

# Estate Planning - Anticipating the Problems

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Presented by:

Timothy Orr

With thanks to

Sharon Cornwell

# Recognising where there is a blended family - 1

- Know your client – this is old-school lawyering.
- Try to understand the family dynamic – just because you know some of the details doesn't mean you know them all.
- Are the clients married or de facto and are they divorced or simply separated from their former partners? Has the separation been documented? Are there still wills in place from prior relationships?
- Always get the details of each of the children – their names, ages, relationship status, economic position and potential degree of need.
- Recognise the different legal position of children – biological, step-child, whangai, illegitimate, adopted and fostered/Home For Life.

# Recognising where there is a blended family - 2

- Who is your client? Recognise conflicts and consider independent advice. Waivers can only bring you so far.
- Who are you seeking to protect? New wife from children of first marriage? The children from the gold digging partner?
- The answers change depending on the facts.
- Explain to your clients the options and try to establish the likelihood of a claim based on the information you have received.
- Consider the potential implications of any structure – PRA claim on separation, WINZ Residential Care Subsidies etc.

# Understanding the legislative framework

- Testamentary Freedom – not always what your clients think it is.
- What legislation do you need to be familiar with?
- Family Protection Act 1955
- Property (Relationships) Act 1976
- Law Reform (Testamentary Promises) Act 1949
- Administration Act 1969
- Wills Act 2007
- Trustee Act 1956
- Property Law Act 2007
- New Trusts Bill
- Applicable legislation in overseas jurisdictions

# Understanding the legislative framework

## Family Protection Act 1976

- Applies to all assets in the Estate – if it forms part of the Estate then it will form part of the claim.

## Who can bring a claim?

- The partner, children (including legally adopted) and grandchildren;
- The parents or stepchildren who were being maintained or were legally entitled to be maintained prior to the deceased's death.

## What is the basis for the claim?

- If as result of a Will or intestacy *“adequate provision is not available from the estate for the proper maintenance and support of the persons...the court may at its discretion...order that any provision the court thinks fit be made out of the deceased's estate”*.

# Understanding the legislative framework

## Property (Relationships) Act 1976

- *“To provide for a just division of the relationship property between the spouses or partners when their relationship end by separation or death, and in certain other circumstances, while taking account of the interests of any children of the marriage or children of the civil union or children of the de facto relationship” (section 1M(c)).*
- A claim under the PRA 1976 does not take away the right to make a claim under the FPA or the Law Reform (Testamentary Promises) Act 1949 but it does have priority over such claims (section 57).

# Understanding the legislative framework

- Choice of Option A or B by spouse
  - Option A: Elect to make an application for the division of the relationship property. If option A is taken then, after the division of relationship property has taken place, every gift to the surviving spouse or partner in the Will is treated as being revoked and the Will is to be read as if the surviving spouse had predeceased the Will maker unless the Will specifically states that the gift is to have effect regardless of the spouse making an election.
  - Option B: Elect not to apply for a division and instead to receive their beneficial interest under the Will or via the Administration Act if there is an intestacy.

# Understanding the legislative framework

- In limited circumstances the administrator of an estate may make an application for division of the “relationship property” under Option A with the leave of the Court. Usually this is where failure to do so would cause a “serious injustice” and prevent claimants from bringing an effective FPA claim.
- What is “relationship property” is determined either when the parties separate or when one dies (section 79). All property of the deceased is presumed to be relationship property unless proved otherwise and a beneficiary of an estate can make such a claim but only if the Court considers it necessary to do so. The role of rebutting this presumption will fall on the administrator of the deceased’s estate.

# What questions regarding assets should you ask your client?

- Always get a title search of the property to make sure that it is owned the way your client thinks it is.
- Do a search of the clients name on LandOnline and Companies Office to identify any other property they may have an interest in.
- Always identify ownership structure: sole, joint tenancy, tenants in common, a trust, life interest in part or whole of property.
- Identify the current amount owed to the bank on the property.
- Life insurance policies – whose names are these policies in?
- Any loans or Personal Guarantees that they might have given.
- Any property held in trust either as a settlor as trustee.
- Any anticipated future property to be received.

