From “Brady Bunch” to “Modern Family” Succession Planning Tips for blended families

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November 2014

Statistics

Gone are the days where mum, dad and 2.5 kids made up the average Australian family. A review of available statistics show just how much things have changed even over recent years[1]:

- 69% of people were living as a family in 2011 with 5.68 million families in Australia.
- There has been a steady decline in marriages over the past decades, with only 5.4 marriages per thousand people in 2012 (compared to 7.0 marriages in 1984). Queensland has the highest crude rate of marriages with 5.8 marriages per thousand people in 2012.
- There has been a steady increase in de facto marriages, which accounted for 15% of all persons living as a socially married couple in 2006, an increase of 25% since the 2001 Census.
- Most couples cohabit prior to marriage, with 77.6% living together before marriage in 2012.
- Same sex de facto couples have only been counted on Census data since 1996 and are shown to be increasing. In 2011 37,800 couples reported being in a de facto same-sex relationship, a 12% increase from the 2006 figure of 33,700. Of those same-sex couples who have children almost all of them are from a previous opposite-sex relationship where separation or divorce has occurred and children are present in 12% of same-sex married households.
- In 2012 49,917 divorces were granted in Australia, representing a 4.7% drop since 2005. However, since 1985 divorces have still increased by 25% in Australia. Queensland has the highest rate of divorce at 2.5 per 1,000 people compared to 1.7 per 1,000 in the Northern Territory.
- 48.4% of divorces in 2012 involved children under the age of 18 years, with Queensland the third highest proportion with 51.3%.
- Of the grooms and brides remarrying in 2004, 30% had children under 16 years from a previous marriage.
- In 2010 there were 2.65 million families with children under 18 years, with 3.7% (99,000) of these families being step families (with at least one child present from a prior marriage) and 3.4% (91,000) of these families being blended families (with at least one child present from a prior marriage and at least one shared child).

As lawyers we invariably deal with clients who are affected by divorce, separation and most significantly for estate planning purposes, children of various relationships - the aptly termed ‘blended family’. The estate planning advice we give to clients must provide solutions to clients for these more complex life circumstances.

[1] Statistics taken from the Australian Bureau of Statistics Website: www.abs.gov.au

Estate planning for Blended Families

Many clients who are in blended families with their second or third spouse are often at pains to ensure that children of a first marriage are provided for and even more determined to ensure that the prior spouse can't get their hands on any more money than they got the first time around.

Often clients have concerns to ensure that the inheritance they leave to their children is not open to attack if those children go through a relationship breakdown or divorce.

On the flipside, however, happily married couples often don't consider what might happen if their widowed spouse were to remarry and start a second family. Similarly clients in blended families are unaware of the potential for their step children to make a claim against their estate if not properly provided for, or of the potential for dependent former spouses to make a claim against their estate. Further, clients who are in de-facto relationships or same sex relationships often have little idea of what claims their de-facto spouse or partner or the children of that partner might have on their assets.

In reviewing a client's estate plan, it is important not only to consider the circumstances of the client's current family members (such as current spouse, and children of the current relationship) but consideration should also be given to other family members or dependants who are not at the forefront of the willmaker's mind (such as children of the willmaker's former relationship or children of the spouse's former relationship).

Often clients will need to be educated about the competing rights that all of these people might have on their estate or other assets. For example some clients will need to be advised that while their adult children of a former marriage may very well be financially independent, failure to provide for them in an estate plan may result in a claim being made against the estate.

Much of what will be involved in preparing an estate plan for clients in blended families will be to ensure a distribution of the assets with a view to minimising or avoiding potential family provision or other claims being made by people who might have an expectation of benefiting from the willmaker.

In order to provide proper advice it is absolutely essential to ensure that you have a comprehensive understanding of the family dynamics and a detailed knowledge of all relationships that might impinge upon the overall succession plan. This is why it is imperative that you ask the awkward questions to obtain the information you need and to independently verify the information given to you by your clients.

Once the client's instructions are obtained to cover these potential scenarios, various strategies should be considered to help clients achieve their objectives.

STRATEGIES

This paper will consider the following estate planning strategies in the context of blended families, future relationship breakdown and remarriage:

1. Testamentary Trust Structuring Options
    - Executor and Trustee Selection
    - Testamentary trusts structuring options

2. Keeping it in the family but out of the Estate
    - Succession of Discretionary Trust Assets

- Succession of Company Assets
- Effect of joint tenancies
- Superannuation and Binding Death Benefit Nominations
- Life insurance

3. Other tools
    - Binding Financial Agreements
    - Mutual Wills
    - Other issues to consider

The factors that will influence which strategy or combination of them ought to be adopted will often depend on the nature and size of the estate, the client's wishes or philosophy, the present and possible future needs of the beneficiaries affected by the plan and more often than not the taxation and revenue implications of the plan, which will therefore require collaboration with accountants, financial advisers, insurance brokers and superannuation advisers.

1. TESTAMENTARY TRUST STRUCTURING OPTIONS

In circumstances where clients wish to ensure that assets directed to their estate are properly considered in the context of estate planning for an existing or possible future blended family, structuring the testamentary trusts within the will can become one of the key considerations.

1.1 Executor and Trustee Selection

Executor and Trustee selection is important for all estate plans, however it is particularly critical to consider for blended families.

Issues of accountability and potential conflicts of interest for selected executors and trustees should be considered.

Strategies such as including adult children as co-executors or co-trustees of a testamentary trust with a spouse might provide a solution for those concerned about a spouse re-marrying. Or appointing adult children of a prior relationship as co-executors with the current spouse might provide a solution for those concerned about how an estate might be administered without prejudicing children of a prior relationship. This however can result in other problems such as having the burden of administering the estate or testamentary trust with multiple joint executors or trustees. Note also that under the current Trusts Act 1973 only a maximum of four (4) executors and trustees may act (although if the proposed changes to the Trusts Act end up as legislation the court will then have power to approve the appointment of a greater number of executors or trustees if appropriate in the circumstances).

Naming completely independent executors and trustees such as lawyers, accountants or financial planners might give clients peace of mind if they are in a blended family. This strategy does of course mean that the independent executor's costs (which may be significant if litigation ensues) will usually be paid out of the estate.

Consideration might also be given to appointing people other than the executors as trustees for any testamentary trusts provided for in the Will, for example appointing adult children as trustees for their own testamentary trusts.

1.2 Testamentary trust structuring options

Establishing testamentary trusts under the terms of a will can be a very effective tool for asset protection and transmission. Testamentary trusts have the added bonus of receiving favourable taxation treatment.

Separate testamentary trusts can be established so that, for example, each child will have control (or eventually have control) of their own testamentary trust.

A memorandum of wishes concerning the administration of such trusts can be prepared to set out how the willmaker intended them to operate. These documents can provide explanations to potentially unhappy family members as to why the estate is divided in a given way and might deter family members from making a claim against the estate in order to honour the willmaker's wishes. In some situations it might be advisable to have the beneficiaries sign the memorandum of wishes as an indication that they agree to be bound by those terms. This may once again minimise the risk of attack on an estate.

