage breakdown create a dependency; while dependence is not limited to financial or material dependence, the existence of an emotional relationship alone is insufficient. John refers to having received an occasional financial benefit – $50 or so, so that he could go out for a social occasion – from Gina*
>
> *– such trivial assistance does not make a case of dependency, even if it were established that it was sourced in Gina and not Ross, which it is not. To the extent that John had any remaining need for maternal services of this kind after the death of his mother Nancy – he was then aged 16 – it was his father who provided them; in the earlier proceedings he deposed that after his mother's death, his father took on the role of both parents, and there was no reference to any contribution by Gina, who did not arrive on the scene until John was in his twenties and married."*

In addition, the house in which he was a member with his father and the deceased was owned by his father, and so the Plaintiff was not dependent upon the deceased for accommodation.

In the absence of the finding of any dependence upon the deceased, the Plaintiff's application was dismissed. This decision was the subject of an appeal by the Plaintiff, which was also dismissed[22].

Second Spouses

The case of *Frastika v Cosgrove as executor of the estate of Russell Walter O'Halloran* (deceased)[23] involved an application for leave to proceed with an application for Family Provision out of time. The application was opposed by the executor of the estate.

At issue was whether the applicant had established that it was just and proper to exercise its statutory discretion to extend time.

The deceased died on 12 September 2014 and the applicant was the wife of the deceased, having married him on 20 January 2014. She was an Indonesian National and 45 years younger than the deceased.

The deceased first married in about 1967 and he and his wife adopted two children. Prior to the death of his first wife, the deceased and his first wife took over the care of their adopted daughter's child. The deceased was granted sole parental responsibility for that granddaughter. She had autism, ADHD and intellectual impairment. The Plaintiff was engaged by the deceased to assist in the care of his granddaughter at his home. In 2013 she ceased in that role but continued to live in the deceased's home. The deceased was diagnosed with cancer in October 2013, and the applicant and the deceased were married in January 2014.

The deceased made a will on 13 January 2014, and then his last will on 27 August 2014. His last will gave a legacy of $30,000 to the applicant and the balance of his assets were left to the trustees of a disability trust for his granddaughter.

[22] Spata v Tumino [2018] NSWCA 17
[23] [2016] QSC 312

On the death of the deceased, the applicant received $150,000 from the deceased's superannuation, which she sent to her parents in Indonesia to repay a debt owed by her parents. She also received $10,000 from a joint bank account by survivorship. The estate was valued at $900,000.

The application was filed 63 days after the expiry of the statutory limitation period, but not served until 12 months after the expiry of the limitation period. The period for bringing a claim in Queensland is within 9 months after the death of the deceased (s41(8)).

Justice Boddice stated at 21:

> "*The court has an unfettered discretion whether to extend the time for making the application. The onus lies on the applicant to establish sufficient grounds. Relevant factors include:*
>
> - *whether there is an adequate explanation for the delay*
> - *whether there would be any prejudice to the beneficiaries*
> - *whether there has been any unconscionable conduct by the applicant; and*
> - *the strength of the applicant's case*."

The applicant's explanation for the delay was that:

- she was in shock following his death,
- she had to leave the family home,
- she was concerned about the risk of deportation,
- while she obtained legal advice, she had little understanding of the legal requirements.
- She lacked financial resources
- She needed to get a job
- She later moved interstate to Western Australia

She submitted that there would be no prejudice to any beneficiary because the estate had not been distributed and the gift for the beneficiary was to be held in a special disability trust. She submitted that there was not any unconscionable conduct on her part and there were strong prospects of success on the substantive application. She relied on her status as spouse of the deceased and the care she gave the deceased and his granddaughter. She submitted that she received little benefit under the terms of the Will and was in an impecunious position. The applicant's position was that there was sufficient in the estate to meet her claim without detracting from adequate provision for the primary beneficiary.

On the issue of delay, the Judge determined that the applicant's explanation lacked cogency. Even when the claim was commenced, the applicant failed to prosecute the application diligently. The Judge stated that as the estate was yet to be distributed there was no prejudice to any beneficiary in granting an extension of time, however, an extension would prejudice the primary beneficiary. There was no suggestion of unconscionable conduct on the part of the applicant.

In relation to prospects, the Judge found that in the context of the size of the estate, the short marriage, and the competing claim of the primary beneficiary, the applicant would have difficulty in establishing that the provision she received was inadequate.

In conclusion, the Judge stated:

> *"The applicant has not discharged the onus placed upon her of establishing a substantial case for it being just and proper for this Court to exercise its discretion in her favour to extend the time for the bringing of the application for family provision.*
>
> *The applicant's explanation for the delay in bringing the application is inadequate. That application has poor prospects of success. That application will result in significant legal costs being incurred by the estate, to the detriment of the estate's primary beneficiary.*

In all of the circumstances I decline, in the exercise of my discretion, to extend the time for the bringing by the applicant of an application for further provision out of the estate of the deceased."

The application was dismissed.

Ex nuptial children

Children born outside of marriage increasingly feature in Family Provision Claims as the family dynamic evolves.

Kohari v NSW Trustee & Guardian[24] dealt with the central issue of paternity in family provision claims, where the child and parent are estranged since birth.

In the Kohari case, the deceased died in August 2014. He had been married to Julie, who had a son from a previous marriage. Julie and the deceased had two children, Joseph and Robert. The deceased and Julie separated when Robert was 18 months old. The deceased had no contact with Robert for the rest of his life, believing that Julie was unfaithful to him and that Robert was not his son.

The deceased then had a de facto relationship with Julia for 26 years, until his death. The whole of his estate was left to Julia by his will. The value of the estate was about $1million.

At the commencement of the proceedings, the Defendant put Robert's paternity in issue. A DNA test was ordered by the courts and the results of the test established that the deceased was Robert's father.

Robert had been discouraged by his mother to contact the deceased. He was told that the deceased was a violent man who beat Julie when he was drunk. He did, nonetheless, attempt to contact his father by letter, but did not receive any reply.

The Court held that the deceased had an obligation to make provision to the Plaintiff by his will. The Plaintiff sought provision of a lump sum of $600,000 to purchase a home, a people mover motor car, payment of debts, medical expenses and a capital sum for contingencies of $50,000. The Court rejected this as being the responsibility of the deceased to provide and instead ordered provision in the amount of $100,000.

Will a claim be successful?

As the courts have shown, eligibility is no guarantee of success when it comes to Family Provision Claims, as claimants must bring an action within the statutory limitation period and then prove that the deceased failed to make adequate provision for their proper maintenance, support or advancement.

This is further compounded by the differing rules between states. For example, in NSW, a family provision claim must be filed with the Court within 12 months of the date of death (where the deceased person died on or after 1 March 2009) and under section 60 additional considerations include:

- the value and location of the deceased person's estate;
- whether the applicant is financially supported by another person;
- the applicant's character; and
- any applicable customary law if the deceased was Aboriginal or Torres Strait Islander;

In Victoria and South Australia any person planning to make a claim must do so within six months of a grant of probate or letters of administration being issued. Additionally, in Victoria, some of the following factors in must be considered under section 91A:

- any evidence of the deceased's reasons for making the dispositions in the deceased's will

[24] [2017] NSWSC 1080

- any other evidence of the deceased's intentions in relation to providing for the eligible person;
- the age of the eligible person;

In South Australia no such legislative assistance or guidance is provided on what factors a Court should considering in determining the strength (or weakness) of a Family Provision Claim other than to be successful the claimant must have been left without adequate provision for his proper maintenance, education or advancement in life.[25]

[25] S7(1)(b) *Inheritance (Family Provision) Act* 1972 (SA)

Approaches to estate planning in blended families

What to leave for the child?

Although the courts have sought to develop guides for eligibility, unfortunately, even when making provision to mitigate the possibility of further Family Provision claims, there is no magic number; no scale to ensure that someone is "adequately" provided for in a will.

As a general rule, estate planners will advise their clients that as testators, if a "child" is eligible to claim against an estate, some provision should be made for that child, even if done so reluctantly.

It should be acknowledged, however, where families are estranged, it is also possible that making nominal provision for the estranged child may make them more likely to make a Family Provision Claim, since a nominal provision may draw the beneficiary's attention to an estate they were previously unaware of entitlement to.

If possible, the best approach is to have clients carry out open discussions with all 'children' and family members to explain what has been done and why. Hopefully, this will help future beneficiaries understand the reasoning behind a Will and be less likely to claim against the estate in the future.

