

Private Client

February 2010

Estate planning for blended families

Estate litigation

Estate planning is something we at McMahon Clarke Legal are passionate about. If not done correctly, then the damage that can be done to the relationships between family members is enormous and can last for many years. Estate litigation is a growth area for many legal firms (including ours), but the human and financial cost of litigation of any sort, but particularly estate litigation, is significant and could so often have been avoided if the deceased had taken appropriate advice in relation to their affairs. While the issues for blended families are no more or less important than for other families, they are perhaps more likely to go awry,¹ simply because of the additional relationships that exist.

Example

Take the example of a husband (Harry) who has been separated from his first wife (whether by divorce or by death) and who has teenage children from that relationship.

After a few years, Harry meets a new partner (Wendy) who is younger than him. They marry and have one child together. Harry's estate planning has clearly become significantly more complex. Harry has a desire to make provision for his grown children, but (obviously) he also wants to ensure the financial wellbeing of Wendy and their young child. Harry's natural inclination might be to leave the majority of his estate to his current partner (Wendy) and leave a more modest inheritance to the children of his first relationship on the understanding (which Harry and Wendy have agreed among themselves) that when Wendy passes, she will provide for all of Harry's three children.

However, adopting this strategy can cause significant headaches for Wendy and Harry's children for a variety of reasons:

1. Given the age of the children from Harry's earlier relationship (they had almost left home when Harry and Wendy married), while they get along well, there is not a strong relationship between them and Wendy. Furthermore, it is likely the relationship will dissipate over time simply because they will spend less time with Wendy as they themselves marry and have children. Therefore, while Wendy had the best of intentions when she agreed with Harry she would include his adult children in her Will, that inclination may wane over time.

¹ A blended family is a family where one or both of the parties to the relationship have had previous partners and/or marriages (whether by divorce, separation or death). Often there may be children from one or both relationships which introduces an additional layer of complexity.

2. Secondly (and perhaps more importantly), adopting this strategy puts Harry's children in a position where they need to consider whether or not they ought to bring a family provision application against their own father's estate at the time of his death. Because Wendy was much younger than Harry, she is likely to live for many more years after Harry's death. So even if Wendy honoured her promise to Harry, the children will have to wait significantly longer for their inheritance.

Furthermore, in some states, Harry's adult children (Wendy's step-children) may not be eligible to bring a claim against Wendy's estate if in fact she does not make adequate provision for them (something they obviously won't know at the time of their father's death).

3. Finally, even if the children were eligible to claim, they also face the prospect that their father's estate will have been dissipated over the years to such an extent that it is not worth them making a claim at all.

As you can see, given Harry's situation, he needs to give considerably more thought to how he makes provision for Wendy and all of his children (from both relationships). Adopting a "plain vanilla" Will where Harry leaves everything to Wendy with an expectation Wendy will 'do the right thing' is not going to address all the issues.

Estate planning

The above is a simple example of the types of consideration which come into play for blended families. Of course, no two clients are the same and in every case, careful attention ought to be paid to ensure the client's estate planning wishes are met.

For any assistance with in-house training for advisers or staff in providing advice in relation to a specific estate planning project for one of your clients, please contact us.



If you would like more information, then please contact **Sean McMahon** by email or on 07 3239 2915.

Foreign assets and international estate planning

Foreign assets

One consequence of living in a world with a global workforce where an increasing number of people work overseas for extended periods is that more and more Australians own foreign assets. However, having assets outside of Australia can cause some problems when it comes to estate planning because while the ‘global village’ is coming together, its lawmakers are not and the legal systems still vary between countries. Therefore, careful consideration should be exercised when you have a client who has or may have assets or property located outside of Australia.

Succession laws and taxation regimes differ from country to country and even in Australia, succession laws differ from state to state. Therefore, the challenge of identifying the succession laws and taxation regimes within the country the assets are held is essential.

Estate planning strategies

There are many strategies and structures available to deal with succession issues for assets held outside of Australia. However, the favoured and most simple strategic plan undertaken for people with foreign assets is to prepare a Will in each jurisdiction an asset is held.