Strategies which might be considered to better ensure transmission to the willmaker's blood line in blended families might be to:

- exclude spouses (defined to include de facto and same sex relationships) as beneficiaries under the testamentary trust/s (so that if spouse re-marries or re-partners distributions can't be made to the new partner through the trust). Additional provisions might then also be needed to disallow amendment of the trust to include such spouses as beneficiaries in the future and the succession of the capital and income of the trust on death of the initial beneficiary should be "hardwired" to ensure this passes to the next bloodline descendent of the willmaker (or next preferred beneficiaries) rather than to someone selected by the initial beneficiary of the trust;
- create a capital protected trust of the estate, of a portion of the estate or of a fixed sum (where the beneficiary e.g. the spouse only has access to the income of the trust during their lifetime with the capital passing to the next bloodline generation upon that beneficiary's death);
- give a life interest to the spouse (e.g. to income and a portion of the capital, in an independent executor's discretion, necessary to maintain the spouse's standard of living) or a life interest or right of occupation to an asset (e.g. matrimonial home) so that the benefit ultimately passes to children upon that spouse's death;

Strategies to minimise the risk of attack of the testamentary trust by a future spouse (e.g. of children) in the event of a relationship breakdown, might include:

- establishing joint or independent trusteeship of the trust;
- creating automatic removal and replacement of trustee with e.g. executors or another person or entity in the event of family relationship breakdown;
- excluding spouses of intended beneficiaries as beneficiaries under the trust (so that a family court looking at the terms of the trust can see that the spouse was not intended to benefit).

Clients should however be advised that while it may be possible (in circumstances where the testamentary trust does not comprise a substantial part of the "matrimonial property") to take steps to protect the children's inheritance from a property "adjustment" order by implementing these strategies, the Courts may consider the assets of the trust as a financial resource available to the child when making orders on how the matrimonial property should be distributed. It might also be prudent to highlight to clients that as changes are made to the Family Law Act and the Court's powers are widened, the safety of these trusts from attack as an asset is likely to diminish.

The downsides to some of these strategies are:

- some may cause hardship to a spouse (e.g. in cases where the spouse and the executors have a falling out);
- some may have the effect of losing some of the taxation benefits of the testamentary trusts (e.g. being unable to split income with a non or low income earning spouse);
- they will not prevent the beneficiary from gifting funds or assets to their partners or other non-bloodline family members (i.e. after they have received their distribution from the trust);
- testamentary trust funds/assets form part of the estate asset pool and will therefore be subject to any claims made against the estate, and any resulting court orders.

2. KEEPING IT IN THE FAMILY BUT OUTSIDE THE ESTATE

Most clients think that by making a Will they have provided for what is to happen with all of their assets no matter how they are held. This is of course not the case. It is important to educate clients regarding this and to then ensure that the succession of other entities controlled by the client are properly catered for in drawing the succession plan.

In circumstances where clients wish to thwart an attack upon their estate, consideration may need to be given to adopting strategies to ensure that assets are not ultimately directed into the estate.

2.1 Succession of Discretionary Trust Assets

What must be considered here is who will control the trust upon the death of the present controller.

A review of the trust deed and any amendments made to it is once again imperative. The vesting date of the trust should be noted and the default beneficiaries of the trust identified. The trust will vest automatically at the expiry of the vesting date. If the trustee of the trust has not made a determination as to the distribution prior to vesting, then unless the trust deed states otherwise, the trust fund must be distributed to the default beneficiaries named in the trust deed in the manner specified in the deed.

Consideration should also be given to who is or is not included as a potential beneficiary of the trust (default or otherwise) particularly if definitions such as "spouse" and "children" are referred to in the deed, without further identification. Further consideration should be given (subject to taking advice on the taxation consequences of doing so) to amendment of classes of beneficiaries to include (or exclude) intended beneficiaries. Be aware that a variation in discretionary beneficiaries will not attract stamp duty, but a variation in default beneficiaries will trigger taxation liabilities (stamp duty and possibly capital gains tax).

Succession for both the trustee and appointor (the person or persons who have the power to remove and replace the trustee) must be addressed. Make sure that both trustee succession and appointor succession provide control to the intended replacement "controller" otherwise it is possible for an appointor to undo the intended trusteeship control, or for the trustees to dissipate the assets in the trust before the appointor is able to remove and replace them.

Provision for the client's wishes concerning the control of any trusts may be expressed in the Will, or as a separate Memorandum of Wishes document but it may also be necessary to amend and "hardwire" the relevant trust deeds to ensure the client's wishes are met.

It is also important to consider and deal with loan accounts or other unpaid present entitlements (UPE's) which may be owed by the Trust to the willmaker. Loan accounts and UPE's in the willmaker's name are debts owed to the willmaker's estate and should be dealt with either by gifting the benefit of them to a specific beneficiary or by allowing the executor/s the discretion (or giving directions to the executor) to forgive or recover the debts, or to forgive those debts during the willmaker's lifetime.

<u>Succession for individual trustees</u>

The general rules for succession of trusts under the current Trusts Act 1973 (subject of course to the terms of the trust deed) where individuals are the trustees or sole trustee are:

- if there are two individual trustees, and one dies, the survivor acts as sole trustee.
- If a sole trustee dies their legal personal representative will act as trustee, unless the person with the power of appointment appoints a new trustee.

Under the proposed reforms of the Trusts Act when a trustee dies the appointor under the trust deed (if any) will have the power to appoint a replacement trustee, if no appointor then the remaining trustee/s can appoint a replacement trustee and if no trustees remain then the legal personal representative of the last surviving trustee can appoint a replacement trustee.

It is therefore important to consider executor selection carefully for the last surviving trustee. In a blended family context leaving it to the last surviving trustee to deal with in their will is not recommended, since that person might re-marry and appoint their new spouse as executor, thereby indirectly passing trustee control of the trust to that new spouse. Consideration should therefore be given either to replacing the trustee/s with a corporate trustee or to amending the trust deed to "hardwire" the further succession of trustee control of the trust via the appointor power.

<u>Succession for corporate trustees</u>

Succession issues for corporate trustees include the succession issues for companies discussed next, but must also take into account appointor succession issues.

For example if shares are distributed equally to all children of prior and present relationships, or to the present spouse and children of a prior relationship, but the constitution is not amended to require unanimity in all director and shareholder decisions this would allow a majority of the shareholders to exclude a minority shareholder from representation as a director of the trustee company, allowing the majority shareholders to operate the trust to the disadvantage of the minority shareholder. This issue can't be "fixed" by simply appointing all four children as joint appointors of the trust because while joint appointors generally must act unanimously (unless the trust instrument allows them to act as a majority), if all can not agree to remove and replace the "biased" trustee, the status quo will be maintained.

If the family dynamics are not good between the persons intended to have equal control of the corporate trustee, amending the constitution to require unanimity of all director and shareholder decision might be equally problematic if all can not agree on how the trust should be operated.

It might therefore be necessary to consider appointment of an independent appointor or independent joint appointors such as a trusted close friend or relative (who are not potential beneficiaries under the trust) or an accountant or solicitor etc. This way the independent appointors can exercise their powers to remove and replace the trustee should the trust be run to the exclusion of an intended beneficiary or should the beneficiaries be unable to reach agreement on how the trust should be operated. Clients should however bear in mind that such an appointment might be a significant burden on someone called upon to mediate a dispute between the intended beneficiaries.

Trust succession strategies

Strategies for succession of trusts are many and varied and will depend on the type of trust and type and value of the assets held in the trust (e.g. business assets as opposed to investments) the size of loan accounts or UPE's in the trust and the potential for family disputes.

If the trust is a discretionary trust, consideration should also be given to preparing a memorandum of wishes to the trustee of the trust concerning the client's wishes on how the trust is to be administered, particularly if control of the trust is passed to an independent trustee to manage on behalf of minor children.

Use of trusts in succession planning

Inter vivos discretionary trusts can be useful tools in succession planning particularly where it is likely that the estate will be contested, since assets of such trusts do not form part of the estate asset pool (provided the trust is not established in NSW and does not hold NSW assets – where notional estate provisions may drag the trust assets into "play" where a claim is made against an estate in NSW).

