

How to Divide Your Wealth Without Dividing Your Blended Family

Introduction

Anyone who has completed or reviewed their estate plan recently can tell you that there are hard choices to be made. This could be choosing the right person for an appointment or how soon you would like your children to have control over their inheritance.

Increasingly, there are hard choices to be made in planning for wealth transfer because many of us are in blended families. Blended families come in many different forms:

- You, your partner or both of you already had a child from another relationship.
- One of your parents may have re-partnered – before you were born, while you were growing up or later on when you were an adult yourself.
- One of your adult children may have entered into a relationship that involves children from a previous relationship.
- You may simply be planning for the possibility that there may be a blended family in the next generation of your family.

In a blended family, you face many of the same personal and financial issues with building and protecting your wealth as in any other family, both during your lifetime and after you are gone.

However, a blended family can mean you face great complexity in transferring ownership and control of your family wealth.

In this paper, we explore:

- What happens when you separate, divorce, marry or re-partner?
- Six planning mistakes for blended families to avoid
- The five appointments you need to make
- Who gets the family home?
- What if you want to pass everything onto your children?
- What if you want to benefit everyone?
- What if you expect an estate challenge?
- What if you have structures like a Family Trust in place?

To demystify what can be a jargon-rich topic, please turn to the back of this paper for a quick guide to estate planning terms



*What happens when
you separate,
divorce, re-partner
or marry?*

You've just ended a relationship or started a new one. It can be expected that you hadn't put reviewing your legal and financial arrangements as the first item on your to-do list.

We work with our clients to review their financial and estate plan to understand which of their structures and documents continue to achieve their goals. We know it is not uncommon to meet new clients who did not have an estate plan or have a plan that does not pass ownership or control of their wealth to their desired beneficiaries. We often see clients who have Wills and appointment documents from their first marriage which give decision-making powers to their former spouse. It's common to see superannuation with a former spouse as the nominated beneficiary upon death or see a Self-Managed Super Fund or Family Trust in which the beneficiaries include the former spouse but not the new partner.

Please be aware that succession is mostly governed by state and territory legislation.

The following are some general rules, but you should also seek the advice of your estate planning lawyer.

What happens when you separate or divorce?

Separation does not revoke your Will or the appointment of your former spouse as your financial attorney or guardian.

Divorce does not revoke a Will, but it does remove any benefit to your former spouse as well as the appointment of your former spouse as your executor, trustee or guardian. However, it does leave intact the appointment of your former spouse as trustee of property left on trust for the children of you and your former spouse. Divorce does not revoke your Power of Attorney or the Appointment of Enduring Guardian of your former spouse.

Consider:

- ▶ Helping adult children who may not have the same capacity to support themselves as their siblings. Some families tell us they worry that one of their children is unable to get or service a home loan or may not have savings to draw on in an emergency.
- ▶ Making a new Will that includes a clause revoking all previous Wills. Estate planning lawyers generally consider it unwise to rely on the default position under the law regarding divorce as it may lead to unintended consequences.
- ▶ Consider notifying your former spouse of the revocation of his or her appointment as your financial attorney or enduring guardian, the best option being to sign a revocation and have that served to your former spouse.
- ▶ Consider whether any additional documents are required to be prepared, such as a binding financial agreement.
- ▶ Ensure all your appointment documents nominate a substitute for each position in the event the person you have appointed is unable or unwilling to act.

What happens when you re-partner or marry?

Re-partnering does not revoke your Will or the appointment of your former spouse as your financial attorney or guardian.

Marriage revokes your Will unless you specifically made it in contemplation of your marriage. That said, marriage doesn't revoke any benefit or appointment of the spouse to whom you are married at the time of your death. Your appointment of a financial attorney remains effective, regardless of whom you appointed, whether your current or former spouse. Your appointment of an enduring guardian is revoked upon marriage unless you marry the Enduring Guardian.