Adult children

Hallen J in *Hogan v Hogan*[26] summarised the principles which are useful to bear in mind when considering adult children:

> *'The relationship between parent and child changes when the child leaves home. However, a child does not cease to be a natural recipient of parental ties, affection or support, as the bonds of childhood are relaxed.*
>
> *It is impossible to describe in terms of universal application, the moral obligation, or community expectation, of a parent in respect of an adult child. It can be said that, ordinarily, the community expects parents to raise, and educate, their children to the very best of their ability while they remain children; probably to assist them with a tertiary education, where that is feasible; where funds allow, to provide them with a start in life, such as a deposit on a home, although it might well take a different form. The community does not expect a parent, in ordinary circumstances, to provide an unencumbered house, or to set his or her children up in a position where they can acquire a house unencumbered, although in a particular case, where assets permit and the relationship between the parties is such as to justify it, there might be such an obligation: McGrath v Eves [2005] NSWSC 1006; Taylor v Farrugia [2009] NSWSC 801.*
>
> *Generally, also, the community does not expect a parent to look after his, or her, child for the rest of the child's life and into retirement, especially when there is someone else, such as a spouse, who has a primary obligation to do so. Plainly, if an adult child remains a dependent of a parent, the community usually expects the parent to make provision to fulfil that ongoing dependency after death. But where a child, even an adult child, falls on hard times, and where there are assets available, then the community may expect a parent to provide a buffer against contingencies; and where a child has been unable to accumulate superannuation or make other provision for their retirement, something to assist in retirement where otherwise, they would be left destitute: Taylor v Farrugia, at [58].*
>
> *……*

[26] [2013] NSWSC 1405

There is no need for an applicant adult child to show some special need or some special claim: McCosker v McCosker; Kleinig v Neal (No 2), at 545; Bondelmonte v Blanckensee [1989] WAR 305; and Hawkins v Prestage (1989) 1 WAR 37, per Nicholson J, at 45.

The adult child's lack of reserves to meet demands, particularly of ill health, which become more likely with advancing years, is a relevant consideration: MacGregor v MacGregor [2003] WASC 169 (28 August 2003), at [179] - [182]; Crossman v Riedel [2004] ACTSC 127, at [49].

Likewise, the need for financial security and a fund to protect against the ordinary vicissitudes of life, is relevant: Marks v Marks [2003] WASCA 297, at [43]. In addition, if the applicant is unable to earn, or has a limited means of earning an income, this could give rise to an increased call on the estate of the deceased: Christie v Manera [2006] WASC 287; Butcher v Craig [2009] WASC 164, at [17].

Member of a household

Being considered a member of a household usually consists of a degree of continuity and permanency of mutual living. It is worth noting for children of divorce that regular weekend visits are not sufficient.[27] However, a person may be a member of two households. In *Nagatomi v Hudson*[28], a distinction was made between being '*in a household*' (which connotes a physical sharing of space) and '*of a household*' (which represents a familial bond).

Dependence

Dependence usually includes financial and material dependence, although the courts have found it extends to anything which implies reliance on someone for "*what is needed*".[29] However, in *Skinner v Frappell*[30] this reliance was held to be more than emotional dependence.

Notional estate

New South Wales is unique in enshrining the concept of notional estate which can impact on estate planning in blended families and cover assets outside the deceased's actual estate at the time of death. This needs therefore to be carefully considered by advisors.

The *Succession Act 2006* (NSW) enables the Court to treat certain property transferred (within 3 years of death) that is not actually part of the estate as being notionally part of it.

For example, if a family were to transfer a property title from a father to his brother to exclude a future beneficiary, the courts may find this property is notionally part of the estate at the time of death and should be considered as part of a Family Provision Claim.

Notional estate also extends to items over which a testator may have exerted some control, despite a lack of direct ownership, including superannuation and trusts, and any property held in NSW.

[27] *Kingsland v McIndoe* [1989] VR 273.
[28] [1997] NSWSC 415
[29] *Ball v Newey* (1988) 13 NSWLR 489 at 491; *Petrohilos v Hunter* (1991) 25 NSWLR 343.
[30] [2008] NSWCA 296 at [85]

Provide for Accommodation Needs – Life Interests?

Life interest clauses offer an attractive strategy to provide for a spouse or partner after death, but careful consideration must be given to tax impacts, the payment of expenses and maintenance of the property. Is this a cost to be borne by the estate or the spouse personally? If the costs are borne by the estate, then where will these funds come from? Who will manage the life interest so as to avoid the possibility of a conflict or beneficiaries being caught up in disputes with the spouse?

Alternative accommodation

It's rare for a spouse's needs to go unhanged as they age. Providing for flexibility with the life interest is vital to ensuring the life interest accommodates the spouse as intended. Therefore, flexibility needs to be drafted into the life interest provisions of an estate plan to allow for the purchase of a more suitable home as the spouse ages or to fund the entry into an assisted care facility.

Consider a right to occupy instead of a life interest

The taxation consequences of life and remainder interests are complex, the consequences of which are outlined in Taxation Ruling TR 2006/14.

The impact of tax can be minimised if the testator chooses to use a right to occupy as compared to a formal life interest. Paragraph 105 of TR 2006/14 confirms that a right of occupy is treated differently for tax purposes than a life interest.

Severing Joint Tenancies

All solicitors should know the risks inherent in estate plans that deal with co-owned assets. In *Badenach v Calvert*[31] the court considered whether an instructing solicitor, in drafting a will, ought to have advised a testator to convert land held in common *into* a joint tenancy to defeat a possible family provision claim. Gageler J's decision centred on the importance of identifying and dealing with jointly held property as part of the estate planning process in circumstances where a failure to do so will frustrate the testamentary intentions of the testator.

> *"Taking reasonable care in carrying the testator's instructions into effect might on occasions require a solicitor retained to prepare a will to do more than merely draft and ensure the proper execution of that will. An example is where taking steps to sever a joint tenancy is integral to carrying into effect a testator's intention that specified property be given by the will such that the taking of those steps can properly be seen to form part of the will-making process."*

Types of Co-Ownership

Co-owned property can either be held in common or as joint tenants.

Tenancy in common

The nature of ownership of property in common is succinctly set out *Tyler & Anor v Raven*:

> *"Tenancy in common is a form of co-ownership of property where each co-owner holds a distinct interest in the same piece of property. The tenants in common hold undivided shares, possessing the property in common without the right to exclusive possession of any part of it. Common possession is the only necessary feature of a tenancy in common. Each tenant in common is entitled to possession of the whole of the commonly owned property but not to the exclusion of the other tenants in common."*

[31] [2016] HCA 18

It is not necessary for tenants in common to hold the same interest in the property. Nor are there rights of survivorship among tenants in common. A testator holding property in common can deal with his or her undivided share in their will as they see fit.

Joint tenancies

Joint tenancies are based on "four unities"

- Unity in title
- interest
- possession, and
- time.

As a general rule, a joint tenancy will cease to exist if one of the four unities is absent. However, there some important exceptions to this rule relevant to estate planning.

Following the death of one of two joint tenants, the surviving joint tenant becomes the full owner of the whole of the property – their interest expanding by accretion to include the whole property.

Unless the joint tenancy is severed prior to death, this type of survivorship renders moot any purported disposition of that property by a joint tenant in his or her will.

If two or more joint tenants die in circumstances rendering it uncertain which of them survived the others, there is a statutory presumption[32] in all jurisdictions except for South Australia[33] that their deaths occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder.

[32] *Conveyancing Act 1919 (NSW) s 35; Property Law Act 1958 (Vic) s 184; Succession Act 1981 (Qld) s 65; Presumption of Surivorship Act 1921 (Tas) s2;*
[33] *In the Estate of Graham William Dawson (Deceased) and Teresa Veronica Dawson (Deceased)* [2016] SASC 89;

Binding Financial Agreements (BFA's)

Binding financial agreements (**BFA**) are another common tool used in estate planning for blended families. BFAs ultimately provide another layer of protection for families complicated by their various dynamics, including step children and second or third marriages.

Types of Agreements

A financial agreement is a written agreement between two or more people which covers the division of property between the parties. The can extend to include the division of superannuation and/or arrangements for the payment of spousal maintenance.

The types of agreements available are:

Part VIII agreements:

- s 90B : in contemplation of marriage;
- s 90C : during a marriage;
- s 90D : after divorce;

Part VIIIAB agreements:

- s 90UB : in contemplation of a de facto relationship;
- s 90UC : during a de facto relationship;
- s 90UD : after the breakdown of a de facto relationship.

BFAs in New South Wales

In New South Wales, a clause can be included in the financial agreement which absolutely prohibits, subject to Supreme Court approval, a claim under testator's family maintenance legislation.

The inclusion of such clauses in a BFA should include acknowledgement by the signatory to the BFA that the agreement is fair for the purposes of provision and an understanding of the signatory's waiver of rights to future Family Provision actions under the NSW Act.

In addition to the prerequisite statement of independent legal advice, the parties should also annexe a statement of independent legal advice from a suitably qualified legal practitioner, specifically in relation to the clauses in the agreement which deal with the parties' rights pursuant to the *Succession Act 2006* (NSW).