Clients might therefore consider establishing such a trust structure specifying the intended beneficiaries (e.g. children of a prior relationship, or current spouse etc) and:

- building their wealth or part of their wealth in that structure;
- transferring existing assets into that structure (subject of course to stamp duty and capital gains tax consequences of such a transfer); or
- executing a mortgage over assets in favour of that trust.

2.2 Succession of Company Assets

The issues critical for company succession are directorship and shareholder control.

Here a review of the company constitution is imperative.

Clients must be made aware that while directors have the day to day control of the company, it is the shareholders who have the power to remove and replace the directors. Effectively therefore it is the majority shareholder who has control of the company.

If the shares in a company are not intended to pass to the willmaker's estate for general distribution they could be specifically gifted to the intended beneficiaries. Or alternately you might consider including the intended beneficiary/ies as joint owners of the willmaker's shares inter-vivos so that those shares pass directly to those beneficiaries rather than through the willmaker's estate. This should only be done after obtaining taxation advice regarding any stamp duty or CGT implications.

Matters often overlooked in this context are:

- failure to review and update the company constitution to ensure that the company can operate as a sole director shareholder company (if that is the client's wish upon their death). The Corporations Law was amended in December 1995 to allow a company to have a sole director;
- failure to amend the company constitution if necessary e.g. to provide that decisions of directors and shareholders should be unanimous (most constitutions will only require a simple majority which in a blended family context can allow children of a prior relationship to run the company disregarding the current spouse's or current children's vote/s if they are in the minority) and to include (in the constitution or separate shareholder agreement) dispute resolution clauses to resolve any "deadlocks" that might arise as a result of the requirement for such unanimity;
- failure to amend the company constitution if necessary to remove "permanent governing director" provisions.
- failure to ensure that the shares in the company are able to be split equally among the intended beneficiaries and failure to ensure that each beneficiary receives their portion of the shares rather than leaving shares jointly to all intended beneficiaries. Most company constitutions will include a provision that only the first named shareholder of joint shares has an entitlement to vote. If this is left unchecked, and if shares are gifted jointly, it may be that the complete control of the company falls to the first named beneficiary in the Will, rather than to all beneficiaries equally. If necessary, steps should be taken to allot additional shares before death (and before execution of a Will) to ensure the client's wishes are met. This can be done without stamp duty consequences provide there is no change in control of the company, however if the company owns assets in its own right consideration will need to be given to CGT consequences of allotting further shares since the new shares will have a different cost base to the original shares.

Particular consideration should be given to "family companies" or companies that run businesses to ensure that the control of these entities passes to the intended beneficiaries whether that be a specific family member to the exclusion of others or to an existing business co-owner. It may be prudent to recommend that the client enter into a buy-sell/ business succession / shareholder agreements (insurance funded or otherwise) to ensure that the willmaker's estate receives value for the shares then transferred to the remaining business-owner or family member at the same time allowing the business to continue to be operated without the then business owners having to engage in protracted negotiations with the estate regarding the value of the willmaker's interest in the business etc. Alternately it might be necessary to consider making amendments to the company constitution (e.g. to the rights attaching to shares upon the death of a shareholder e.g. converting voting shares to dividend only shares etc).

2.3 Effect of joint tenancies on estate planning

Upon the death of a joint tenant, any assets held in joint tenancy pass to the surviving joint tenant i.e. they do not form part of the joint tenant's estate asset pool. Conversely if assets are held as tenants in common, the tenant's share of the asset passes to that person's estate upon their death.

Obviously this is a critical issue to consider and advise client's on in a blended family situation. It is essential that searches be undertaken of all assets held jointly to be certain of how the assets are held.

In some cases it may be necessary to consider severing joint tenancies in order to achieve the client's intentions.[2]

In other cases creating joint tenancies before a client dies can provide an excellent strategy to transfer property (not located in NSW) to an intended beneficiary, particularly if it is expected that the client's estate will be contested. Once again if properties are to be transferred to a joint tenancy holding the client must be made aware of the possible stamp duty and capital gains tax consequences.

The difficulty with joint tenancies in estate planning is that there is no certainty that the intended beneficiary will survive the willmaker. If the intended beneficiary pre-deceases (or is deemed to pre-decease) the willmaker then the asset will once again form part of the willmaker's estate. It is accordingly important to consider and provide for the alternate wishes of the willmaker in the Will if this were to occur.

<u>Trusts as Joint Tenants?</u>

On undertaking complex succession plans where clients are taking all steps possible to ensure that there are no assets or limited assets ultimately left in the estate (which they expect will be challenged) the writer has had cause to consider whether or not trusts could hold property with other persons as joint tenants so that those trusts could ultimately take the benefit of the asset by survivorship upon the death of the individual joint tenants.

If trusts are able to hold as joint tenants to take by survivorship, clients with blended families might then be able to make provision (outside the estate) for minor children who might otherwise not be able to hold an interest in property as joint tenants (or otherwise).

In undertaking this task the writer has had dealings with the Titles Office Registry concerning how the trust's holding on the title should be recorded since nothing concrete is set out in the Land Titles Practice Manual on the question. The writer has been met with differing opinions provided by Titles Office managers. One manager indicated that how the holding would be recorded would depend on whether or not the trust deed allowed the trust to hold as joint tenant or not. Another manager has more recently indicated that it is the Registrar's current position that regardless of the terms of the trust deed a trustee can only hold as tenant in common (on the ground that the "unity of interest" element for joint tenancy is not met because the trustee only holds the legal but not beneficial interest, where as other natural persons or bodies corporate hold both the legal and beneficial interest).

Despite statements contained in Part 51 of the Land Titles Practice Manual relating to Trusts - stating that "there appears to be little restriction placed upon a trustee" "in dealing with trust property" (see paragraph [51-0220]) and that the Registrar or Titles takes a "non-intrusive approach to trusts" leaving it to the trustee and their legal representatives to decide that a trust deed authorises a dealing which may not come within the scope of the powers under the Trusts Act and to inform the Registrar or that authority (see paragraph [51-0245]) - the writer has not yet been successful in having a trustee's co-ownership interest registered as a joint tenancy interest with other co-owners.

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[2] See Jeff Otto's paper "Severance of joint tenancy – how, when and why?" Succession Law Conference 2005 for a useful discussion on severing joint tenancies.

It may be that the Titles Office position might alter in light of the proposed reforms to the Trust Act which propose to allow trustees to hold in relation to trust property all of the powers of an absolute owner of the property.

It is the writer's view that - where its trust deed permits the trust to hold property in joint tenancy and where steps have been taken to either appoint a corporate trustee or appoint joint trustees – a trust can in circumstances where the trustee has (after discharging its duties on investment) in good-faith considered that such holding is for the benefit and in the best interests of the present and future beneficiaries of the trust and with the agreement of the other co-owners, hold property in joint tenancy with other co-owners. The writer's position is based on the following:

1. Co-owners in joint tenancy do not owe fiduciary duties to one another (unless they expressly agree to be subject to those duties) and so in the above circumstances the trustee's powers can not be said to be limited or subject to the direction of others when holding as joint tenant.

   Halsbury's Laws of Australia at para [355-11610] confirms that although co-owners in joint tenancy are entitled to possession of the whole of the land they are not per se in a fiduciary relationship and do not owe fiduciary duties to each other.

   In the writer's view the trustee's duty to its beneficiaries is no different if holding as tenant in common or in joint tenancy. If the trustee was of the view at a future date that the joint tenancy should be severed because that was of benefit to its beneficiaries then the trustee could do that unilaterally, however since the trust is likely only to benefit from the increase to its interest in the property as the natural persons die the trustee is not compromising its duty to the beneficiaries by holding as joint tenant.