Consider:

- ▶ Helping adult children who may not have the same capacity to support themselves as their siblings. Some families tell us they worry that one of their children is unable to get or service a home loan or may not have savings to draw on in an emergency.
- ▶ Making a new Will that includes a clause revoking all previous Wills. Estate planning lawyers generally consider it unwise to rely on the default position under the law regarding divorce as it may lead to unintended consequences.
- ▶ Consider notifying your former spouse of the revocation of his or her appointment as your financial attorney or enduring guardian, the best option being to sign a revocation and have that served to your former spouse.
- ▶ Consider whether any additional documents are required to be prepared, such as a binding financial agreement.
- ▶ Ensure all your appointment documents nominate a substitute for each position in the event the person you have appointed is unable or unwilling to act.



Six Planning Mistakes To Avoid

Don't expect a perfect solution

One of the most confronting realisations you may make when succession planning for a blended family is that you will rarely get what you want. State-based family provision legislation, and the added reach of notional estate provisions in NSW, require you to look after certain family members more than you may wish.

If an eligible family member makes a claim, the courts can intrude into your private arrangements and substitute your decision for theirs. Yes, you could move to Queensland to avoid the NSW laws, as one lawyer quipped, but a pragmatic approach is essential.

Don't assume you have to die first

Many believe that the greatest gift they can give their children is their grandchildren's education. They don't wait until they die to give this gift.

We encourage our clients to think first about the purpose of their life savings – it should provide not only food and shelter, but pleasure and fulfillment too. Many have created wealth well beyond their own personal needs and instead choose to help their children when it is most needed, make a philanthropic gift or teach a child the responsibilities of being a steward of family wealth. You should obtain specific legal, financial and taxation advice before transferring assets prior to your death because the cost transfer, including any applicable tax, may lead to different financial outcomes for your or your beneficiaries.

Of course, we often see that living longer brings an increased likelihood that you won't always be able to make decisions for yourself. Do you want to take the risk that you and only you can keep your world spinning on its axis? We have assisted too many widows and widowers with the challenges of unravelling the complex structures their partners managed.

Don't rush the selection of your succession planning team

You need the right people at the wheel of your estate planning. You can scour the map, indicate the destination and mark out the best route. But what about the roadworks, the other drivers, the inclement weather?

You cannot predict or control those factors. You have to trust in the wisdom and skills of the people you have appointed to act for you after you die or when you can no longer make your own decisions. And there are many appointments to make – Executors, Trustees, Guardians, Attorneys and Beneficiaries to name but a few, as well as substitute appointees if the person you have appointed is unable or unwilling to act.

Who will make health, lifestyle and medical decisions for you if you cannot? What about financial decisions? After your death, who will carry out the terms of your Will? Wills are complex, and your Executor can be sued if they do a poor job. If you set up a trust in your Will, known as a testamentary trust, who will manage it, and who will make sure they are doing a good job?

These are hard decisions. How do your family dynamics play out? If you appoint multiple people to a role, can they have competing interests and still work together productively? If in doubt, do you consider adding in a professional adviser, like an accountant or solicitor, as an independent tie breaker? But what about those extra costs?

Don't assume everyone wants an equal slice of the pie

We have found it far more common than you might think for couples to have their first frank discussion about wealth transfer with us and their lawyer. That's when it clicks that they don't agree on how to transfer ownership and control and they have different expectations of how the other will provide for them. "You might re-marry if I die? Really? I didn't expect to hear that!"

Not all Will-makers choose to leave the home to their partner or to treat all their children equally. Beneficiaries will have different needs and expectations. You may not know if you don't ask. They may surprise you and open up alternative strategies to explore, like selling the family home or giving different gifts at different times. You may wish to leave your children an equal share, but your investment banker daughter may have different cash flow needs to your teacher son.

Whilst it's a deeply personal decision, we are seeing a growing trend for couples to tell their children about their estate plans and involve them earlier in philanthropy or Family Trust. Not all lawyers will recommend this approach, so discuss it with your professional advisers so you can weigh up the considerations.

Don't tie your beneficiaries together in financial knots

Adult children with parents still together are more likely to receive their inheritance from their longer-living parent, while adult children in blended families are more likely to receive a portion of their inheritance earlier.

However, we have seen examples where the Will-maker has tried to share the assets. The partner is allowed to live in the home and spend the income of the trust, but ultimate ownership passes to the Will-maker's children after the partner dies (or repartners or remarries, depending on the terms of the Will).