However, there are some difficulties associated with having separate Wills for separate jurisdictions. For example, there is a potential for the accidental revocation of a Will, if a revocation clause in the Will has not been properly drafted. However, the positive aspects of having separate Wills will usually outweigh the negatives, and will be preferable to the alternative of having a single Will with multi-jurisdictional capabilities.

Separate Wills

The main benefits of having separate Wills for separate jurisdictions are as follows:

1. The legal and administrative time and costs in administering the estate are significantly reduced because the executors of each Will are able to administer the estate wholly within one country and independently of any other Will dealing with assets in another country.
2. By having separate Wills prepared in each jurisdiction where assets are held, the formal requirements of each country are met and requirements for supplementary evidence is reduced. For example, a valid Australian Will may not necessarily meet the formal requirements for a valid Will in another country.
3. For the purposes of privacy, information can be kept separate from the beneficiaries and governments of each jurisdiction.
4. The Will can be tailored to be tax-effective in the particular country it is to operate in. For example, certain death duties and inheritance taxes would be confined to the assets in that particular country, rather than the total wealth of the testator being assessable.

5. If there are beneficiaries in each jurisdiction who are able to receive the assets, then any costs of transferring those assets across jurisdictions would be avoided.

Single Wills

If a single Will is intended to operate in Queensland and in a foreign country, then the difficulty of having a formally valid Will in both jurisdictions presents itself. Therefore, the Will drafter needs to ensure the provisions of the Will are compatible with Queensland's succession laws and the foreign country's succession laws. However, some of the following barriers might arise when attempting to draft compatible provisions:

1. The other jurisdiction may indicate that a stipulated share of the deceased's estate is to be provided for the spouse and children, which cannot be dealt with or reduced by the Will.
2. The taxation laws may differ significantly.
3. Guardianship arrangements may be different to our guardianship arrangements.

Our recommendations

There are many estate planning strategies available to clients however, care must be taken so that each situation is assessed in accordance with the client's individual circumstances and the appropriate estate planning strategy applied accordingly.

We recommend legal advice should be sought in each overseas country where assets are held and if it is appropriate or necessary, then a Will complying with the formal requirements in relation to the assets in that country should be prepared.



If you would like more information, then please contact **Evelyn Abadines** by email or on 07 3239 2924.

Succession law news

Did you know ...

If you have a client who is the executor and sole beneficiary of real property under a Will, then it is not necessary to register two transfers on the title.

If the executor has registered a transmission upon death into their name as executor, then once the executorial duties are complete, the property will no longer be held on trust and the executor will own the property outright.

However, it would be wise to register the required form in any event to ensure the estate has been finalised neatly.

Contact

If you would like some advice about how to manage estate assets during administration, then please contact Laura Hanrahan, a solicitor in our estate planning team.



Laura Hanrahan can be contacted by email or on 07 3239 2924.

Superannuation instalment trusts—two years on

Borrowing by superannuation funds

In recent months, we have seen a significant increase in the number of clients looking to take advantage of the ability to borrow through their superannuation fund using superannuation instalment trusts (SITs). This is perhaps to a large extent due to increased confidence in the property market together with the major banks developing their own lending products in the two years that have passed since the legislative change.

The amendments to the *Superannuation Industry (Supervision) Act 1993* created an exception to the long-standing borrowing prohibition imposed on superannuation funds. The change means superannuation funds can borrow in limited circumstances.

Borrowing by superannuation funds is allowed due to an exception to the normal prohibition, so it is important clients understand the limited circumstances in which superannuation funds may borrow (Borrowing Rules).

Back to basics—the main elements

The key requirements of the Borrowing Rules are set out below:¹

1. The money borrowed must be used to acquire an asset which the superannuation fund trustee could have acquired directly.
2. The asset is held on trust and the superannuation fund trustees acquire the beneficial interest in the asset.
3. The superannuation fund trustee has a right to acquire the legal title of the asset by making one or more payments.
4. The lenders' recourse against a superannuation fund trustee for default on the borrowings is limited to the rights related to the asset.

¹ Section 674A of the *Superannuation Industry (Supervision) Act 1993*.