BFAs in Victoria, South Australia and other states

In Victoria and other states, it not possible for a financial agreement to definitively exclude parties from future Family Provision claims. Clauses purporting to do so are non-binding statements of intention, similar to a Statement of Wishes, and will be considered by the courts as such in the event of future estate challenges.

Such statements still have value for this reason, though, as the courts have shown they examine the question of adequate provision depending on the individual circumstances of each matter.

Mutual Will Agreements

Mutual will agreements are most commonly used in blended family scenarios as the testator often fears that their spouse will amend their will upon the death of the testator and disinherit the children.

A mutual will agreement is a contract whereby the parties agree to not change their will during their lifetime without the consent of the other party. On the death of the first to die, the mutual will agreement states that the surviving party is bound by and cannot change the mutual will.

This may be an effective tool for couples, particularly when the agreement is limited to specific assets only and allows for the residue of the estate to be dealt with freely. However, it is important to note that as a result of the decision of the High Court of Australia in *Barns v Barns*[34] mutual will agreements will not oust the jurisdiction of the court to make a decision in relation to the assets of the estate pursuant to a testator family maintenance claim. As such, the mutual will agreement may have greater force in relation to the moral obligation imposed by the agreement rather than the legal agreement.

In this context, save for New South Wales where notional estate provisions exist, a better way to ensure the couple's objectives are met is to ensure that there are little assets in the estate that would be subject to the determination of the court under a testator family maintenance claim.

A well-established category of constructive trust arises in relation to a contract for the making of mutual wills. Such contracts are not common and the making of them is not to be encouraged for they can give rise to many problems.

The fact remains that some clients want and intend to create a binding contract in relation to their wills. They may want to leave their assets to their current partner, but at the same time make sure that their children from previous relationships will not miss out on the death of the survivor. Or they may want to ensure that a particular property stays with the side of the family from which it was originally inherited.

There are any number of reasons why clients might want to make a binding contract as to how their property is to be disposed of on death. It is important that practitioners identify those clients and provide them with proper advice. In a NSW Court of Appeal case it was alleged that a practitioner had been negligent in failing to advise his clients on the need for a non-revocation agreement between each of the testators. In that case the Court found that there was no negligence, but the following expert evidence given by Mr Neville Moses at the hearing and referred to by Giles J in his judgment is instructive:

> *"I think it would be usual to explain all wills may be revoked and I think it would naturally follow from that if the solicitor was told that the parties didn't wish to be able to revoke the wills they be given the advice there would need to be a deed or contract in relation to the ongoing wills so they couldn't be revoked."*[35]

Practitioners in wills and estates need to have a proper understanding of the nature and effect of mutual wills, not just in order to properly advise clients who wish to make mutual wills, but also to identify circumstances which indicate the existence of a mutual wills contract affecting the estate of a deceased person.

What are mutual wills?

Mutual wills refer to contracts as to the content of a will. As it is in the nature of a will that it is revocable, a feature of a mutual wills contract will be an express or implied covenant not to revoke the will after the death or incapacity of a contracting party. While both parties are alive and have capacity, the wills may be revocable by agreement or with notice.

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[34] [2003] HCA 9

[35] Aslan v Shehadie [1998] NSWSC 676

Typically, a mutual wills contract will be between two persons and will include covenants by both parties as to the terms of their wills. An example would be where a couple make an agreement that on the death of the survivor of them their property is to pass to a specified beneficiary.

How do they work?

In the case of a breach of a mutual wills contract, an aggrieved person who is a party to a mutual wills contract can rely on the contract to obtain damages or specific performance.

There is no privity of contract for an aggrieved beneficiary who is not a party to the mutual wills contract. On the death of a party to a mutual wills contract, equity will recognise a constructive trust over the assets the subject of the mutual wills contract, and an aggrieved beneficiary will have enforceable rights against the constructive trustee.

Mutual Wills and Family Provision

Until recently, the leading case on mutual wills and family provision legislation was the 1972 Privy Council case of *Schaefer v Schumann*[36]*.* This case was an appeal from the Supreme Court of New South Wales and the relevant legislation was the old *Testator's Family Maintenance and Guardianship* of *Infants Act 1916,* which did not contain any 'notional estate' provisions. It involved a housekeeper who agreed to work for no wages on the basis that her employer, a Mr Seely, was to leave his house and contents to her. Mr Seely's daughters brought a claim under the testator's family maintenance legislation and were initially successful. The Privy Council, however, found that the Court had no jurisdiction under the testator's family maintenance legislation to interfere with the benefit which a testator has conferred by will on a person with whom he has agreed for valuable consideration under a bona fide contract to confer such benefit.

The Barns case

This is a 2003 decision by the High Court on appeal from the Supreme Court of South Australia. It is worth bearing in mind that the South Australian *Inheritance (Family Provision) Act 1972* does not contain any 'notional estate 'provisions.

Lyle & Alice Barns were farmers. They had a son Malcolm, who worked on the family farm, and an adopted daughter Kathryn who had been married, had children and divorced. She had also been bankrupted after an unsuccessful business venture with her husband. Lyle and Alice wanted to make sure that Malcolm would inherit the family farm.

In 1996, Lyle, Alice and Malcolm entered into a deed whereby each of Lyle and Alice covenanted to make a will in an agreed form which was attached as a schedule to the deed and not to revoke the will without the written consent of the other two parties. Wills in the agreed form were executed on the same day. Each will appointed Malcolm as executor and contained a gift of the whole estate to the spouse of the testator, with a substitutional gift of the whole estate to Malcolm.

In 1998, Lyle died and probate of his will was granted to Malcolm. Kathryn applied for provision to be made for her out of Lyle's estate. Counsel for Malcolm and Alice argued that the effect of the deed and the mutual wills was that, upon his death, Lyle was not the beneficial owner of any property and for that reason there was no estate within the meaning of the family provision legislation.

The High Court, by a majority of 4 to 1 found that the deed and mutual wills did not prevent the property forming part of Lyle's estate for family provision purposes.

Gummow and Hayne JJ held that as mutual wills only give rise to a constructive trust which impacts on the estate of the survivor, and as a family provision order out of the estate of the first to die operates as

[36] [1972] AC 572

a codicil immediately prior to death, such an order diverts property away from the operation of the constructive trust prior to the constitution of the trust.

Gleeson CJ, with whom Kirby J agreed, went further, comparing the reasoning in *Schaefer v Schuhmann' with* the Privy Council's earlier decision in *Dillon v New Zealand Public* Trustee[37] and preferring the view in that earlier case that provisions in a will in fulfillment of a contract do not restrict the power of the Court to redistribute the estate.

Gleeson CJ staled (at 33):

> *"The answer to the argument that this takes no account of the rights of the second respondent under the deed, and treats her as a mere beneficiary, is that the nature of the rights she obtained under the deed was such that they were always liable to be affected by the potential operation of the Act. Because the Act imposed a restriction on freedom of testamentary disposition, a promise to make a testamentary disposition was subject to the potential operation of that legislative restriction. The effect of the legislation could have been avoided by a disposition inter vivos so that the deceased died with no estate; that is inherent in the scheme of the legislation. But the effect of the legislative restriction on freedom of testamentary disposition cannot be avoided by a promise to make a certain disposition."*

There has been some criticism of the majority decision, and it may be that cases involving the estate of the surviving party to the mutual wills contract can be distinguished on the facts. In the meantime, however, it would be unwise to assume that a mutual wills arrangement will be effective to defeat a family provision claim.

Advantages of Mutual Wills

For clients wishing to make mutual wills, one of the appealing features is that they can leave the survivor of them free to deal with assets during their lifetime. One alternative to mutual wills is the granting of a legal or equitable life interest only to the spouse, with an interest in remainder to the ultimate beneficiaries. There are, however, significant limitations on the ways in which assets the subject of a life interest can be dealt with, as well as a need to balance the interests of the life tenant with the interests of the remainderman. With mutual wills, depending on their terms, the survivor can be given freedom to dispose of or mortgage assets without fear or action by the ultimate intended beneficiaries.

Another advantage of mutual wills contracts is that they enable both parties to the contract to have a say in who will ultimately be entitled to assets which may not pass into the estate of each individual, such as jointly held assets and assets held by one party only

Disadvantages of Mutual Wills

The flipside of the main advantage of mutual wills highlights a significant disadvantage. If the survivor wishes to defeat the mutual wills contract, he or she may be able to do so simply by dissipating the assets, the subject of the agreement.

Further, in order to be effective in a situation where the survivor does not leave a will in the terms required by the mutual wills contract, it is left up to the intended beneficiaries of the mutual wills contract to;

- be aware of the existence of the mutual wills contract;
- be aware of the terms of the mutual wills contract;
- be aware of the nature of the constructive trust;
- take action to enforce the constructive trust.