# What are the most common clauses and structures

## Trusts

- Established before death with asset transfer having taken place.
- Established before death but with assets to be transferred in after death.
- Testamentary Trust formed by reference to a clause in the Will e.g. “to hold on Trust for my daughter during her lifetime and then to be divided equally between her children”.

## Survivorship

- Assets pass to the joint owner by survivorship and do not form part of the estate.

Life Interest in a significant asset such as a half share or the whole of the family home.

# What are the most common clauses and structures

## Wills

- Who should be the Executors.
- Guardianship of minors and leaving funds on trust for them.
- Who should control access to funds held for minors.
- Division of assets should be as clear as possible.
- Explanations either in Will or in supporting document as to reasons.
- Statutory Declaration from testator giving reasons for distributions.
- Life interest should be used only where appropriate.
- Clearly explain that a mirror Will is not a mutual Will.
- Consider having Will maker discuss Will with family.

# Suggested wording where assets comprise both personal and trust property

- The following gifts are conditional upon my current partner, ZZ, surviving me and our continuing to be engaged in a relationship (state nature of relationship) at the time of my death. Should either of the above conditions not be met then the gifts referred to in clauses XX below will fail and the assets are to form part of the residue of my estate. In such circumstances ZZ is not to receive any part of the residue of my estate.
- I give to ZZ the following...
- In making such distributions I have had regard to my obligations under the Family Protection Act 1955. ZZ and I have entered into a Contracting Out Agreement under Section 21 of the Property (Relationships) Act 1976 excluding ZZ from benefitting from the YY Trust

# Suggested wording where assets comprise both personal and trust property

- My Children are beneficiaries of the YY Trust and I have requested that the trustees make provision for them.
- I have discussed these matters with all my beneficiaries and it is my hope that they all respect my wishes regarding these matters.

# What are the benefits and potential problems with these structures - 1

## Family Trusts

- The FPA does not apply to property held in a trust.
- They allow a degree of flexibility.
- There is expense involved in their establishment and administration.
- Transferring property to a trust may trigger tax consequences or require re-documenting of mortgages etc.
- If there is a transfer of property to a trust via a will, forgiveness of debt on death or the creation of a testamentary trust then it forms part of the estate and could be the subject of an FPA claim.
- Recent judicial decisions and the new Trusts Bill highlight trustee's responsibilities to act in the interests of all beneficiaries of a trust.

# What are the benefits and potential problems with these structures - 2

## Survivorship

- Often achieved inexpensively through the conversion of an interest in property from tenants in common to joint tenancy.
- Can preclude a claim under the FPA but not necessarily the PRA.
- Benefits the partner only and does not reflect prior asset ownership.
- Creates significant problems if spouse decides not to follow the deceased's wishes with regards to benefiting the children of a previous relationship.
- This approach will usually circumvent any prior relationship property structuring and could cause difficulties if clients separate.
- Can leave little if anything for children.

# What are the benefits and potential problems with these structures - 3

## Life Interest

- Who wants to live forever?
- Very effective way of balancing the needs of the spouses with the interests of the children.
- The Estate must remain active for the entire term of the life interest and it is recommended that there are funds available to assist in maintaining the property and administering the estate.
- They can be very difficult to administer e.g. maintenance of the property, servicing of any mortgages etc.
- Children, particularly if the life tenant is not their biological parent, can get very frustrated and can begin to challenge the administration of the estate, the investment of any funds etc.

# Options to consider when dealing with Wills and Trusts

- Life Insurance Policies – Could these be a solution to providing for a spouse or children?
- Rights of occupation for a limited time period often in conjunction with a Contracting Out Agreement and/or a Property Sharing Agreement?
- Memorandum of Guidance that are not generic but specific to circumstances.
- Forgiveness of debts owed by Trust to Will maker – in some circumstances this could be used to provide for payments of legacies under a Will to persons who are not beneficiaries of the Trust.

# What are the benefits and potential problems with these structures - 4

## Wills

- Clauses setting out unequal division of assets between spouse and children.
  - e.g. all to surviving spouse/50% to spouse 50% equally to children/All to children, but life interest in estates share of property to spouse.
- Clauses explaining the background to unequal division for, or exclusion of, beneficiaries are very effective.
- One of the most common approaches but if poorly drafted or insufficient supporting documentation they are open to successful challenge.
- Can be challenged under the FPA, LR(TP)A and PRA.