2. There appears to be no statutory or common law prohibition on trusts holding as joint tenants.

   The Property Law Act and the Trusts Act are both silent on the issue of how a trustee generally might hold property jointly with others i.e. there is no requirement that a trustee hold as tenant in common and not as joint tenant. Although the general position that two or more persons will hold as tenants in common is set out in s35 of the Property Law Act, this position can be altered by providing that the persons are to take as joint tenants. In fact s38(7)(a) of the Property Law Act considers that a statutory trustee might hold as joint tenant in that a sale of the property under such trust will not of itself effect a severance of the joint tenancy.

   The Trusts Act refers only to the possibility that a trustee might hold property jointly with another person (s82(3)) and s 53 provides that a trustee where it holds a share in a property has the power to concur with joint owners (even in circumstances where the trustee might be entitled or interested as a co-owner in his, her or their own right).

   The Land Title Act, s 56 requires the Registrar when registering an instrument of transfer to co-owners, the registrar must also register the co-owners as holding their interests as tenants in common or joint tenants (but if the instrument does not specify which then the Registrar must register the interest as tenants in common).

This seems to indicate that if the instrument of transfer states that the co-owners are to be registered as joint tenants, then the Registrar must do so, however, that does not seem to be the case in practice (in the writer's experience).

The writer has not been able to find any authority that prohibits trustees of trusts holding property in joint tenancy or any authority stating a requirement that trustees of trusts can only hold property as tenants in common.

3. Unity of interest (legal interest)

As indicated earlier the Title's Office has indicated that the Registrar's current position (that trustees can only hold as tenants in common) is based on the proposition that the unity of interest element of joint tenancy is not met due to the difference of "legal and beneficial interests" of the trustee as opposed to the other natural persons (or bodies corporate).

Once again the writer has not been able to find any authority or commentary which considers whether this stated "difference" would necessarily mean that the unity of interest element would not be satisfied. There is commentary stating that the unity of interest could not be met for A, B and C as joint tenants where A was the holder of a life interest and B & C were the remaindermen, Because A has a life estate vested in possession, whereas B and C are entitled to the fee simple in remainder. B and C are joint tenants inter se because they share the same interests (the fee simple in remainder) (see commentary on s56 Land Titles Act "Registering Co-Owners" in the Land Titles Law and Practice Queensland, Sharon Christensen , Bill Dixon, Anne Wallace).

The writer's view is as set out by Ford and Lee at paragraph [1.8600]:

> The existence of an equitable interest in the beneficiary does not detract from the legal estate owned by the trustee. Although equity might regard a beneficiary as having an equitable interest comparable with one of the common law estates, any such equitable interest is not seen as being carved out of the trustee's legal estate but as being impressed upon it. The trustee still has all the common law rights attached to the legal estate but is under an equitable obligation to respect the terms of the trust in exercising those rights.

In the writer's opinion, trustees of trusts having all of the common law rights attached to the legal estate should be able to have their interest recorded as joint tenant should the trustee assess that such a holding is for the benefit and in the best interests of the present and future beneficiaries of the trust (particularly in circumstances where the trust deed allows the trustee to do so).

4. Right of survivorship for bodies corporate

Halsbury's Laws of Australia discusses the nature of survivorship in joint tenancy at para [355-11530] and notes that historically at common law it was for this reason that a corporation could not hold as joint tenant with a natural person because the corporation was "unable to die" however, legislation now provides (under s34 of the Property Law Act) that a body corporate is capable of holding as joint tenant as if it were an individual and further provides in s34 (2) that on dissolution of the body corporate the property will devolve to the other joint tenant.

In the writer's opinion if a body corporate which is (unless dissolved) "unable to die" is able to hold in joint tenancy with other natural persons thereby gaining an unfair advantage in the "lottery" of joint tenancy, a trustee of a trust should also be able to avail itself of the same advantage for the benefit of its beneficiaries (particularly if the other joint owners agree to that "advantage" in circumstances where all parties concerned are aware of their rights to sever the joint tenancy unilaterally should any one of them wish to do so in changed circumstances).

While it will be important to ensure that trustee succession is covered to avoid the transactional issues that could be otherwise necessary upon the death of a sole individual trustee under the current Trusts Act (i.e. the automatic vesting of the trust property in the Public Trustee under s16(2) of the Trusts Act) it is the writer's view that once this is done the position of a trustee of a trust should not be treated any differently to a body corporate.

2.4. Superannuation and Binding Death Benefit Nominations

For many clients superannuation is one of their major assets, if not during their life time, then upon their death, given that often life insurances are held by people within their superannuation funds.

It is important in the context of blended families and other interdependent relationships that clients be made aware of who the potential beneficiaries of this asset might be and be advised of the strategies available to them to ensure that this asset is passed to the people they intend to benefit.

The Superannuation Industry Supervision Act 1993 (Cth) ("SIS Act") provides that a trustee must only pay superannuation death benefits to a member's dependant or legal personal representative.

The definition of "dependant" under section 10 of the SIS Act includes:

- a spouse (including a de facto spouse)
- a child (including a natural, adopted and stepchild); or
- an interdependent person (i.e. a person who had an "interdependency relationship" with the member).

The common law position is that a step child will only be a dependant for as long as they are considered a step child of the deceased. This position only changes if the relevant legislation specifically states otherwise (such as the Succession Act does for the purposes of FPAs). The SIS Act does not contain a further definition of step child to change the common law position.

The ATO's position adopts the common law approach in ATO ID 2011/ 77 - that a child ceases to be stepchild of a step-parent for the purposes of being a dependent of the member under the SIS legislation when the marriage between the child's natural parent and the step-parent member ends. This would occur on the death of the natural parent or upon the divorce of the natural parent from the step-parent.

The same position was adopted by the Superannuation Complaints Tribunal (SCT) when they decided in Determination D04-05/186 to set aside the decision of a trustee to pay a member's death benefit to the children of a deceased person's former spouse. The SCT held that it was bound by the common law view that a stepchild relationship ends on the death of a natural parent. As the step children ceased to be the 'stepchildren' of the member on the death of their natural parent, they were not 'dependants' of the step-parent member when the step-parent member died. Similarly in the SCT determination D99-2000/082 the tribunal set aside the decision of a trustee to pay a member's death benefit to the child of a former spouse on the basis that the child ceased to be a step child and a dependant of the member when the child's natural parent was divorced from the member.

Clearly then a step child of a member where the step child's natural parent has pre-deceased or divorced the member will only be a dependant for superannuation purposes if they can show that they had an interdependency relationship with the deceased member.

People are in an "interdependency relationship"[3] (whether or not they are related by blood), this of course could therefore include same-sex partners, children of de-facto or same-sex partners, dependant parents, or adult children residing with and caring for a parent or interdependent siblings living with one another, provided:

- they have a close personal relationship; and
- they live together; and
- one or each of them provides financial support to the other; and
- one or each of them provides domestic support and personal care to the other.

The Superannuation Industry (Supervision) Regulations 1994 (Cth) (the "SIS Regulations") provide further detail on what is to be taken into account in determining whether or not an interdependency relationship exists (or existed).[4]

The SIS Regulations make it clear that:

- mere friends or flat mates, paid carers and employed providers of domestic support are excluded;
- it is possible to be in an interdependent relationship even if the parties are temporarily living apart (e.g. one is temporarily working overseas or is in gaol).

Unlike under the Succession Act, there is no time threshold to achieve before being classed as being in a de-facto relationship or in an interdependent relationship (although one of the factors considered in establishing the existence of a de facto relationship is the duration of the relationship).