[37] [1941] AC294

It is not hard to imagine that a beneficiary who was a minor at the time the mutual wills contract was entered into or at the time of death of the first will maker might well never be informed of the existence of the mutual wills contract. Even if the beneficiary is aware of existence of the mutual wills contract, he or she *may* not be willing to instigate a Court action to enforce the constructive trust. Indeed, if the estate is not large, it *may* not make sense to do so.

The position of the legal personal representative where it is apparent that there has been a possible breach of a mutual wills contract is an unenviable one. There will inevitably be a delay in the distribution of the estate and conflicting pressure from both sets of potential beneficiaries. While the circumstances would be burdensome even for a professional trustee, where the trustee is (as would often be the case) a beneficiary of the last will the position of the trustee could become untenable.

In addition to these disadvantages, the taxation position is far from clear. It has been reasoned that, in the light of the High Court decision In the *Orica*[38] case, there is potential for mutual wills to give rise to a Capital Gains Tax Liability, on the basis that a taxpayer's rights against a third party under an agreement are an asset and the performance of contractual obligations amounts to disposal of the asset.

Drafting Tips

While mutual wills contracts have been found to exist without any written contract or deed it is prudent practice to set out the terms of the contract in writing, and in a deed if there is any doubt as to whether there is real consideration being given by each party. In addition, a recital should be included in each will as to the fact that it is entered into pursuant to a mutual wills contract.

The principles to be applied in the drafting of mutual wills contracts are the general principles for drafting contracts of any type. The objectives are to accurately reflect the intentions of the parties and provide certainty, without reference to extrinsic evidence, as to the obligations and rights of each party.

It is important to identify clearly what the subject matter of the gift is to be. While it *may* be tempting to simply refer to the whole or a portion of a party's estate, the parties need to understand that this would include any assets acquired after the death of the first to die. This *may* not be acceptable. If the subject matter is to be a specified property or other identifiable assets, it is important to consider the circumstances in which the survivor is to be permitted to dispose of the property or other assets.

While the following checklist for taking instructions on a mutual wills contract is not exhaustive, it may provide a useful starting point:

- In what circumstances may the contract be terminated and the wills revoked?
  - Any time while both parties are living?
  - Only if both parties are living and have testamentary capacity? Need agreement of other party before revoking will?
- May revoke will without consent but must give notice?
- Is the contract to continue to be binding:
  - If the parties divorce?
  - If the surviving party remarries after the death of the first?
  - If the surviving party has a child after the death of the first?
- What is the subject matter of the gift?
  - The whole or a specified portion of the estate of the survivor? A particular property or other identifiable assets?
- What is the survivor's power of disposition?
- Are there limits on dispositive power (e.g. only for the purpose of meeting the survivor's ordinary living expenses)?

[38] *Orica Limited v Commissioner of Taxation* [2015] FCA 1399

When seeing two clients together in relation to their wills, it is important to make sure that they understand that wills are, by their nature, revocable, and either one of the two clients may decide tomorrow or next week or next year to change his or her will. It is also necessary to distinguish between those clients who simply have a common present intention in relation to their wills, and those clients who wish to enter into a binding contract.

When it becomes apparent that clients want to make a binding and enforceable agreement dealing with how they will leave their property by will, the practitioner has an obligation to explain the advantages and disadvantages of such agreements. If the clients make an informed decision that they want to proceed with the agreement, the obligation of the practitioner is to draft a valid and enforceable agreement, which will give rise to an enforceable constructive trust.

Trusts

Many Australians now hold significant wealth in trusts. Their popularity has grown due to the tax and asset protection they offer. What many Australians do not understand is that assets held in trust cannot be dealt with by a will and do not form part of a deceased estate. For estate planners, dealing with the control of a trust in the event of death is compounded by issues faced by blended families with competing interests.

The challenge for estate planners is to get the right combination of persons as trustees, directors, shareholders, appointors and beneficiaries and, in appropriate cases, to customise the terms of the trust deed and constitution of a corporate trustee or appointor to ensure control passes to the people the original controller or testator intended.

This is especially important for blended families in attempting to balance the needs and roles of the testator's children. As such, reviewing the terms of the trust deed is critical for estate planners. The deed itself regulates how succession is to be managed (including the mechanisms and any restrictions as to who can act in a role).

It is vital that succession requirements in the trust deed are strictly adhered to, otherwise the appointment could be invalid as highlighted in *Mercanti v Mercanti*[39] and *Mercanti v Mercanti*[40].

If the trust deed does not identify who has the power to remove and replace trustees then statute will apply – potentially giving unintended results.

Best practice is to review the trust deed and make sure control of the trust passes as intended. Most modern deeds allow for the appointor to nominate their successor. These nominations can be revocable in the event a relationship breaks down.

Many trust deeds which provide for the nomination of a successor will also provide for a failsafe to act in the event the appointor dies without dealing with the nomination of their successor. Again, relying on the failsafe is unwise as this mechanism can give unintended results.

If the terms of the trust permit, the appointor should nominate their successor by deed or other instrument in writing. The trust deed may refer to the appointor being able to do this by Will, although this is not recommended as validity or dispute may arise in relation to the Will which could delay or otherwise affect the ability of the appointor to act.

Trust succession in blended families

Sole controllers vs Joint controllers

If the first spouse dies, and they intended for the items held in trust to be kept for the benefit of the family, there are control mechanisms available to ensure assets held in trust are not disposed of or dissipated beyond the family bloodline.

Joint control is one common solution; requiring the surviving spouse and children to work together to achieve unanimity of decisions involving the trust can prevent assets being hastily liquidated or benefit extended to new parties. This, of course, must be considered and balanced against potential conflicts within the family.

'Independent' trustees or appointors

In situations where joint control is likely to lead to disputes, the appointment of an independent party as the sole trustee (or director of the trustee company) and the appointor is an alternative worth

[39] [2016] WASCA 2067
[40] [2017] HCASL 59

investigating. Alternatively, the independent trustee could be appointed with the spouse and children to provide a check and balance or even a casting vote in the event of a dispute.

In order for this structure to have any advantage the independent trustee must have real involvement in the day to day management of the trust. The trustee must conduct themselves in accordance with the fiduciary requirements of the office making decisions in good faith for the benefit of the beneficiaries in the context for which the trust was established.

Estate planners should note, however, that the appointment of an independent trustee does require careful planning, particularly with relation to succession. While professionals are the obvious alternative, they may require remuneration for their time, unlike a close friend or family member.

When considering an independent appointor, they must:

- be independent of the relationship and business risks of the key individual;
- have the intellectual capacity to handle the role, including the ability to make decisions free from influence.
- should be someone in whom the family has absolute faith and confidence to act in their best interests, and;
- should not be significantly older than the existing appointors.

In addition, the independent appointor may:

- be a child of the existing appointors (but if more than one child recommends not be the child as this could give the child an unfair advantage over any siblings who are not appointors and could also give rise to a perception of undue influence when the existing appointors become older);
- be a relative of either of the existing appointors such as a brother or sister;
- be a trusted friend of the existing appointors;
- be a professional adviser of the existing appointors such as an accountant.

Corporate Trustees / Appointors

Company, rather than individual appointers, can be useful from a succession planning perspective in a blended family, as the shares in the corporate appointor can transition into the hands of two groups of children (first relationship and the steps) without the need to have individuals in the role.

Where a corporate trustee is in place it is possible to deal with control of the structure through the company constitution. The constitution can regulate who is able to act as director of the company and how decisions are to be made by the company.

Each family's requirements will vary but the constitution could be used to deal with matters such as, who can be shareholders or directors and how decisions are made by (whether by majority of unanimous decision). The constitution can be used to achieve these control mechanisms. It may also be appropriate in some family structures to put in place a formal shareholder agreement to manage day to day decision making for a trustee company.

'Family Agreement'

A formal family agreement can be used to document matters relating to a trust structure or a number of connected structures. These agreements can be used in circumstances where there are a number of individuals keen to play a role in the management of the trust, or a number of family members wish to 'own' or have certainty around future ownership of part of the business or family wealth.

These agreements are particularly useful when trying to create consensus around a family's assets and "buy-in" to the management plan and trust structure. There may be issues with binding legal effect in that the agreement may seek to create interests that do not exist at law (such as a notional share in a

discretionary trust). It can be argued that equity would support a party to enforce the agreement if another party failed to adhere to its requirements (promissory estoppel).

Superannuation

For many Australians, superannuation represents the larger portion of their wealth. This raises important questions in the area of estate planning. In the context of blended families (and in any family), there is firstly the issue of considering whether the 'child' is a member's 'dependant' for superannuation purposes.

These issues are compounded by the growing use of Self-Managed Superannuation Funds (SMSF), which if not properly established can see the testator's wishes usurped by competing interests.