It can work, but the beneficiaries can also feel that it is ruling from the grave, and it can damage family relationships. Would each party have accepted a different arrangement that gave them potentially less money, but gave it to them sooner and with fewer restrictions? Not everything in estate planning is about maximising the after-tax dollars. Freedom from the control of one's parents can also be highly prized!

Just because your family gets along now, don't assume that your harmonious family bonds will continue after your death. As one lawyer told me, the bond can all too often disappear because you were the glue holding it all together.

Don't assume your family will never be blended

It's understandable that the main sticking point in your estate planning as a parent is guardianship of your young children in the event of both parents die early. But it's mercifully rare for both parents to die simultaneously. Far more likely (statistically speaking) is that you will divorce and re-partner.

In our experience, couples, both old and young, are increasingly acknowledging this prospect and planning for the protection of their wealth, even if their marriage is great and they are healthy. We urge our dual-income professional clients who have built assets before marriage and who are well insured not to skimp on their estate planning.

If you do not have a Testamentary Trust, ask your estate planning lawyer why it's not right for you. Spoiler alert: it's appropriate far more often than you would think. Your beneficiaries can choose not to go ahead with the trust, but they cannot wind back the clock and get one if you didn't ask the right question. Setting up an Estate Proceeds Trust within three years of your death may provide some, but not all, of the same benefits as a Testamentary Trust.



The Five Appointments You Need to Make

Estate planning is about appointing one or more trusted representatives to make decisions for you when you cannot because of incapacity or death. It's important to understand the roles and to think carefully about which of your family, friends or trusted advisers be the best person to take on each appointment.

Tips:

- ▶ Make sure that the people you appoint can work together productively.
- ▶ Consider appointing a person to represent each "side" of any estate planning challenge you may foresee. This could be an appointee to represent the interests of your current spouse and an appointee to represent the interests of your children from a previous relationship.
- ▶ Consider appointing an independent person as a tie breaker for decision-making.
- ▶ Nominate a substitute for each role in case the person whom you have appointed is unable or unwilling to act.
- ▶ Review your appointments regularly. Ask yourself, for example, if this is still the person you trust to make your financial decisions or decide where you are going to live?

Executor

Your Executor is the person you appoint in your Will to carry out the terms of the Will and administer the estate. The main responsibilities are to arrange the funeral and disposal of your body, apply for probate, pay your debts and taxes, decide whether to sell your assets and distribute the estate to the beneficiaries.

In a blended family, the role of Executor can be more complex where the Will is difficult to interpret, the beneficiaries are at odds, or a claim is made for further provisions.

Trustee

Your Trustee is the person or company you appoint to administer a Trust you set up in your Will. The Trust is set up for a specified purpose, but the Trustee exercises discretion in making decisions under the powers given to the Trustee in the Will. The main responsibility is to invest the assets of the Trust for the long-term benefit of the beneficiaries and to pay capital or income to beneficiaries depending on the terms of the Trust as set out in the Will.

In a blended family, the role of Trustee can be more complex where there are competing goals. For example, take a situation where you leave a capital reserved Trust from which your spouse may receive the income and your children from a previous relationship may receive the residual capital of the Trust. It's foreseeable that your spouse will prefer the trust to be invested to maximise income, while your children will prefer the trust be invested to maximise long-term capital growth. A Trustee must be well placed to manage the various interests.

Appointer

The Appointor is the person to whom you can give the power to remove and appoint the Trustee of a Trust, be it a Family Trust or Testamentary Trust.

In a blended family, the role of Appointor is an important check and balance for the discretion which the Trustee has in exercising her or her powers. A Trustee could be perceived to be exercising discretion in favour of his or her interests as a beneficiary. The Appointor can exercise his or her discretion to step in and remove the Trustee.

Enduring Attorney or Financial Attorney

The Enduring Attorney or Financial Attorney is appointed to make financial decisions if you wish him or her to do so and/or are not capable of making them yourself. The Attorney is a fiduciary of the principal and must always act in the best interest of the principal for the principal's benefit.

The appointment can come into effect immediately if you so choose. Alternatively, you can specify that it comes into effect when your attorney or a medical practitioner determines that you have lost the capacity to make decisions.