Key points for clients to note

A key requirement of the Borrowing Rules is that the acquired asset be held on trust for the superannuation fund. One of the more common mistakes we have found is where clients have entered into a contract to purchase an asset in their capacity as trustee of their self-managed superannuation fund (SMSF). This makes it very difficult to then establish an SIT.

An instalment trust structure which complies with the Borrowing Rules should be established prior to the acquisition of the asset. Typically it is the instalment trustee who enters into a contract for purchase of the asset and not the SMSF trustee however, this will depend upon the type of instalment trust arrangement.

Please refer to [December 2007](#) and [July 2008](#) editions of *Private Client* for further information about superannuation instalment warrants.

McMahon Clarke Legal has completed SIT transactions with each of the major lenders and is available to provide advice regarding SITs generally and to assist in their establishment for your clients.



If you would like more information, then please contact **Laura Hanrahan** by email or on 07 3239 2924.

Unsuccessful family provision applications

Further provision

In the last issue of *Private Client*, we wrote about the circumstances in which a family provision applicant may be unsuccessful, illustrated by the Queensland case of *Underwood v Underwood*.

The 2009 New South Wales Court of Appeal decision in *Ford v Simes* is another example of an unsuccessful applicant. In this case, the determining factor was one of estrangement between the son and his father.

Estrangement

Mr Ford died on 16 March 2004. He left a daughter and a son. At the time of his death, his son (the applicant) was incarcerated in Queensland.

The deceased left the whole of his estate to his daughter who was also the executrix. The estate's major assets were some tenanted shops valued at approximately \$1 million.

The applicant suggested to the court he would require \$10,000 to \$20,000 to purchase equipment so he could resume his business upon his release from prison and at least a further \$250,000 to \$300,000 to purchase a modest residence in a location in which he intended to live in Queensland.

The applicant had been raised in Sydney but left in about 1990. From 1990 until his father's death in 2004, there was only one short encounter between the two when the applicant verbally abused the deceased.

In 1998, the deceased wrote to his daughter about his relationship with his son, where he referred to the applicant's lack of respect for him, his failure to contact him for any of his birthdays and his failure to assist him as he had aged. The deceased also referred to the fact that he had not provided his daughter with the same kind of material support he had provided to the applicant during his youth.

The decision

The applicant relied on a line of cases which say that where the estrangement can be explained, usually by fault on both sides, a claimant may still be successful. However, there will be cases in which the estrangement is such that the testator is entitled to make no provision for an estranged child. The court found this was one of those cases.

Acrimony or estrangement does not necessarily destroy the bonds of parental ties. The nature of the estrangement and the underlying reason for it is relevant to an application for further provision. This case was distinguishable from all the other cases relied upon by the applicant, in that this was a unilateral abandonment of the father for 14 years from when he was 76 until he died at 90.

The court made specific reference to the entitlement of testators, in certain circumstances, to make no provision for children. This is particularly so in respect of children who treat their parents callously, by withholding without proper justification their support and love from them in their declining years. Even more so, where that callousness is compounded by hostility.

Summary

In circumstances where the child has estranged themselves from the parent, it may be possible to not provide for that child in the Will. Whether the child can challenge the Will is a question of fact and may involve interviews with other family members.

Administering estates or drafting Wills for clients where relationships between family members are such that there is a potential for a dispute requires particular care. If you or your clients are concerned about these types of issues, then please contact us.



If you would like more information, then please contact **Brit Ibanez** by email or on 07 3239 2960.

Estrangement not enough to defeat claim

On 5 February 2010, the Queensland Supreme Court delivered its judgement in the case of *O'Donnell v Gillespie*. You may have read about this decision in the newspapers as the media was fascinated by this family's story. Unfortunately, it is a story all too familiar to those who practice in this area.

In this case, despite an estrangement of 12 years, the court granted Mr O'Donnell's application for further provision from his father's estate. This contrasts with my article in this newsletter which talks about cases of estrangement denying an applicant's claim.

The lesson is that the individual circumstances of each family must be taken into account when drafting documents for the disposition of assets or in properly advising clients of their prospects in making a claim against an estate.

If you would like further information about the O'Donnell case or the effects of estrangement on the provision which should be made in a Will, then please contact us.



Brit Ibanez can be contacted by email or on 07 3239 2960.

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