Katz v Grossman[41] is a good example of where neither structured planning nor control was properly addressed. In that case the father was the sole member of the SMSF and appointed his daughter as trustee to act with him following the death of his wife. After her father's death, the daughter appointed her husband as co-trustee and then distributed her father's death benefits to herself (and nothing to her brother, Danny Katz). The case brought by the brother concerned the validity of the appointment of both the daughter and her husband as trustee. The daughter exercised powers under the *Trustee Act* 1925 (NSW) to give effect to the appointment (there was a delay in the executors being able to act as LPR for the late member). The appointment was found to be valid.

Even if you have structured planning around super (and confidence that it is all valid and enforceable) it is important to ensure succession control is established in line with the wishes of the testator.

Where trustees of SMSFs are faced with litigation, particularly where the trustees themselves have an interest in the resolution of the matter, careful consideration should be given to whether they should approach the Court for guidance before taking any steps in relation to that litigation.

Who can get control?

The *Superannuation Industry (Supervision) Act* 1993 includes provisions which include specific requirements regarding the identity of trustees or directors of a corporate trustee of an SMSF in order for the fund to remain 'compliant'.

Failure to comply can mean significant issues (tax and penalties) and therefore compliance is important.

A sole member fund can have as trustee(s):

- two individuals (one of whom must be the member);
- a company with a sole director (who is the member); or
- a company with the member and one other as directors.

A fund with multiple members can have as trustees:

- all individual members as trustees; or
- a company with all members (and no one else) as directors.

The legislation *does not* specify who should be the shareholders of a corporate trustee.

[41] [2005] NSWSC 934

There is provision in the SISA to allow for an SMSF to remain compliant where the member's legal personal representative (LPR)[42] acts as trustee in place of the member.[43]

Brine v Carter – fiduciary obligations

The 2014 Queensland Supreme Court decision in *McIntosh v McIntosh*[44] examined the conflict of an administrator of a deceased estate claiming superannuation benefits directly for herself, in her personal capacity, rather than requesting the fund pay the proceeds into the deceased estate.

The recent South Australian Supreme Court judgement of *Brine v Carter*[45] considered whether the same conflict arises with an executor.

In *Brine v Carter*, Professor Brine died with two superannuation accounts with UniSuper. Pursuant to this last Will the Professor appointed his three children and his de facto partner, Ms Carter, as his executors. Ms Carter applied to UniSuper for the death benefit to be paid directly to her in her personal capacity. The other executors sought an order requiring (*among other things*) that Ms Carter account to the estate of their late father for the superannuation benefit she received citing the conflict of interest caused by her being an executor of the Professor's estate.

Professor Brine was survived by his de facto Ms Carter and 3 sons from a prior relationship.

In his Will the Professor appointed Ms Carter and the 3 sons as executors and provided a life interest for Ms Carter in his principal place of residence in Adelaide and another property and gave the rest of his estate to his sons and grandchildren.

Professor Brine left 2-member accounts with UniSuper.

- an indexed pension (a defined benefit account) which was only able to be paid to a spouse on death; and
- a Flexi Pension account which was able to be paid to a spouse, children or the estate of the deceased.

Professor Brine had provided a *non-binding nomination* during his lifetime to UniSuper and indicated that Ms Carter was his spouse for the defined benefit pension and that his preferred recipient of the Flexi Pension was his estate. There existed the ability for the Professor to complete a binding death benefit nomination form with UniSuper prior to his death (but not at the time he arranged his superannuation affairs and indicated his preferred beneficiary), the forms were readily available and no more or less complicated than any other retail industry superannuation fund nomination form.

For some months, Ms Carter was found to have failed to disclose the extent of the superannuation benefits to the Brine brothers and that the estate, and additionally, each of the sons, were a potential beneficiary of the Flexi Pension.

Once the Brine brothers found out about the super and the potential claims that existed, the 3 of them claimed the benefit as executors of the estate. Despite being entitled to also claim independently as children of the deceased Professor they elected not to do so, quite rightly they would (a) placed themselves also in conflict which they complained of and (b) were unlikely to have had any success given the facts.

UniSuper exercised its discretion in favour of Ms Carter.

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[42] LPR is defined in s10(1) of SIS which refers to those acting as executor or administrator of the deceased member's estate, trustee of a member who is under a disability and attorney for a member who has been appointed under an enduring power of attorney.
[43] S 17A(3) of SISA
[44] [2014] QSC 99
[45] [2015] SASC 205

The Court relevantly found:

- an executor has a duty to collect assets of the estate;
- an executor is in a fiduciary position where they must not, without prior authorisation, use knowledge or an opportunity for their own personal interest, or pursue a personal benefit where it conflicts with their duty;
- the obligation is not limited to profits arising from the use of the fiduciary position;
- a breach of these obligations results in an obligation to account to the person to whom the obligation is owed and which has been received by reason of the use of knowledge or opportunity and arises irrespective of an absence of bad faith; and
- a fiduciary would not be liable if they were authorised to act in a position of conflict, either expressly or by implication from the circumstances of his or her appointment or by the informed consent of the beneficiaries.[46]

Implications

For testators who want their spouse to benefit from their super but have different beneficiaries in their estate (hello second relationships), they should consider taking steps to mitigate the risk of a conflict of interest arising. This could include an express authority in the Will regarding the spouse claiming and receiving death benefits personally.

For executors who wish to claim a superannuation death benefit they could consider renouncing their right to be an executor or at the very least inform all other executors of their intentions, obtain their consent, and should the facts require it, recuse themselves from acting as executor for the purpose of claiming the super for the estate.

For testators who want certainty about who receives their superannuation benefits, the cases illustrate the significance of a valid binding nomination or reversionary pension.

The Facts

On 15 January 2001, Professor Brine applied to UniSuper to restructure his lump sum superannuation entitlement to receive a regular monthly Allocated Pension of $26,122 per annum against the capital balance of his Flexi Pension.

He wrote on the application form that his preferred beneficiary upon death was his estate, having made provision for his children in his will and the funds remaining were to be applied to the provisions of his will. At that time (2001) UniSuper did not offer to their members the ability to nominate a beneficiary via a binding nomination form.

He wrote a covering letter saying that in respect of his Indexed Pension his de facto spouse was Ms Carter.

As of 2004 the UniSuper fund trust deed was amended to allow members to complete a BDBN form, they are readily available, both non-binding preferred beneficiary nomination forms as well as binding death benefit nomination forms.

There was no communication between the Professor and UniSuper from 2001 until his death other than the receipt of his Flexi Pension Statements which, for the years 2007, 2008 and 2009, included in small print a notation that members can make a BDBN (interestingly the statements thereafter did not provide this notation).

On 14 December 2012, Professor Brine suffered a heart attack.

[46] Jennifer Dixon & Michael Labiris of Moores Legal – Executor's obligation to claim Superannuation Death Benefits – 15 February 2016

A valid binding death benefit nomination may have avoided lengthy and expensive litigation and achieved the Professor's overall estate planning objective.

What about adding Attorney to the list of capacities a person may have?

A person holding an EPOA for a member of a superannuation fund (including an SMSF) would have power to perform certain functions on behalf of the member, such as making contributions, withdrawing benefits, nominating pension or commutation draws, changing pension terms and conditions (such as reversionary beneficiaries), investment choice and making or revoking a binding death benefit nomination.

It is important that an EPOA is not limited to the extent that it would prevent the attorney from acting for the member in connection with their superannuation affairs. Whilst this may not technically prevent the attorney from being appointed to the position of trustee or trustee director (because they would not hold that position under the EPOA, but via a separate appointment to office) – such a limitation may prevent other dealings with the SMSF that would enable the appointment to be made.

Similarly, to drafting appropriate clauses in wills to either indicate or authorise actions in positions of conflict, appropriate clauses positively identifying authorised actions with super funds should be included with EPOAs.

> *Conflicts*
> *My attorneys may enter into financial transactions on my behalf, notwithstanding:*
> *that there may be a conflict, or which results in conflict, between:*
> *the duty of my attorneys toward me; or*
> *the interests of my attorneys, or a relation, business associate or close friend of my attorneys; or*
> *another duty of my attorneys;*
> *……*
>
> *Superannuation powers*
> *My attorneys may (with the exception of ####)*
> *enter into any financial transaction, notwithstanding that there may be a conflict, or which results in conflict, between:*
> *the duty of my attorneys toward me;*
> *the interests of my attorneys, or a relation, business associate or close friend of my attorneys; or*
> *another duty of my attorneys.*
> *act in my stead to exercise any powers or discretions in respect of any Superannuation Fund of which I may be a member including, without limitation, power to affirm any current binding death benefit nomination.*

Where the attorney is to act for the principal in the context of a SMSF, subject to the following, the principal must resign as a trustee of the fund (or director of its corporate trustee) and the attorney be appointed in the principal's place.

That is, the attorney is in lieu of, rather than in addition to, the principal.

