



Estate and Succession Planning and Blended Families

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Estate and Succession planning can become complicated when a client is involved in a blended family. The term "blended family" maybe used to refer to any family situation where at least one of the current partners in the relationship has been in a previous marriage or de facto relationship and they have a child from that previous relationship. Such a previous relationship may have ceased because of separation, divorce or death.

What follows is an overview of the particular issues that face clients with blended families when dealing with estate and succession planning and the different approaches to planning and structuring estates in respect to blended families.

Blended Family Particular Circumstances

In order to adequately advise a client in respect to blended families a clear understanding of the parties involved and the history of the relationships is needed.

In particular the following circumstances need to be determined:

1. Current partner assets and liabilities held:
 - o Separately
 - o Integrated
 - o Other

2. Property settlement between the client and their ex-partner
3. The nature and length of the relationship between:
 - o Current partner
 - o Ex-partner
 - o Ex-partner's children
 - o Children from previous relationships
 - o Adoption of children from previous relationships

Particular Estate Planning Issues with Blended Families

Blended families raise many of the same estate and succession planning issues as 'intact families'. However, there is an additional layer of complexity with blended families due to:

- Complexity of the personal relationships; and
- Additional legislation that may apply to clients that may have a blended family.

Set out below are some matters that are particular to dealing with blended families.

Potential for Conflict

Conflicts may arise at a number of levels and not just between previous partners.

Conflict between stepchildren and step parents or between siblings of different parents. Furthermore there is a risk of conflict been heightened where there are adult or minor children from the previous



marriage and their natural parent marries or enters a de facto relationship with a second spouse.

Family Provision Planning

Every State in Australia has its own legislation giving rights to certain persons to claim against a deceased estate if adequate provision has not been made for that claimant in the Will or under intestacy.

The need for family maintenance legislation was cogently summarised by Gleeson CJ of the High Court in *Barns v Barns* where he said that its purpose was:

*"to prevent family dependants being thrown on the world with inadequate provision, when the person on whom they were dependent dies possessed of sufficient estate to provide for or contribute towards their maintenance"*¹

While it is beyond the scope of this strategy update to deal in any detail with the different legislation in each state, there are separate issues with children that need to be mentioned.

Stepchildren

The nature of the relationship between step-parent and stepchild after the termination of the relationship between the natural parent and the step-parent, by reason of divorce, separation or death, should always be considered.

At common law, it is now well established since the decision of the High Court in *Re Cook Maxwell; Ex parte*² that where any marriage terminates by divorce or death of one of the parties to the marriage, the step-parent/stepchild

relationship is also terminated.

If this is undesirable, the adoption of the stepchild by the step-parent may be a solution. However, such a process can be lengthy and in the following circumstances may be impractical:

- The stepchild has attained 18 years of age; or
- The estranged natural parent is still alive.

Family provision legislation in all jurisdictions except Queensland adopts the common law position that the meaning of child does not include a former stepchild. Thus a former stepchild would have no ability to make an application under the family provision legislation.

Such a result would be particularly unfair in circumstances where a child's natural parent has an understanding with the surviving spouse, that on the death of the natural parent, all of the assets are to pass to the surviving spouse provided that on the death of the surviving spouse, some of those assets are to pass to the natural parent's child. If the surviving spouse does not pass the relevant assets to the former stepchild as promised, the former stepchild would have no ability to make an application for family provision against the surviving spouse and would therefore not receive the assets that their natural parent had earmarked for them.

In order to avoid situations like the above, considerable care should be taken by advisers to ensure that adequate provision is made for the children from the first marriage. In this respect life

¹ [2003] 8HCA 9

² [1985] HCA 47 [1985] 156 CLR 249



insurance should be considered to ensure all children are adequately provided to meet the problems that may occur in respect to blended families.

Effect of Divorce

In most jurisdictions, any divorce subsequent to the making of a Will invalidates the appointment of the divorced spouse as executor and any gift to that spouse. Therefore, if a new Will is not subsequently completed, it may mean that your client may die wholly or partly intestate. If a person dies intestate, the estate is distributed under the laws of intestacy in each State. If the Will validly disposes of only part of the estate, then the balance of the estate is administered under the intestacy provisions.

It is worth noting that similar laws are not in place for the separation of married couples. This means that the appointment of a separated spouse as executor and any gift to that person will remain valid even though that relationship may now have ceased.

It is therefore prudent for all individuals who have undergone a separation or divorce from their spouse to complete a new Will.

Effect of Remarriage

In most jurisdictions, marriage has the effect of revoking a current Will, unless the Will is made in contemplation of the marriage.

Again, if a new Will is not executed it may lead to a result that a client dies wholly or partly intestate. Recourse will then be made to the intestacy provisions in each State.

Family Trust Distribution Tax

Family trust distribution tax of 46.5% will generally be payable in circumstances where a trust makes a family trust election or an interposed entity election and a distribution of income or capital is made outside the relevant family group.

Prior to 1 July 2007, the term "family group" was narrowly defined to include the primary individual, their spouse, child, parent, grandchild, grandparent, brother, sister, nephew and niece. This meant that distributions made to a former spouse, former widow/widowers and former stepchildren would all attract family trust distribution tax.

However, from 1 July 2007, the following changes were made to the definition of family group:

- The definition of 'family' was broadened to include lineal descendants of family members;
- Measures were introduced to ensure that the death of a family member does not by itself result in another person ceasing to be a member of the family; and
- Distributions to former spouses, former widows/widowers and former stepchildren were exempted from family trust distribution tax by including them within the definition of 'family group'.

This now means that since 1 July 2007, distributions made to a former spouse, former widow/widowers and former stepchildren child will no longer attract family trust distribution tax.



In future issues of the Strategy Update we will continue with reviewing structuring superannuation, life insurance, Will, Testamentary and Family Trusts and other Asset Protection strategies in respect to Estate and Succession Planning and Blended Families.

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