In a blended family, it can become complicated when an Enduring Attorney makes decisions that favour a new spouse and children over children from a previous relationship, or vice versa. This could be selling particular assets to fund medical or aged care, where that sale reduces the amount one group of beneficiaries will inherit.

Enduring Guardian or Health Decision Maker

The Enduring Guardian is appointed to make lifestyle, health and medical decisions for you when you are not capable of making them yourself. The appointment only comes into effect when you lose the capacity to make your own decisions and ceases if you regain this capacity.

In a blended family, an Enduring Guardian can be a difficult role that requires balancing the wishes and beliefs of groups who feel an equal entitlement to make those decisions, such as a new spouse and adult children.

QUESTIONS TO CONSIDER

- ▶ Should I appoint a professional Executor such as a trustee company or a professional adviser (such as a lawyer or accountant)?
- ▶ Does my chosen Executor(s) have the skills to deal with the estate? This can include making financial decisions, managing expectations of beneficiaries and understanding family tensions.
- ▶ Whom should I appoint if my Executor(s) cannot or do not wish to act?
- ▶ What assets and liabilities will my Executor be managing?
- ▶ What assets would the Trustee of my Testamentary Trust need to manage?
- ▶ Should I appoint a company or person as a Trustee?
- ▶ Will my chosen Trustee(s) be able to administer the testamentary trust over a potentially longer period?
- ▶ Should I appoint a professional Trustee such as a trustee company or a professional adviser (such as a lawyer or accountant)?
- ▶ Whom should I appoint if my Trustee(s) cannot or do not wish to act?
- ▶ Who among my family (or friends or trusted advisers) would best fill the role of Appointor?
- ▶ How should the role of Appointor be passed on if the person I choose is no longer able to act?
- ▶ Should my Enduring Attorney be the same person or people as the Executor?
- ▶ Should I place restrictions on the powers of the Enduring Attorney?
- ▶ Should my Enduring Attorney's appointment come into effect immediately or when I lose capacity to make decisions?
- ▶ Who has the most appropriate skill and temperament to fill the role of Enduring Guardian in my family?
- ▶ Should I leave a living will or directions for my Enduring Guardian to aid them in their decision-making, for example in relation to end-of-life care?



Who Gets The Family Home?

Decisions about the family home are often difficult.

Do you give your spouse a right to remain in the home, which eventually passes to your children? Do you split your asset base between your spouse and children, with the result your spouse may have to leave the family home? Do you leave your family home to your spouse, with your children to inherit the remainder of your asset base?

Rights of Residency and Life Tenancies

Many lawyers favour seeking an arrangement which does not continue to tie your surviving spouse and your children financially through a life interest in the family home. Tying the inheritance of family members together has the potential to test relationships.

It remains common, however, to have an arrangement which allows your partner to remain in the family home

but your children to inherit it upon your partner's death (or remarriage). Many lawyers now prefer a right of residence to a life tenancy. Its portability allows more flexibility if the spouse later wishes to move or to fund a transition into aged care by selling the property. It also has tax advantages, such as not creating a capital gains tax event when it ceases and still allowing the main residence capital gains tax exemption even if the home is moved into a testamentary trust (bearing in mind the potential land tax implications).

Rights of residency can be portable (transferrable to a different place of residence) depending on the terms of the Will. This provides flexibility for the person with the right of residency, for example, to downsize or pay a Residential Accommodation Bond (RAD) to move to an aged-care facility. It's important to remember aged-care facilities only repay the bond to the estate of the resident, not the estate of the partner who established the right. Accordingly, the terms would need to include recovery of this amount from the estate of the resident.

Splitting the Assets

This is most easily achievable in higher net wealth families with substantial Family Trust, superannuation or business assets outside that which can be passed on to children. If your family home is your largest asset, this goal may potentially be funded through life insurance.

Tips:

- ▶ The family home might not be the sticking point it looks to be. Ask your beneficiaries if the family home is important and then ask why. You may find beneficiaries may not place the same value on the home, and other points may be more important to them.
- ▶ The family home may be more a burden than a gift. This could be the case, for example, where the home is large and its upkeep is expensive.