Relevantly the Commissioner of Taxation states, in Self-Managed Superannuation Fund Ruling SMSF 2012/2 at [8] and [9]:

> *[t]he appointment of the legal personal representative as a trustee and the removal of the member must be in accordance with the [fund's] trust deed, the SISA and any other relevant legislation...where a corporate trustee is involved, any removal and appointment must also be properly made under any constitution for the corporate trustee and the Corporations Act 2001.*

So, the fund deed and the *Corporations Act* 2001 (Cth) are also relevant.

If the SMSF has a corporate trustee and the member does not want to step down as a director of that company, provided that the enduring power of attorney is correctly drafted for that purpose the attorney can be appointed as an alternate director on the board of the trustee company.

Where the attorney is an alternate director only, the member can stay on as a director of the fund trustee, although, without limitation, the alternate director will only be able to perform the duties of a director while those duties are not being performed by the member director.

Additional fiduciaries arise in the EPOA context as the testator has not yet died and as such beneficiaries may not yet be entitled to a share of the estate until death occurs.

Removing the Trustee's Discretion – paying a death benefit

Trustees to a superannuation fund wield enormous power – particularly in the case of self-managed super.

However, there are cases where a lack of certainty and wide flexibility created by the trustee's discretion can be a serious problem. Estate planners should consider the need to remove a trustee's discretion where it is not possible to adequately control the decision-making process where a death benefit is payable (especially in a retail or industry superannuation fund).

There are a number of ways that the trustee's discretion can be removed:

- binding death benefit nomination;
- reversionary pension;
- specially drafted trust deed provisions; and
- separate SMSFs.

Additional causes for the removal of discretion include:

- there is no appropriate person to make the death benefit decision;
- there is a risk of a dispute or a disagreement between the controllers of the superannuation fund following death;
- there are multiple families and the testator wishes their super to benefit a specific individual.
- there is a high risk the testator's wishes will not being implemented by the controller of the SMSF; and
- There is a high risk of dispute among beneficiaries.

The disadvantage of taking this course of action is the loss of flexibility.

Given these issues, there is no universal answer for death benefit planning – for many people the flexibility inherent in superannuation is very important and useful, and for others the ability to lock in the payment is vital.

Separate SMSFs

Although this option does not remove a trustee's discretion, creating separate Self-Managed Super Funds can be a very valuable solution in the right circumstances

Separate SMSFs allow each spouse to implement a succession strategy that does not require any involvement from the other. This allows a person to have more flexibility in distributing death benefits

and can also be important as there are unfortunately situations where a person may choose to ignore documents by which they are legally bound (as occurred in *Wooster v Morris*[47]).

Determining the most appropriate beneficiary

Any adviser who assists a client with removing the trustee's discretion can completely undermine the best estate plan if they do not consider this in the context as a whole.

If you do recommend removing the trustee's discretion, it is vital to acknowledge there is no 'default' or 'fall back' beneficiary choice. This includes the estate.

The choice of beneficiary must be the result of in-depth thought and analysis, even more so than any discussion around receipt of superannuation death benefits as the result of desired use of trustee discretion. This is because you are removing the trustee's discretion and lose the ability to deal with the varying range of possibilities that might exist at the time of death.

It is the job of the adviser who recommends removing the trustee's discretion to carefully consider the probability of all situations and way up the pros and cons of locking in a particular decision in a particular form.

It is almost negligent to recommend a binding nomination in favour of the estate where there is a concern or a likelihood of the estate being insolvent but for the superannuation death benefit; or risk of an estate challenge.

Binding Death Benefit Nominations

A binding nomination allows a member to pre-make the death benefit payment decision, therefore removing the ability of the trustee to determine who will receive the death benefit.

In addition to specifying who can receive the death benefit, it is possible for a binding nomination to also specify how the beneficiary is to receive the death benefit (subject to the trust deed).

Section 59 of the *SIS Act* and regulation 6.17A of the *SIS Regulations* allow the trust deed of a superannuation fund to be structured such that a member can make a nomination that is absolutely binding on the trustee in relation to how their death benefit is to be paid.

However, the provisions in the *SIS Act* and the *SIS Regulations* regarding binding nominations only apply to retail and industry superannuation funds and not SMSFs.[48] As a result, there are slightly different considerations for each type of fund.

Binding nominations and retail/industry superannuation funds

The *SIS Act* and *SIS Regulations* only allow a superannuation trust deed to contain the provisions enabling binding nominations – they do not themselves give the beneficiary the power to make a nomination that is binding on the trustee. For a member to be able to make a binding nomination, the trust deed for the superannuation fund must be appropriately worded. Therefore, it is essential before making a binding nomination that the trust deed provisions are carefully considered.

Also, any process specified in the trust deed must be followed. For example, if the deed contains a form that must be used, that form must be used. If the trustee must acknowledge the nomination, then we must have evidence that the trustee has issued an acknowledgement.

[47] [2013] VCS 594
[48] See the comments of the Commissioner for Taxation in SMSF Determination 2008/3, *Ioppolo* v *Conti* [2015] WASCA 45 and *Munro* v *Munro* [2015] QSC 61

These cases[49] illustrate the validity of binding nominations are being tested, and this is a continuing battleground for estate litigators given the substantial wealth in superannuation.

In addition to the trust deed requirements, there are quite a number of technical requirements for a binding nomination to be effective for retail and industry superannuation funds set out in *SIS Regulations* 6.17A and 6.17B. In summary, these are:

- The trustee must give sufficient information to the member so the member understands the member's rights to make a binding nomination.
- The nominees must be dependants of the member or the member's legal personal representative.
- The proportion that is payable to each nominee is certain or readily ascertainable.
- The nomination is in writing, signed by the member in the presence of two witnesses who are over 18 and not mentioned in the nomination.
- The trustee must advise the member each year that the member has made a binding nomination, who are the nominated beneficiaries and when it lapses.
- The trustee also has an obligation to clarify a nomination if the nomination is not sufficiently clear to allow the trustee to pay a benefit.

Further, in a retail/industry superannuation fund the nomination is only binding for a maximum of three years (compare this to SMSFs), at which time the nomination lapses and is no longer binding on the trustee. If a beneficiary wishes to continue with the binding nomination, then they will have to make a new one.

A binding nomination can be changed at any time, so when you review a Will you should consider whether the client should have one or not, and whether you should change any existing one.

Even though retail and industry superannuation funds may provide the same opportunity to make binding nominations, practically the attitude of professional superannuation trustees in our experience limits the estate planning opportunities. For example, most retail and industry superannuation funds do not allow you to make cascading or conditional nominations. This effectively removes the majority of the tools out of any estate planner's toolkit.

There are many variety of retail superannuation funds with unique governing trust deeds and rules. In South Australia, one government employee superannuation fund *Super SA, Triple S Super* until very recently did not allow members to make any decision, binding or non-binding, concerning the destination of their superannuation fund and associated insurance. If the member had a spouse, as defined, then the entire benefit would be payable to that spouse, if no spouse, then to the member's legal personal representative.

Only very recently has the governing trust deed been amended to allow some form of control to its members. If the requisite form is not completed, then the above rules will govern the destination of their superannuation fund balance, if, however, the form is completed, then the fund balance will be paid to the member's legal personal representative.

The form is confusing as there does not appear any *selection* or *option*, it merely is a form that is signed and returned. Signing the form *is* the election, the choice to override the fund deed's default provisions and overlook the member's spouse for payment.

Binding nominations and SMSFs

As the legislative provisions have no bearing on the binding nomination process in SMSFs, the provisions of the trust deed are paramount.

[49] *Wooster v Morris* [2013] VSC 594; *Ioppolo & Hesford v Conti* [2013] WASC 389 and [2015] WASCA 45; *Donovan v Donovan* [2009] QSC 26; *Munro v Munro* [2015] QSC 61

The process specified in the trust deed must be followed precisely. Where the process is not followed precisely the nomination will not be binding on the trustee and it is highly likely, given the prevalence of estate litigation, to find this the subject of a challenge.

As binding nominations in SMSFs are purely a trust deed concept, they are not subject to the maximum three-year validity that applies to binding nominations for retail and industry superannuation funds (see regulation 6.17A(7) of the *SIS Regulations,* SMSFD 2008/3, *Ioppolo v Conti,*[50] *Munro v Munro*[51] and *Cantor Management Services P/L v Booth*[52]). Therefore, unless there is a restriction in the SMSF trust deed, it is possible to make a non-lapsing binding nomination in an SMSF.

If there is none, then consider amending the deed!

Also, when preparing binding nominations for an SMSF it is possible to utilise your drafting skills so that the binding nomination can cover a multitude of situations. Unlike in the majority of retail and industry superannuation funds, the trustee will accept cascading or conditional nominations. Commonly, SMSF binding nominations even specify the form in which the death benefit is paid to the beneficiary.

Once the decision is made to make a binding nomination, it is essential that careful consideration is given to the terms of the trust deed to ensure that the binding nomination has the intended outcome.

Challenging the Validity of Binding Death Benefit Nominations

It is critical for a binding nomination to be made in accordance with the requirements in the trust deed. This is where the majority, if not all, of the challenges to a binding nomination are going to come from.