Many people are unaware that trustees of superannuation funds have the discretion to distribute funds to any of the above "dependants" even if the client has advised the trustee of their nominated beneficiaries without completing a binding nomination, or where a binding nomination has lapsed. While it is usual practice of most trustees to distribute the fund to the surviving spouse or the estate even if there are dependent children, it is open to any of the above listed dependants to approach the trustee for provision out of the fund and if not provided for can (unless the fund is an SMSF) appeal the trustee's decision to the Superannuation Complaints Tribunal.

Sometimes, the only way that a client can be sure that the superannuation funds are distributed to the beneficiaries of their choice is to prepare and maintain a valid Binding Death Benefit Nomination ("BDBN") if such a Nomination is available to be made with that client's superannuation fund i.e. some funds do not allow members to make BDBNs e.g. the Public Sector Superannuation Scheme ("PSS") and Commonwealth Superannuation Scheme ("CSS").

[3] Section 10 A of the SIS Act.
[4] See Regulation 1.04AAAA of the SIS Regulations.

From the commencement of the 2014 financial year QSuper and REST now accept BDBNs, when previously they did not.

Clients should be advised the following concerning BDBNs in the context of blended families, separation and divorce:

- they will only be binding if legally valid pursuant to the SIS legislation and the Deed. (The SIS regulations requires BDBNs to be in writing, signed and dated by the member witnessed by two adults (who are not beneficiaries) with a declaration by those witnesses that the notice was signed in their presence, and directed to SIS dependants or the member's LPR in certain proportions. However, there may be other requirements set out in the deed that must be followed to ensure the BDBN is valid e.g. some require that the BDBN be provided to and approved by the trustee, others set out a required form etc)
- some lapse after 3 years others might be non-lapsing.
- most will allow the fund to be distributed in percentages so that it is possible to provide for a percentage to a spouse and percentages to children or other dependants
- most will allow selection to be made concerning the type of distribution i.e. lump sum or pension
- most will not allow clients to make an "if this, then that" nomination, so that they cannot provide for a spouse in the first instance and then children if the spouse does not survive.
- some funds allow an Attorney appointed under an Enduring Power of Attorney ("EPA") to renew or make a binding death benefit nomination, provided they are specifically authorised by the EPA document to do so. By including a direction to the Attorney in the EPA to renew a BDBN (or to remake it in the event of the death of a spouse or child) it could be possible to ensure BDBNs do not lapse and that the client's wishes are achieved, even post incapacity. A review of individual fund Trust Deeds will be necessary to determine whether a BDBN can me made by an Attorney.

Superannuation benefits do not form part of the estate asset pool, unless paid to the member's personal legal representative.

One strategy to ensure children of a prior relationship (or spouse of existing relationship) are provided for might therefore be to make provision for them via the superannuation fund by completing a BDBN.

The client should however be aware, that particularly in relation to adult children, distributions directly from the superannuation fund may not be as tax effective for them as having the distributions paid to them via a testamentary trust where they will have access to income splitting to their spouse (if named as a beneficiary) and their children.

Further if distributions are made to minor children (e.g. by way of pension), clients should be aware that the terms of the superannuation deed may allow for such pensions to be commuted by those children upon turning 18 years of age when that child may not yet be able to properly handle their financial affairs.

Checklist:

- Obtain authority from clients to request information about the superannuation fund, including any nominated beneficiaries (binding or non-binding), and including the ability or otherwise to make a BDBN.
- Obtain a copy of any current BDBN and copies of the relevant Deed (and any variations) and review the BDBN alongside the deed to check its validity and status, especially if the client does not wish to make a new BDBN.
- Make sure there are no out of date nominations in place e.g. to an ex-spouse or ex-partner. If so, ensure these are changed to reflect the client's current wishes immediately.
- Consider whether BDBNs should be made to dependants directly or to the estate.
- make sure that any existing or new nominations made are to people properly classed as "dependants" under the SIS Act.
- Make sure clients are aware of and diarise the lapsing date of the BDBN (if applicable).
- If necessary, send the BDBN to the trustee and ensure receipt and acceptance of same by the trustee.
- If the Super Fund Deed allows Attorneys to make or remake BDBN's, consider including a direction to the Attorney in the EPA to renew a BDBN (or to remake it in the event of the death of a spouse or child) to ensure lapsing BDBNs do not lapse and to ensure that the client's wishes are achieved, even post incapacity.

<u>Self-managed superannuation funds</u>

As self-managed superannuation funds grow in popularity we need to advise our clients on the succession issues attaching to self managed funds.

Review of the Superannuation Deed is imperative as is review of the Superannuation fund's trustee succession.

Consideration should be given to updating the Deed to allow for non-lapsing BDBNs to be made if not already provided for.

BDBNs should be carefully drafted in accordance with the rules of the fund. If necessary under the particular deed, further steps may need to be taken to ensure the BDBN is provided to and/or approved by the Trustee/s.

These BDBNs can be as detailed as needed to record the client's wishes and may include "if this, then that" scenarios.

The recent case of *Ioppolo & Hesford v Conti*[5] highlighted the importance of BDBNs as critical succession planning documents, especially in the case of Self Managed Super. The case involved a husband and wife who were estranged but remained married and who were both as individuals joint trustees of their SMSF. The wife made a will in 2005 expressing her desire that her entitlements in the SMSF be paid to her children, specifically noting that she did not want any of these benefits to be paid to her estranged husband. At the date of the wife's death in 2010 her entitlements amounted to $648,586.00, her will remained unchanged but she had not made a BDBN following a nomination which lapsed in 2006.

[5] [2013] WASC 389

After the wife's death the husband (in accordance with the provisions of the SIS Act) established a trustee Company (of which he was sole director) and proceeded to make a resolution transferring all of the wife's superannuation benefits to himself. It was held that the husband had done nothing wrong as the SMSF Deed specifically gave him the power to do as he had done in the absence of a BDBN. It was also held that SMSF Deed provisions prevailed, despite the contrary intention which existed in the wife's will.

This case highlights the current view of the courts on this issue – taking a strict trust law view in enforcing what is provided for in the SMSF Deed. This case also highlights two further lessons; the importance of reviewing the SMSF Deed as it applies to the succession of superannuation death benefits, the importance of diarising the lapsing date and reviewing the status of any nominations when reviewing other Estate Planning documents, that a Will has **no** control over how a deceased's persons superannuation death benefits are paid (even if there is no valid BDBN) and that the surviving member of a SMSF can effectively take control of the fund to convert it into a single member fund and 'lock out' the executors of the deceased member's estate from being appointed as trustee in the deceased member's position and having a say in how the superannuation benefits are paid.

It is important that clients understand the difference between assets which are under the control of their Will and those which are under the authority of the SMSF Deed. If client's wish to take control over how their Super is paid out, they need to make (and regularly review) BDBNs.

Reversionary Pensions vs Binding Death Benefit Nominations

A reversionary pension is another way clients who are receiving a pension via their superannuation fund can nominate a beneficiary to whom that pension will revert upon their death. A reversionary pensioner will continue to receive the original pension on the death of the original pensioner as if they were the original pensioner.

Reversionary pensions have a number of advantages including (but not limited to):

- a member can deal with multiple pension interests separately;
- there remains a tax advantage of a reversionary pension over non-reversionary pension;
- any life insurance proceeds added to a reversionary pension will retain the tax components of the pension.

Reversionary pensions also have a number of disadvantages including (but not limited to):

- reversionary pensions do not allow death benefits to be paid to the Legal Personal Representative or adult children;
- there can be only one Reversionary beneficiary nominated to receive the reversionary pension;
- reversionary nominations must be made for each pension (also considered an advantage for some clients); and
- the nomination of the reversionary beneficiary will be lost if the pension is commuted or a new pension is commenced.