# What are the benefits and potential problems with these structures - 4

- Specific gifts are useful in detailing who is to receive what and avoid many of the fights that arise around jewellery, art and other items that have a primarily sentimental value. Ensure that in the event of any dispute the administrator's decision shall be final.
- Consider equalisation clauses in regards to any distributions made to other children while alive.

# What are the benefits and potential problems with these structures - 5

## Mutual Wills

- This section applies when 2 persons make Wills in which each disposes of property on which the 2 persons have agreed; and
- makes the disposition in a way on which the 2 persons have agreed; and
- Each promises the other that he or she will not:
  - Revoke or change the Will in order to defeat the agreed approach; or
  - dispose, during his or her life, of some or all of an item of property that the Will specifically disposes of; and
  - The first of them to die (person A) keeps the promise; and the second of them to die (person B) does not keep the promise.

# Identifying and minimising the likelihood of a claim

- Good documentation is the key – updating the terms of a Will often hinges on being able to prove the deceased considered all those whom he or she felt he or she owed a moral duty to.
- Ensure you have good notes – email the clients immediately after the first meeting summarising the family circumstances, points of discussion and your understanding of their instructions.
- Insert clauses in the Will explaining that the Will maker has considered their obligations and the needs of their beneficiaries.
- Draft a supporting declaration for the Will maker to sign explaining the circumstances surrounding their decisions – include details of support previously given to excluded or deprived beneficiaries etc.

# Identifying and minimising the likelihood of a claim

- Well drafted Wills with supporting documentation are essential to ensuring the Will makers intentions are upheld. They also protect your firm from criticism in the future.
- Don't treat Wills for complex or blended family situations as an afterthought or cheap addition to your conveyancing offering. This is one of the clients most important documents and deserves to be treated as such.
- In the appropriate circumstances consider including a clause stating that the Will maker has discussed the contents of the Will with their family and ensures that this happens.

# Helpful Points

- H – History (Duration of relationship and parentage of children)
- A – Assets (Extent, Current vs new ownership structure)
- N – Needs (Who is, or may be, dependant on Will maker)
- D – Dynamics (Who gets along with who, who may bring a claim)
- C – Conflicts (Independent Advice, effect of separation)

There is no “silver bullet” or simple “one size fits all” solution when formulating an estate plan in a blended situation. Each relationship and family unit is unique and in each instance the clients will want to achieve different objectives.

# Scenarios

- **Scenario One**
- Tom and Kylie are a couple in their forties who met four years ago and live together. They have both previously been in long term relationships. Kylie has a child from her previous partner with whom she receives minimal child support payments. Tom owns a house, with a mortgage of \$800,000. He has recently received a substantial legacy from his mother. Kylie is pregnant with Tom's child and they intend having more children together. Tom is currently providing financially for Kylie's child.

# Scenarios

- **Scenario two**
- Mary and Gordon are a couple in their late seventies, both widowed. Mary has three daughters and Gordon has one son. They both receive national superannuation and Gordon has bonus bonds and a bank account with \$300,000 in Term Deposits. Mary has substantial investments and a home worth \$1.3 million. Gordon does not own a home because he dedicated most of his life to charitable causes. They are close friends, have known each other for fifty years and Gordon has recently moved into her home because it is bigger and has central heating. Mary's children all live overseas and rarely communicate with her.

# Scenarios

- **Scenario three**
- John and Emma met approximately two years ago on a cruise around the Mediterranean. John is aged seventy and Emma is aged thirty. Emma moved from Europe to live with John and is both his partner and primary care giver as John now has restricted mobility. John was previously married with three adult children. He separated from his former wife 5 years ago, they did not divorce although an informal separation agreement was entered into. John has limited assets in his own name but is the settlor and a beneficiary of a trust which owns the property he lives in, worth \$3,000,000 and substantial investments. John wants to ensure that Emma is comfortable for the rest of her life but John's children intensely dislike Emma and this has caused a rift between John and his children.

# Timothy Orr



DDI:+64 9 300 7618

MOB:+64 21 0228 2119

Email:[timothyo@martellimckegg.co.nz](mailto:timothyo@martellimckegg.co.nz)