QUESTIONS TO CONSIDER

- ▶ Who owns my home? Should I take steps to change the tenancy of my property holding?
- ▶ Does the family home make sense for my spouse or me if one of us was on your own? Is it the right size? Could my spouse or I afford the upkeep on our own? Would my spouse want to remain living in the home after I pass away?
- ▶ Can my spouse continue to support himself or herself if he or she only receives the family home? Will he or she also need further provision from my estate in order to receive an income?
- ▶ What would the experience of a life tenancy be like for my spouse? What rights and responsibilities would my spouse have? Who would pay rates, taxes, costs of repairs and other outgoings for the home? What rights are there to sell the house or downsize? What rights would my spouse have to bring his or her own family to live in the property? Could my spouse move out and rent the property and get income from it? What rights does my spouse have to bring in a new partner?
- ▶ How would my spouse fund aged care if he or she needed it down the track?
- ▶ How well do my spouse and children get on? Would it work for them to continue to be tied together by the family home?
- ▶ If I left my spouse a life interest in our home, what would my children receive now? How old might they be by the time they would likely receive the family home after my spouse has passed away?
- ▶ How much do I want to leave to my children? Can I fund this inheritance from other assets or from insurance?
- ▶ What can I do if I want to make an agreement that my spouse? Should I leave a living will or directions for my Enduring Guardian to aid them in their decision-making, for example in relation to end-of-life care?
- ▶ How much do I want to pass on to my kids?
- ▶ Do I have a testamentary trust? Who would control it and who would benefit from it?
- ▶ What happens if asset values change significantly? Could one of my beneficiaries end up much better or worse off than I intended?



What If You Want To Benefit Everyone?

In our experience, you and your spouse may be more likely to wish to benefit each other and your own children if you met later in life and one of you is not independently wealthy or if you met earlier in life and build wealth and perhaps a family together. In such cases, you may wish to support your spouse during his or her lifetime but also ensure your children are the ultimate beneficiary, so your wealth stays with your bloodline. We tend to find this of particular concern if it is reasonably possible your new partner may survive you and there is a risk your wealth may ultimately become part of their children's inheritance (rather than your own children's inheritance) or may become assets of a new relationship.

Tips:

- ▶ How and when your children may inherit may impact how happy they are with the outcome, particularly if your partner is likely to outlive you by some time.
- ▶ Asset values can change significantly from the date of the Will, which can result in inequity or insufficient provision for the children of your surviving spouse.
- ▶ Be open to an estate plan that incorporates a range of methods of planning such as the traditional Wills, powers of attorney and enduring guardianship documents, as well the less traditional letter of wishes, family agreements or family constitutions. Sometimes, blending different approaches may be the best strategy for a family.

should be a person who will understand the best interests of your children. If you ultimately intend for the assets to be divided between a new spouse and children, then an independent third party or co-trustee arrangement may be preferable.

A second layer is the purpose of the money in the Trust, and there can often be two purposes: to support the spouse in their lifetime and to benefit the bloodline after the spouse's death. This becomes a question of balancing complexity and certainty with flexibility and understanding the implications of tying different parties together, in the same way that a right of residency or life estate in the family home could. It risks creating tension over the investment strategy for the trust, with your new spouse likely wishing to maximise income and your children wishing to maximise long-term capital growth. It also risks conflict where your children may have to wait some years to inherit when your new spouse has passed away, especially if your spouse may be younger than you. Your children may also resent your new spouse spending the income with a new partner after your death.

Sharing the assets

Some solicitors will suggest a Capital Reserved Testamentary Trust to benefit your spouse during his or her lifetime but ensure the capital of the trust is protected for your children from a previous relationship. A Capital Protected Trust allows for the income of the trust to be distributed to, say, your new spouse as the income beneficiary and the capital reserved for a period of time for children as capital beneficiaries. In a blended family, this arrangement can achieve your goals but may bring its own complexities. For example, the value of the assets can change significantly and may not provide sufficient income for your surviving spouse.