In contrast a BDBN can operate over all benefits, including multiple pension and accumulation of interests and will generally not be affected by the commencement or commutation of pensions.

However, the question remains – which prevails Reversionary Pension or BDBN?
The answer may lie in the terms of the deed. A SMSF trust deed will usually either:

- expressly state that one takes precedence over the other;
- provide that the one signed or effected later will take precedence over the earlier one; or
- be silent as to which takes precedence.

If the deed is silent, then it seems to be, the prevailing position that a reversionary pension will take precedence regardless of the order of singing the pension document and the BDBN. This is based on the argument that the reversionary pension automatically transfers the pension to the reversionary beneficiary and the pension therefore does not technically form part of the death benefits to which the BDBN attaches.

It is prudent therefore when reviewing a SMSF deed to review the deed on this point and if the deed does not deal with this issue the deed should then be updated to cover this issue to avoid later uncertainty.

"Superannuation Wills" vs Binding Death Benefit Nominations

Superannuation Wills have emerged recently, generally involving the amending of a trust deed of a SMSF to "hardwire" the deed to contain the nomination of beneficiaries for death benefits rather than relying on a stand alone nomination document. Usually the amendment to the deed would also include clauses preventing further amendments being made to the death benefit provisions of the deed after a member's death.

Clearly this approach can be incredibly inflexible and if a member wishes to later vary their nomination the entire deed must be amended. Nevertheless in some circumstances (for example where an amendment to the Deed might be considered less "challengeable" than preparation of a controversial BDBN) a Superannuation Will may be an appropriate tool for ensuring the member's wishes are followed with arguments that they provide security in an aging population where dementia numbers are on the incline and where blended families and familial complications are prevalent.

If a Superannuation Will is to be implemented, clients should be fully informed of their restrictive consequences, and prompted to regularly review their self managed superannuation fund deed as their circumstances change.

In the writer's view the equally effective but more flexible strategy of amending the SMSF trust deed to allow non lapsing BDBNs to be made (if not already allowed) will be the preferred approach in most circumstances.

2.5. Life Insurance

Where clients are "insurable", life insurances can be an excellent tool by which significant assets can be left directly to intended beneficiaries in a blended family without affecting the remaining estate plan, or complex entity or business succession plans.

The client can establish one or more life insurance policies and nominate the intended beneficiaries to take the benefits under those policies on the client's death, directly.

If the intended beneficiaries are also SIS dependants then these policies can also be established as stand alone superannuation policies so that the client can then prepare BDBN's directing those proceeds to the intended dependants directly. If these BDBN are lapsing or do not allow the insured client member to provide for "if this then that" circumstances it is prudent to then include directions to an Enduring Power of Attorney to make binding nominations on behalf of a member to cover events where a spouse might pre-decease a member but the member has lost capacity to make a new BDBN. (e.g. "*In the event my wife has predeceased me and I have not re-made my binding death benefit nomination, my attorneys are instructed to remake my binding death benefit nomination 100% in favour of my child*").

Benefits under an insurance policy do not form part of the client's estate unless the proceeds are directed to the estate (either by nomination or by operation of the policy in the absence of a nomination). This accordingly can provide a good way of ensuring provision for a second spouse, or for children of a prior relationship, particularly if the estate is likely to be contested.

The downside to a potential beneficiary if the policy is an insurance policy (if the beneficiary will not qualify as a dependant under a superannuation policy) is that while the proceeds will be received as a tax free lump sum, future income earned on the investment of those funds will not attract any favourable taxation treatment that might be available if the proceeds were directed into the estate and paid to them via a testamentary trust.

3. OTHER TOOLS

3.1. Binding Financial Agreements

Part VIII A of the Family Law Act 1975 (Cth) (the "Family Law Act") allows parties to a marriage to enter into a binding financial agreement to set out how, in the event of a marriage breakdown, the property settlement rights and spousal maintenance rights of the parties are (or are to be) dealt with. Such agreements may be entered into before a marriage (s90B agreements or "pre-nuptial agreements"), during a marriage before dissolution (s90C agreements) or after dissolution of a marriage (s90D agreements).

Since 2009 Part VIII AB of the Family Law Act allows parties to a de facto relationship to enter into a binding financial agreement in the same way as parties to a marriage. These agreements may be entered into before a marriage (s90UB agreements), during a de facto relationship before breakdown of the relationship (s90UC agreements) or after the breakdown of a de facto relationship (s90UD agreements).

<u>Ability to bind estates</u>

The Family Law Act (s 90H in the case of a marriage and s 90UK in the case of a de facto relationship) makes it clear that a binding financial agreement binds the respective estates of the parties. This could therefore mean that the estate might be bound to continue paying spousal maintenance if it was provided for in the agreement without provision that such maintenance would cease upon the death of the person liable to pay it.

<u>Ability to make a claim against estate despite Agreement</u>

Generally it is not possible to contract with another party that they refrain from making an application for family provision.

Therefore the downside to these agreements is that despite such agreements binding estates, the mere existence of such agreements will not protect the estate from claims being made for family provision. Clients should therefore be made aware that their former spouse may be able to come back for another "slice of the pie" despite having such agreements in place, and further that other applicants (not parties to the agreement) may be able to access assets subject to the agreement should they make an application for provision from the estate.

Having said that, in the writer's view, there is no harm in including provisions in Binding Financial Agreements which provide that the parties wish to effect an intention to provide an exclusive and final method of finalizing all rights, and as such provide the other with a guarantee that they will not later make any claims against their estate.

It appears that courts will give serious consideration to such a clause contained agreements made between parties (see Singer v Berghouse (1994) 181 CLR at 201). However, when including such provision it is important to make it clear to clients that a Court may later allow a Family Provision claim in the appropriate circumstances and that such a clause may not prevent other applicants not parties to the agreement (e.g. step children) from making application for family provision.

Claims by dependent former spouses (husband, wife or registered partner)

It should also be noted that "dependent former husbands or wives or registered partners[6]" (defined under s5AA (4) of the Succession Act (Qld) as a person who was divorced from the deceased and had not remarried or was in registered relationship with the deceased that was terminated but had not married or entered into another registered relationship before the deceased's death and was receiving or entitled to receive maintenance at the time of the deceased's death) are entitled to make a claim against the estate of their deceased former husband, wife or registered partner. In the writer's view such a claim could be made by such dependant former spouse, whether or not a provision was included in the Binding Financial Agreement that maintenance would cease upon the death of the party paying it.

Claims by former de facto partners

As a result of the operation of s5AA (2) of the Succession Act 1981 (Qld) a de facto partner (as defined by s 32DA of the Acts Interpretation Act 1954 (Qld)) will only have the right to make a claim against their partner's estate if they were in such a relationship for a continuous period of at least 2 years ending on the deceased's death. Accordingly a former de facto spouse will not be able to make a claim against their deceased partner's estate unless the former defacto spouse was a surviving parent of a minor child of the deceased and was receiving maintenance from the deceased at the time of death, in which case the former de facto spouse will fall within the definition of a "dependant" pursuant to s 40 of the Succession Act (i.e. as a person being wholly or substantially maintained or supported by the deceased at the time of death).

3.2 Mutual Wills

Mutual wills are made by two parties (often husband and wife) pursuant to an agreement that neither party will change their will during their respective lifetimes (without the approval of the other party) and that upon and from the death of the first party (if that party has complied with the terms of the agreement), the survivor is bound irrevocably by the agreement.