The following are considered to be the common mistakes made by practitioners that could give rise to questions in relation to the validity of a binding nomination.

Fund rules

The most critical step when making a binding nomination is determining what are the current rules of the Fund.

Unfortunately, this step is often overlooked with most people just assuming that the latest deed update sets out the current rules of the Fund without undertaking a detail review of the trustee and trust deed history of the Fund.

To ensure a binding nomination will be valid, it is critical that a detailed review of both the trustee and trust deed history is carried out. If there is an error or gap in the history (which is often seen), this could impact on the validity of the binding nomination.

In the case of *Perry v Nicholson*[53] the deceased's adult child, Ms Perry, was challenging her father's binding nomination, which provided that all of his death benefit would be paid to his de facto spouse, Ms Nicholson. Ms Perry argued that the binding nomination was invalid because of some technical imperfections in a change of trustee almost two years before the binding nomination was signed.

Fortunately for Ms Nicholson (and the deceased's accountant), the court upheld the effectiveness of the change of trustee even though the documents prepared by the accountant to change the trustee did not strictly comply with the requirements in the trust deed.

Had the Court applied the stricter approach from previous cases, the change of trustee may well have been invalid, which could have then resulted in the binding nomination being ineffective.

[50] [2015] WASCA 45
[51] [2015] QSC 61
[52] [2017] SASCFC 122
[53] [2017] QSC 163

This was the outcome in *Moss Super Pty Ltd v Hayne*[10], where the Court found that an earlier resignation signed by the trustee rendered a later change of trustee ineffective, unravelling the deceased's expressed estate planning intentions.

Approved form

There are a number of common trust deeds in circulation that require the binding nomination to be made in the 'approved form'.

Usually, this requires the member to use the specific form set out in the schedule to the particular trust deed. In the grand scheme of things, this is a fairly basic condition to satisfy, but it is surprising how many times it is not.

In most of these situations why this requirement has been overlooked is unclear. However, the most compelling reason seems to be that the specified form did not have sufficient flexibility to cater for the practitioner's drafting style (for example, it was not possible to make cascading nominations).

Unfortunately, where the 'approved form' is not used, it is irrelevant how well the alternative form is drafted, as it will not be binding on the trustee.

Therefore, if the trust deed requires a certain form to be used, that is the only form in which a binding nomination can be made and be binding on the trustee.

If you do not like it, amend the trust deed, not the form.

An even bigger problem is caused by trust deeds that require the binding nomination to be made in the form 'approved' by the trustee.

These trust deeds do not usually include a default or pre-approved form and it is therefore up to the trustee to decide at the time what is the 'approved form'. As a result, the trustee must have taken an active step to 'approve' a form before a nomination can be binding on the trustee.

Even where this step is taken by the trustee, such provisions are at high risk of a challenge. This is because, if put to proof, the parties will need to produce evidence that the trustee 'approved' a form and that the form of the binding nomination used was in fact the 'approved form'.

As a result, we do not like to gamble on clients keeping adequate records to prove this issue if challenged. For this reason, you should be inclined to vary trust deeds to remove this requirement when making a binding nomination even though it is technically possible to make a valid binding nomination under such provisions.

Eligible beneficiaries

Another common mistake is that the binding nomination nominates a beneficiary that is either:

- not an eligible recipient for the purposes of the *SIS Regulations*; or
- they are an eligible recipient for the purposes of the *SIS Regulations* but the trust deed provisions (in particular the definitions) are inexplicably narrow.

A common example that arises is where a person makes a binding nomination in favour of their de facto spouse but the trust deed defines a 'spouse', for the purposes of the 'dependant' definition and the binding nomination clause, to only include a married spouse. In this case, the binding nomination to the de facto would not be valid as they are not a permitted beneficiary under the trust deed.

In one prominent superannuation trust deed, a binding nomination can only be made to a dependant

Also, it is critical that the binding nomination itself correctly refer to the intended beneficiary. As the power to make binding nominations for SMSFs is solely based on the provisions of the trust deed, the courts have insisted on strict compliance with the requirements of the trust deed when determining the validity of binding nominations.

In the Queensland Supreme Court case of *Munro v Munro*[54] the binding nomination was found to be invalid, allowing the trustees of the SMSF to distribute the deceased's death benefit other than as set out in the nomination. The Court held the binding nomination was not valid as it did not comply with the requirements in the trust deed. The Court emphasised that the binding nomination would only be binding if it strictly complied with all the requirements of the trust deed. In this case, the nomination was to the 'Trustee of Deceased Estate' rather than the deceased's 'legal personal representative' as required by the trust deed and the *SIS Act*. The Court determined that this was not a nomination of the deceased's 'legal personal representative' (as required by the trust deed and the *SIS Act*) as the roles were different.

Eligibility to make a binding nomination

This issue is a twist on the situation in the section above.

It is dangerous to assume that every member of a superannuation fund is able to make a binding nomination.

There are SMSF trust deeds that allow a 'member' to make a binding nomination, although, the definition of 'member' did not include a person whose only interest in the SMSF was their pension account. As a result of this drafting oversight, only a person with an accumulation balance in the superannuation fund could make a binding nomination and a pension account could not be subject to any effective binding nomination.

Trustee acknowledgement/receipt

Another common binding nomination provision requires the binding nomination to be given to the trustee or the trustee to 'acknowledge' or 'accept' the binding nomination for it to be valid and binding on the trustee.

Although this is not a difficult provision to comply with, such provisions are high risk. If there is a dispute, the parties will need to produce evidence that the binding nomination was given or the trustee 'acknowledged' or 'accepted' the binding nomination. In our experience this step is not often completed satisfactorily, or where it has been attended to, the client does not keep adequate records to establish this at the time of payment of the death benefit.

This issue was examined in the case of *Cantor Management Services P/L v Booth.*[55] In this case, the trust deed required the binding nomination to be 'given' to the trustee to be binding on the trustee. The Court found that the binding nomination was given to the trustee in this case as it was being held at the registered office of the corporate trustee, even though the sole director of the corporate trustee was not aware of its existence.

Also, clauses requiring the trustee to accept or acknowledge a binding nomination presents a problem where the trustees/members have separated and one of the members wishes to make a new binding nomination. As the nomination has to be accepted or acknowledged by the trustee, you have to get the ex-spouse to consent to the new binding nomination for it to be valid. As you can imagine, this can be rather difficult.

Importance of Enduring Powers of Attorney

Although a loss of capacity is not an issue that arises because of death, if a member of an SMSF loses capacity, this can be fatal to the operation of the SMSF.

[54] [2015] QSC 61
[55] [2017] SASCFC 122

Where a member loses capacity, they are no longer capable of acting as a trustee or a director of a corporate trustee. There are two potential problems that result if the person is not automatically removed as a trustee or a director of the corporate trustee, it may not be possible for decisions to be made. This is particular a problem for two-member funds as decisions either require unanimous or majority decisions – in a two-member fund this will require both to consent to decisions.

Where the trust deed or constitution provides that the person is automatically removed from their position in the event of incapacity, the SMSF may no longer continue to satisfy the basic requirements to be a complying superannuation fund. This is because section 17A of the *SIS Act* requires every member to be either a trustee of the fund or a director of a corporate trustee.

However, there is an exception to this rule, which allows the member's LPR to be appointed a trustee or a director in place of the member. This has to be done within six months of the member ceasing to be a trustee or a director. However, you need to check the terms of the trust deed carefully as it may not permit the LPR to be appointed as a trustee or a director or a person to remain a member where they are not personally a trustee or director.

A person will be a LPR if they are the trustee of the member's estate where they are under a legal disability or they are the member's attorney appointed under an enduring power of attorney.

It is a common misconception that the enduring power of attorney document must authorise the attorney to act as trustee of the SMSF or give the attorney power of the member's financial affairs. However, this is not correct. Section 17A(3) of the *SIS Act* merely provides that the SMSF will remain complying where a person who is appointed as a member's attorney acts as trustee or director in the place of the member. Therefore, this section will be satisfied where a person who is only appointed in relation to personal and health matters acts as a trustee or director in place of a member.

The making of an enduring power of attorney has become such an integral part of the estate planning process, that it is hard to imagine that it was only a generation ago that the idea of a power of attorney operating after its maker had lost capacity was first introduced.

The current relevant legislation in each State and Territory of Australia is set out in the following table.

- ACT *Powers of Attorney Act* 2006
- NSW *Powers of Attorney Act* 2003
- Northern Territory *Advance Personal Planning Act*
- Queensland *Powers of Attorney Act* 1998
- South Australia *Powers of Attorney and Agency Act* 1984
- Tasmania *Powers of Attorney Act* 2000
- Victoria *Powers of Attorney Act* 2014
- Western Australia *Guardianship and Administration Act* 1990

So, what can an enduring attorney do in relation to the principal's superannuation?