The first layer of complexity is the choice of people to appoint. The Trustee you appoint must not simply have sufficient financial acumen. If your ultimate intention is for your children to benefit from the assets, the Trustee

With significant wealth or illiquid assets, a Master Testamentary Trust structure may enable different control during a particular period or over a particular asset. This is helpful where there is a single large illiquid asset, such as a property development site that needs to be sold at the right time or a business asset that is critical to the business. The Master Trust is like a unit trust, and you have your normal testamentary trusts underneath that where each child can exercise their own discretion about what they actually get.

Splitting the assets

This is most easily achievable in higher net wealth families with substantial Family Trust, superannuation or business assets outside that can be passed on to children.

One strategy is to separate the assets into individual Testamentary Trusts, one for each beneficiary. This may involve selling large assets or splitting up smaller assets, like shareholdings.

Another strategy is to put in place a life insurance policy to equalise how much beneficiaries receive. For example, one beneficiary could inherit a lumpy asset like the family home, and another could inherit through the insurance policy. It's important, of course, to consider the impact of tax on the outcomes achieved but also be aware of the risk that the asset values may change significantly and result in inequity.

QUESTIONS TO CONSIDER

- ▶ How much do I want to pass on to my kids?
- ▶ Do I have a testamentary trust? Who would control it and who would benefit from it?
- ▶ What are testamentary trusts like to administer? What would the experience be like for the surviving spouse?
- ▶ What happens if asset values change significantly? Could one of my beneficiaries end up much better or worse off than I intended?



What If You Expect An Estate Challenge?

Your estate distribution plan may be challenged in some circumstances if an eligible beneficiary makes a Family Provision Claim.

Your estate distribution plan may be challenged in some circumstances if an eligible beneficiary makes a Family Provision Claim

In NSW, it is important to remember that the reach of family provision claims may be larger than in other jurisdictions. This is because a Family Provision Claim can result in the Court looking beyond your actual estate to your Notional Estate. Notional Estate refers to the assets that you don't own directly at the time of your death because the assets were transferred to another person or a trust without full valuable consideration in the three years prior to your death or on or after your death. In NSW, the Court may apply the assets of the Notional Estate to satisfy the claim where the Court considers there are insufficient assets in the estate to make adequate provision for a beneficiary.

Tips:

- ▶ Think about communicating your plans and taking into account the wishes of your beneficiaries.
- ▶ Consider the steps available to you to provide certainty.
- ▶ Be rigorous in documenting all gifts and loans to beneficiaries of your Estate at the time they are made. Be clear in your Will, and to the beneficiary, whether a loan will need to be repaid or a pre-death gift will be taken into account in an equalisation clause in your Will.

formal written record or acknowledgment of receipt of the gift, preferably with context of why the gift was made. It's important to clearly document that the funds are a gift and not a loan.

This strategy is often used to equalise provisions made to beneficiaries during your life, usually amongst adult children where one child may have received a financial contribution towards a property purchase. It has the effect of essentially creating a level playing field for your beneficiaries at the time of death when receiving a benefit under the Estate.

Lifetime structure

A lifetime restructure is a strategy in which you seek to take assets outside of the Estate that may be subject to a family provision claim. For example, you may move assets into a Family Trust so they are no longer your assets. You may change a tenancy in common to a joint tenancy to own them as joint tenants because the surviving joint tenant inherits directly, not by way of the Will. You may transfer superannuation to a beneficiary directly via a reversionary pension or death benefit nomination.

If you have a blended family, the motivation to restructure would arise from the need to protect your wealth as it reduces the amount available in the challengeable pool. However, in NSW, the Court has the power to apply the assets of the notional estate to satisfy a family provision claim and can claw-back any assets that have been disposed of or in which the interests have been altered within three years of the date of death. Superannuation and failure to sever a joint tenancy can also bring assets into Notional Estate. In other states, this is a more common strategy.

Financial agreement

In estate planning, the benefit of a binding financial agreement would stem from the parties releasing each other from a family provision claim. For this to be the case in NSW, for example, anyone giving up rights must obtain independent legal advice and have a Deed of Release under section 95 of the Succession Act approved by the Supreme Court. The Court may approve the release in relation to any part of your estate or your Notional Estate. Proceedings for approval of the release may be commenced before or after your death.