There are differing views on what constitutes such an agreement and in particular some support for the view that such an agreement might be implied from the circumstances of making the will and may not require that consideration pass between the parties.[7]

It is accordingly once again critical in the context of blended families, where a husband and wife might make "mirror wills" leaving each other something less than an absolute entitlement in each other's estates, that the effect of mutual wills is raised with clients and their intentions to make or not make mutual wills are clearly expressed in the Wills they make.

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[6] As defined under s36 of the Acts Interpretation Act 1954 (Qld) as amended by Relationships Act 2011 (Qld) (previously Civil Partnerships Act 2011)

[7] See Julie Cassidy's text "Mutual Wills", The Federation Press 2000.

Because mutual wills remove any flexibility for the surviving party to alter their succession plan for even legitimate circumstances (which the deceased willmaker may very well have consented to), the writer is of the view that making mutual wills is not the best strategy to be adopted and that other strategies such as those outlined above provide far better avenues to achieve the clients' estate planning objectives.

If the making of mutual wills is the only strategy that can be adopted, clients should be fully informed of their restrictive consequences, and of the potential that:

- family provision applications can still be made against estates despite the existence of mutual wills, where the claim is brought following death of the first party to the mutual will.[8]
- assets can still be transferred by surviving party inter-vivos to another person or entity without being in breach of the constructive trust imposed on the asset by the Mutual Will. [9]

3.3 Other issues to consider

(i) Specific gifts of heirloom and family items

Encourage clients particularly in blended families to make specific gifts of any family heirlooms, sentimental personal items, photos and videos etc to avoid family arguments or worse family relationship breakdowns regarding these often overlooked but highly sentimental items. This should be done in the Will to be binding on the executors but can be made by informal list (noting that these documents may need to be submitted to the court as documents of testamentary intention pursuant to s 18 Succession Act as part of the probate application).

(ii) Guardianship of minor children

Ensure clients have properly turned their mind to the appointment of guardians for their minor children if there are children of prior relationships particularly if the surviving parent is to have interaction with the guardian regarding the care of the children.

Consideration should also be given to preparation of guidelines for guardians to cover issues the willmaker considers important in providing care for the children such as education, health, religion, culture, where and with whom the child should reside, involvement of other family members in the children's upbringing, general matters such as standard of living, pocket money, overseas travel, employment during minority, sport and other activities, and personal development.

(iii) How to deal with excluding a beneficiary

Often clients come to us with preconceived ideas on how they wish to leave their estate. Even if we are able to educate them about potential claims against their estate or other assets, clients may regardless wish to leave a dependant out of the Will, or at the most leave that dependant with a token gift in the hope that this will satisfy that beneficiary or stop them from making a claim against the estate. This might, however, provide the dependent with money to use to finance the costs of making the very claim that was intended to be avoided.

[8] See Barns v Barns (2003) HCA 9 - involving a successful challenge to a mutual will established with the intention of preventing a daughter from benefiting in the estate of the surviving parent.
[9] See Cosentino v Cosentino [2010] WASC 40

Similarly, including reasons for excluding a beneficiary in the Will could provide the grounds for that beneficiary to make their claim. If reasons are to be included it is probably best to include those in a separate statutory declaration prepared by the willmaker and kept with the Will, since this document will only be viewed by the executor and not made public with the Will.

(iv) Notional estate

A 'notional estate' is a concept currently operational in NSW (and potentially in other states and territories where estates contain NSW assets) which allows a Court to look beyond the assets of the estate and to examine assets held by the deceased up to three years prior to their death (e.g. such as assets transferred to a trust etc).

The fact that national succession law reforms remain on the horizon means that we as practitioners should be aware of the potential for the notional estates to become a reality in Queensland. If this does occur it is likely that many of the strategies listed above will no longer be of any great use against potential Family Provision Applications if the deceased dies within 3 years of putting those strategies into effect.

For the moment, particularly in circumstances where clients are adopting strategies to limit the assets to fall into an estate in order to discourage potential blended family (or other) applicants from making a claim against an estate, the notional estate issue must still be considered to the extent that the 'location' of the relevant assets, personal, trust, superannuation etc must be checked to ensure that none might establish sufficient nexus to allow an application for provision to be made in NSW. It is therefore important to check the jurisdiction applicable to any trusts and superannuation funds, the registered offices of companies in which shares might be held etc and if any of these assets are located in New South Wales it might be prudent to consider transferring any assets of concern to alternate jurisdictions. If this is not done prior to the death of the client there is the potential for a Family Provision proceeding to be commenced in New South Wales meaning that notional estate will apply to undo what would otherwise be a carefully constructed succession plan.

(v) Review of what is to occur on incapacity

Much of the discussion of the above strategies has been focussed on strategies to cope with the death of a client, however, equally critical is the potential for incapacity of the client.

Steps should accordingly be taken to obtain the client's instructions on what is to occur on their incapacity as well as on their death.

Review of the following matters should be undertaken:

- Review of Enduring Power of Attorney Documents
- Review of documents governing entity succession (such as trust deeds, company constitutions, partnership agreements, buy-sell agreements etc).

Review of Enduring Power of Attorney Documents

Clients must be advised of the need to have an up to date Enduring Power of Attorney document.

This document should be reviewed if ever circumstances change.

Pursuant to s 53 of the Powers of Attorney Act 1998 (Qld) (the "Powers of Attorney Act") (in relation to spouses) and s53A (in relation to registered partners), if a principal divorces or terminates a registered relationship after making an EPA the document is revoked to the extent it gives power to the divorced spouse or previous registered partner. The document is not revoked at all upon separation of a spouse, registered partner or de facto partner, so clients should be advised to alter these documents upon separation.

Section 52 of the Powers of Attorney Act (in relation to spouses) and s52A (in relation to registered relationships) state that unless there is a contrary intention expressed in the EPA, if a principal marries or enters into a registered relationship after making an EPA, that document is revoked to the extent it gives power to someone other than the principal's husband, wife or registered partner.

Critical issues in the context of blended families, separation and divorce are:

- Attorney selection for personal and financial powers
- Attorney succession
- Directions to attorneys (for example in relation to any business succession agreements, or in relation to the amendment, revocation or confirmation of any BDBNs – if the superannuation fund allows for attorneys to take such steps)
- Consideration as to whether or not to allow conflict transactions, and if so in what circumstances bearing in mind that clauses which allow conflict transactions should be carefully considered and drafted.

The recent NSW case of *Taheri v Vitek*[10] held that an EPA which contained a clause allowing the Attorney to enter into conflict transactions authorised the Attorney to enter into transactions in his own interests not necessarily for the benefit of the principal. In this case a husband signed a contract and guarantee on his own behalf and on behalf of his wife under her EPA (while she still had capacity). When the husband and wife were sued for damages / specific performance of the contract the wife attempted to avoid liability because her husband had signed on her behalf, but the court pointed to the conflict clause in the EPA to hold her equally liable..

Review of documents governing entity or business succession

Documents such as trust deeds, company constitutions, partnership agreements, buy-sell agreements etc should be reviewed for their provisions concerning what is to occur on the incapacity of your client. If necessary steps should be taken to amend these documents to ensure the client's wishes are met.[11]

<u>STOP GAP STEPS TO TAKE UPON RELATIONSHIP BREAKDOWN AND DIVORCE</u>

While clients often decide to contact you to make or update their estate plans when they are about to get married, or have just married, or when they start a family, many of them forget to consider a review of their estate plan if they are contemplating or effecting a separation from their spouse or partner. This is usually because people are dealing with the emotional and financial aspects of the separation, rather than contemplating what might happen if they were to die before finalising property settlements, or in the case of married couples before they formally divorce.