Confirming, revoking or making a binding death benefit nomination

The scope of the authority of an enduring attorney is expressed differently in each jurisdiction and it is only Tasmania that it is clear that the authority extends to exercising any power of the donor in relation to superannuation. As the legislation in South Australia and Western Australia confers a wide authority it is arguable that in those States there is authority, but in the remaining jurisdictions the question of whether an enduring attorney can make revoke, alter or confirm a binding death benefit nomination is unclear. Further, if the maximum breadth of an attorney's scope is ascertained then the inclusion of a special condition purporting to permit the attorney to do something which is beyond scope must be ineffective.

Taking the principal's superannuation balance out of the fund

Without doing anything in relation to the binding death benefit nomination someone may be able to change the ultimate destination for their spouses' death benefit by rolling his member balance out of the fund in which he has made the nomination into another fund. A binding death benefit nomination made in one fund will not bind the trustee of another fund, and in the new fund it is likely that the recipient/s of the death benefit will be at the discretion of the trustee subject to the terms of the superannuation trust deed.

Does it make any difference if the super is in a self-managed fund?

Section 17A of the *Superannuation Industry (Supervision) Act 1993* (C'th) (SIS Act) sets out who may be a trustee of a self-managed super fund. To summarise, where there is a single member fund with a sole director corporate trustee, the member must be the director of the corporate trustee.

Where a member dies or loses capacity, the fund remains compliant if the legal personal representative (defined in s10 of the SIS Act to mean the executor of the will or administrator of the estate of a deceased person, the trustee of the estate of a person under a legal disability or a person who holds an enduring power of attorney granted by a person) of the incapacitated member becomes the director of the corporate trustee during any period when the member is under a legal disability: s17A(3)(b).

Paragraph 55 of SMSFR 2010/2 provides that the legal personal representative administers the fund in their capacity as a director of the corporate trustee, not as an agent for the member under the enduring power of attorney. Therefore, the attorney's authority to perform the duties of a director of the corporate trustee will be derived from the position as a director of the corporate trustee and not from the enduring power of attorney.

This adds a further layer of complexity when advising clients in relation to decisions they might make in relation to an incapacitated spouse.

Additional steps to ensure the testator's wishes are carried out

In addition to carefully drafted wills, trust deeds and constitutions, consideration ought to also be given to further supporting documentation and clauses that can be put in place to go one step further in protecting the wishes of the testator.

Statement of Wishes

A statement of wishes is an informal document that codifies a testator's reasoning behind certain decisions codified within a will. A statement of wishes might expand on why a certain charity has been provided for, why a child has been excluded or may even contain instructions or other non-binding directions to the trustee of the testamentary trusts.

Some of these wishes can also be recorded in the will to ensure that, in the event that a statement of wishes is lost or forgotten, the wishes are listed somewhere else. However, the statement can be designed as a confidential document containing specific instructions to the trustee of the testamentary trusts, as to the administration of those trusts.

For blended families, statements of wishes are crucial, in that there is often a disproportionate distribution of estate assets. Clearly setting out the reasons for this disparity in a statement may mitigate the likelihood of a testator family maintenance claim down the track. They also provide an important evidentiary tool, somewhat like an affidavit, in the event of a Family Provision Claim, as the courts will have firsthand explanations as to why certain decisions have been made in a will.

Family Council

While this might sound like something from prohibition era Chicago, family councils offer a formal process to discuss family business dealings and help create "buy-in" to codified estate plans.

It is important that the testator considers the establishment and operation of the family council during their lifetime. This enables the family to become accustomed to the process and procedure of the council meetings, the involvement of external advisors and the issues to be discussed. Simply imposing a council type structure upon a family post death will rarely achieve its desired objective.

Progressive transfer of asset on vendor terms

A transfer of assets on vendor terms generally refers to the vendor agreeing to fund (usually part of) the purchase price of the business the vendor is selling. An initial amount tends to be paid by the purchaser at settlement with the balance repaid over time as agreed between the parties (usually with interest).

In the context of a sale and purchase of business and business assets, a progressive transfer of assets is problematic for a number of reasons:

- The business will effectively be split during the transfer process;
- Tax implications, including GST exemptions being lost.

It is worth noting that if the transaction is a sale of shares in a company there will be more flexibility, including vendor finance. This allows the testator to hand over the reins while still getting paid the profits from the business during the course of the agreement/loan.

Security may be taken in the event of default by the purchaser which may include a mortgage or security interest over specific assets.

Understandably, this method of vendor financing is not without its risks. Careful consideration needs to be given to:

- correctly documenting the arrangement in the form of a contract of sale/security agreement/loan agreement;
- ensuring any security taken is sufficient.

Dispute resolution clauses

When drafting wills, trust deeds, company constitutions or family constitutions, it is critical that a dispute resolution procedure is put in place to resolve disputes as efficiently as possible and keep disputes out of Court.

Default distributions

Sometimes, default distributions are used as a mechanism to achieve the testator's objectives if there is an inability to achieving an acceptable outcome for the family members. However, the use of such a mechanism needs to be carefully considered as they can result in a loss of flexibility and trigger unfavourable tax outcomes.

Questions estate planners and testators should address include:

- Is the relevant distribution in question a distribution or appointment of income and/or capital?
- What is the trigger event (the default) that gives rise to the particular distribution?
- In respect of an income appointment, is it merely the failure to make a valid determination on or before 30 June that triggers the operation of the default distribution provisions?
- In respect of a capital distribution, is that triggered upon the failure to achieve consensus on key decisions?

Whenever the parties resort to a default distribution, it may result in inefficient outcomes as one party may benefit to a greater extent than another pursuant to a default distribution scenario and therefore they take action that manufactures the deadlock to trigger the default distribution, even if this results in a less tax efficient outcome for the whole of the family.

First options to buy

Often a family business is left by the parents equally to all children even though some of those children may have no direct involvement in that business at all. This is often done on the understanding that those involved in the business will continue to operate the business as usual and those not involved in the business will receive their portion of the profits/equity. This is a common scenario in farming families where one son may continue to work the land while the others move to the city to pursue other professions.

This scenario has its own set of complications with a reluctance of those children involved in the business to manage and develop the business where they feel as they are not being adequately compensated for their hard work in comparison to their other siblings who benefit regardless. There may be additional conflict whereby those not involved in the business want to see a regular stream of income whereas those involved in the business may wish to retain funds as working capital.

Providing the children who are involved in the business with a first option to buy out the interests of those children not involved in the business is a way of potentially addressing and mitigating the risks of conflict when attempting to balance the transition of wealth through the family business. This option is not without its pitfalls.

Factors to be considered include:

- how is the price to be determined (i.e. will there be an agreed formula that is used or the appointment of an independent accountant nominated by the family, will any discounts be applied to the price)?
- who bares the cost of the valuation if an independent accountant is engaged?

- what time frame is allowed for the exercise of the option (i.e. within a certain period or open ended)?
- what sort of notice is required to be given by the child wishing to buy-out another child's share?
- is there a dispute resolution mechanism in the event a disagreement as to value arises?

If the shares in the business are owned by the testator personally, and they intend on distributing those shares after their death via the provisions of their will, then consideration and advice should be given to the enforceability and certainty of the terms of the option to buy especially if, for example, the child not involved in the business decides to challenge the provisions of the will and in particular the terms of the option.

As is usually the case, the shares in the business will be owned by a discretionary family trust. In this case, it is easier to build in and enforce the provisions of the option to buy. If the option to buy is exercised, however, the proceeds of the sale become an asset of the discretionary trust. It will then be up to the trustee of that trust to then make distributions to the child who was not involved in the business. The terms of the option to buy can be agreed upon by the family during the life of the testator.

Sibling payout over time

A large factor to be considered relating to the first option to buy, and one which can ultimately cause the most conflict between siblings relates to the timeframe for payment.

Given there may be issues with obtaining funding for such a buy-out, careful consideration ought to be given to the method of payment and timeframe for payment.

Options to be considered include:

- lump sum payment within a timeframe as agreed by the relevant parties;
- annual instalments over an agreed number of years;
- are any discounts to be applied (i.e. discount for earlier or lump sum payments)?

Conclusion

Estate planning for blended families can be tricky at the best of times.

The ever changing landscape of what it means to be in a blended family, what comprises those families, the different personalities, needs and expectations can be overwhelming…..for the clients. As professional advisors we need to offer some level of guidance and reassurance, despite what a client's personal circumstances are we can tailor their estate plan to meet everyone's needs and minimise the potential for conflict and litigation at a later date.

Continued education is paramount as laws, societal attitudes and opinions rapidly evolve and one can easily find themselves with a professional negligence claim against them if much of what has been written in this paper has been considered.

Personally, I find it a great challenge to unravel the family dynamics and ultimately present a solution that the client thought may never be possible. Maybe that's just me.