Estate Planning for Blended Families

Anticipating the challenge and providing for the future
Recognising where there is a blended family

• 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

- 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.
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.
Understanding the common law and legislative framework

- Testamentary Freedom subject to:
  - Family Protection Act 1955 (FPA)
  - Property (Relationships) Act 1976 (PRA)
  - Law Reform (Testamentary Promises) Act 1949
  - Administration Act 1969
  - Wills Act 2007
  - Trustee Act 1956
  - New Trusts Bill

- Applicable legislation in overseas jurisdictions
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

Martelli McKegg lawyers
Property (Relationships) Act 1976

• “To provide for a just division of the relationship property between the spouses or partners when their relationship ends 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).
• 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.
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 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.
The following gifts are conditional upon my current partner, ZZ, surviving me and our continuing to be in a (*state nature*) 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.

ZZ and I have entered into a Contracting Out Agreement under Section 21 of the Property (Relationships) Act 1976. ZZ accepts that she has no claim to the assets of the YY Trust.

The terms of the Contracting Out Agreement are binding on the Executors of my Estate and should be adhered to.
I direct that the following gifts are made in addition to the terms of the Contracting Out Agreement:

My Children are beneficiaries of the YY Trust and I have requested that the trustees of that trust make provision for them.

I have made known to and discussed with my beneficiaries my intentions and it is my hope that they will all respect my wishes.

In making such distributions I have had regard to my obligations under the Family Protection Act 1955 and the Property (Relationships) Act 1976.
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 or other claim.
- Recent judicial decisions and the new Trusts Bill highlight trustee’s responsibilities to act in the interests of all beneficiaries of a trust.
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 (particularly those of a previous relationship).
• This approach will usually circumvent any prior asset structuring advice and could cause significant difficulties if clients separate.
• Can leave little if anything for children and increase animosity.
Life Interest

- Who wants to live forever?
- Can be an 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.
Wills

- Clauses setting out clearly the specific 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.
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 or benefit from interest earned on funds 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.
• 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.
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 - 1

• 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.
While much of the above may seem self-evident, it can make the difference between ensuring that the deceased’s wishes are respected or a claim being successful.

When dealing with a Trust (or any other structure) always look closely at the original intentions of the Settlors in establishing the Trust and consider the supporting documentation prepared by them at that time (Clement v Lucas).

Discuss with your clients the possibility that they have made any promises or other form of potentially binding commitments in regards to their estate or other property (including Trust owned property), particularly if that person has made any contributions or provided services (Masters v Stewart).
Consider carefully the role an independent person can play as the Executor of an Estate or Trustee of a trust – particularly where the presence of such a person can serve to reassure some beneficiaries that their needs will not be sacrificed in favour of others.

Is a mechanism needed by which an independent person cannot be arbitrarily removed by someone who holds that power.

Document the reasons that the independent person is being appointed and whether they are to consult with or have regard to the views of any particular persons in making any decision.

Be very mindful of the liability that may attach to that persons role and ensure that indemnities (such as may be available) are obtained to protect the person taking on that role.
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.

Where possible document the true nature of the relationships between the family and the benefits each person may have received from or given to the

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.
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.
• **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.
• **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.
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