[10] [2014] NSWCA 209

[11] The writer highly recommends that you refer to a paper by Michele Sheehan "Applying advanced Will Drafting Techniques to maximise the latest developments in estate planning law" delivered at the Lexis Nexis 2006 Qld - Wills, Succession & Estate Planning conference, for a detailed review of what to look for when reviewing Partnership Deeds, Company constitutions, and Trusts in the context of incapacity.

Consequences of death during Marriage prior to Divorce or Annulment or prior Termination of Registered Relationship

Pursuant to the Succession Act 1981 (Qld), provided a person is the deceased's husband, wife or registered partner at the time of the deceased's death, they will be entitled to make a claim against the deceased's estate.

Accordingly if a spouse can produce a Marriage Certificate which has not been affected by a divorce or annulment, or a registered partner can show the relationship remains registered that spouse or registered partner (whether or not in a genuine domestic relationship at the time of death) may make a claim on the deceased's estate. Further if wills and other succession planning documents name the spouse or registered partner as the sole or major beneficiary, and the willmaker does not alter those documents upon separation, the spouse or registered partner will (if the will is not challenged or another claim is not made against the estate) receive all of the benefits so conferred even though the spouse or registered partner was separated from the willmaker at the time of death.

It is therefore extremely important for a client going through or contemplating separation from their spouse or registered partner to update their succession planning documents including:

- their Will,
- their Enduring Power of Attorney, and Advance Health Directive
- their Superannuation and Life Insurance nominations,
- the succession of any other of their entities; and
- considering severing any joint tenancies.

Consequences of death during de-facto relationship (including same sex relationship)

As a result of the operation of s5AA (2) of the Succession Act 1981 (Qld) a de facto partner (as defined by s 32DA of the Acts Interpretation Act 1954 (Qld))[12] shall have the right to make a claim against their partner's estate if they were in such a relationship for a continuous period of at least 2 years ending on the deceased's death.

If however there is a child of the de facto relationship (including biological, adopted or step child) under 18 years residing with the de facto partners the two year period may not apply, as it may be possible for the partner and/or the child to make a claim against the deceased partner's estate if they fall within the definition of being a "dependant" pursuant to s 40 of the Succession Act (i.e. as a person being wholly or substantially maintained or supported by the deceased at the time of death).

Unless a couple has registered their relationship pursuant to the Relationships Act 2011 (Qld) there is far more involved in establishing the existence of a de facto relationship than for married couples, and such a relationship must be shown to have been in existence as at the date of death before a claim can be made for provision out of the estate.

However, if wills and other succession planning documents name the de facto partner as the sole or major beneficiary, and the willmaker does not alter those documents following separation, the surviving partner will receive all of the benefits so conferred even though the partner was separated from the willmaker at the time of death.

[12] A paper by Barbara Hamilton "Who is a "De Facto Couple" under Succession Law?" presented at QLS Succession Law Specialist Accreditation Conference 2005 provides a detailed analysis of what is required to establish the existence of a de facto relationship in the context of Succession Law, in particular in the context of making a claim against an estate.

Clients in de facto relationships should therefore also be strongly encouraged to review their succession plans upon separation from a de facto partner.

Death prior to institution of property adjustment claims

Institution of property adjustment proceedings under the Family Law Act are rights “in personam” (and not rights “in rem”), accordingly if proceedings have not been commenced at the time of death the right to property adjustment may be lost.

Once separation has occurred clients should also be encouraged to ensure that relevant Property Orders are commenced quickly and then made either by consent (e.g. by Binding Financial Agreement, or by Separation Agreement) or by court order as soon as possible.

Death after commencement of property adjustment claims

In the case of a marriage s 79 (8) and in the case of a de facto relationship s 90SM (8) of the Family Law Act provides for what is to occur in the event a party to proceedings in respect of property dies before those proceedings are completed.

In both cases a court may make a property adjustment order if it considers that it would have made such an order if the deceased party had not died, and if t considers that it is still appropriate to make such an order.

These provisions expressly state that the proceedings may be continued by or against the estate of the deceased party. Section 66 of the Succession Act also provides that such a cause of action will survive against or for the benefit of the deceased person’s estate.

Effect of Marriage and Divorce on Wills

Since 1 April 2006, s 14 of the Succession Act deals with the effect of a marriage on a will and s14A deals with the effect of a registered relationship on a will. Section 15 of the Succession Act deals with the effect of divorce or annulment on a will and s15A deals with the affect of termination of a registered relationship on a will.

Pursuant to s14[13] and s14A marriage or registration of a relationship revokes a will, with the following exceptions:-

- a will made in contemplation of that marriage or registered relationship (whether or not that contemplation is stated) is not revoked
- a disposition to the person the willmaker is married to or in a registered relationship with at the date of the willmaker’s death) will not fail
- an appointment as executor, trustee or guardian of the person the willmaker is married to or in a registered relationship with at the date of the willmaker’s death will be valid
- a will is not revoked, to the extent that it exercises a power of appointment where the property appointed would not pass to an executor or to an administrator of any will or estate of the willmaker if the power of appointment was not exercised.

[13] s 14 of the Succession Act will apply to wills where someone dies after 1 April 2006 (s7), however this is subject to s76, which states that s14 will apply to wills made before 1 April 2006, if the willmaker’s marriage is solemnised on or after 1 April 2006 (s 76(3)) but **does not apply** to wills made before 1 April 2006 if the marriage was before that date (s76(2)) – the old section 17 will apply in those cases.

Pursuant to s15[14] and s15A a divorce or annulment of the willmaker's marriage or termination of a registered relationship revokes the following (unless a contrary intention appears in the will[15]):

- a disposition to the willmaker's former spouse or former registered partner made by will in existence at the time of the divorce or annulment or termination;
- an appointment of the willmaker's former spouse or former registered partner as executor, trustee or guardian; and
- any grant of a power of appointment exercisable by or in favour of the willmaker's former spouse or former registered partner

with the following exceptions[16]:

- the appointment of a willmaker's former spouse or former registered partner as a trustee of property left by the will on trust for beneficiaries that include the former spouse's or former registered partner's children;
- the grant of a power of appointment exercisable by the willmaker's former spouse or former registered partner only in favour of children of whom both the willmaker and the former spouse or former registered partner are parents.

If a disposition, appointment or grant is revoked, the will takes effect as if the former spouse or former registered partner had predeceased the willmaker[17].

It is imperative that clients be made aware of the above matters and that they be encouraged to:

- update their wills and other succession planning documents if they are contemplating separation or have separated
- conclude any Binding Financial Agreements or commence relevant property proceedings as soon as possible following separation
- review their wills and other succession planning documents upon divorce (or annulment) or termination of a registered relationship and when contemplating re-marriage or a new registered relationship.

CONCLUSION

There can be no denying that these days when dealing with clients living their own "modern family" scenario, their personal affairs are of a complex nature requiring implementation of sophisticated succession planning strategies to effect that client's wishes.

As practitioners we must after gaining a full understanding of our client's circumstances and wishes know how to use the myriad of tools available in our succession planning toolkit so that we can produce wills and other succession planning documents that achieve our client's objectives and either prevent or are able to withstand attacks (as far as is practically possible).

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November 2014

[14] s 15 of the Succession Act will apply to wills where someone dies after 1 April 2006 (s7), however this is subject to s76, which states that s15 will apply to wills made before 1 April 2006, if the divorce or annulment occurs on or after 1 April 2006 (s 76(5)) but **does not apply** to wills made before 1 April 2006 if the marriage was before that date (s76(4)) – the old section 18 will apply in those cases.

[15] Pursuant to s15 (3) and s15A (3) of Succession Act it is possible to express a contrary intention in the Will

[16] Section 15 (2) and s15A(2) Succession Act

[17] Section 15 (4) and s15A (4) Succession Act