Immediate gift

One strategy to achieve your estate planning goals is to provide an immediate gift to a beneficiary during your lifetime. In NSW, this would generally need to occur at least three years before your death to reduce the risk of the relevant asset being considered as Notional Estate under a Family Provision Claim. It is prudent that when substantial sums of money or gifts are given, there is a

Facilitation

A third strategy, particularly for families with complexity, significant wealth and adult children, is facilitation of a family meeting. The aim would be a family agreement and a discussion about blending the estate plan into the intergenerational financial plan.

Collaborative agreement

Collaborative dispute resolution is an early-intervention, multi-disciplinary framework that involves lawyers working with other professionals, like financial advisers (as financial neutrals). The aim is for the parties to negotiate, cooperate and problem solve to resolve potential conflicts and reach a binding agreement. It is based on the parties and their lawyers having agreed not to litigate in court. It is a relatively new approach to estate planning and contested estates in Australia.

QUESTIONS TO CONSIDER

- ▶ Who could make a claim on my estate?
- ▶ Could I gift assets to a beneficiary now? If I still want to use the assets, could you make them a 'gift and loan back' arrangement? What are the tax consequences of making an immediate gift?
- ▶ Could I restructure my ownership of assets, for example, by moving them into a Family Trust? Would this be effective? What would be the cost to achieve this?
- ▶ Could I sever a joint tenancy? Should I?
- ▶ Could I transfer superannuation to a beneficiary directly via a reversionary pension or death benefit nomination?



What If You Have Structures Like A Family Trust In Place?

For higher net wealth blended families, a Family Trust will often form part of the picture for asset protection, tax efficiency and wealth transfer. Indeed, the wealth outside the estate in Family Trusts and other entities can often be larger than the actual estate. The assets of the Family Trust, however, are not your assets and are not distributed in accordance with your Will.

Choice of Trustee

If your Family Trust has a corporate trustee, what is distributed in accordance with your Will is your shareholding in that corporate trustee. If you are an individual trustee, control passes in accordance with the terms of the trust deed.

Whom you would seek to take control of the Family Trust depends on whom you'd like to benefit from the underlying assets. If your intention is for your children to benefit under the Family Trust, then the children or a member of your family would usually be appointed to the role of the trustee to ensure the children's best interests are observed. This would usually be someone with sufficient financial acumen to continue the management of the Family Trust's affairs. If you intend for your surviving spouse and children to benefit, you may appoint an independent third party to the position of trustee.

Make sure you have accounted for gifts and loans you or your entities have made during your lifetime. Have them appropriately documented and determine whether this may force a trust or company to sell assets to repay a debt to the estate.

Choice of Appointor

The same considerations often apply to your choice of appointor, perhaps even more so as the appointor usually has the ultimate power to remove and appoint a trustee.

Tips:

- ▶ Consider your wealth transfer plan as part of the establishment of a Family Trust. For example, whether you settle the trust with a gift or a loan will have an impact later on.
- ▶ Consider a corporate trustee to enable control of the Family Trust to pass more easily to your intended beneficiaries.

QUESTIONS TO CONSIDER

- ▶ Have I made loans to the Family Trust that may be recalled by my estate upon my death?
- ▶ Does my Family Trust have unpaid entitlements owing to beneficiaries?
- ▶ What is the purpose of the Family Trust? Where does it fit in my financial plan?
- ▶ Who do I wish to benefit from the Family Trust? How do I want them to benefit?
- ▶ What is the timeframe for investment in my Family Trust?

Now what? How can you get started?

In a blended family, your estate planning raises many questions. How will your plans impact your loved ones? How can you preserve family relationships as much as possible? What is the legacy you want to pass on?

There is much to consider but, in thirty years of assisting our clients, we have found it helpful to come back to three important principles:

- Consider where you want to fall in the continuum between allowing flexibility and providing certainty. You probably cannot achieve certainty, flexibility and simplicity in your wealth transfer plan. It's important to give thought to achieving your goals and finding the right balance for your family. Do you want to appoint people you trust and let them make the best decisions at the time? Or do you want to provide detailed provisions that must be followed and be comfortable that your wishes are clear?
- Get good advice about making and communicating decisions about how you manage and pass on your wealth. Good advice can help you to think through some of the issues and complexities, put in place considered and pragmatic arrangements, structure your affairs, prepare your family and integrate your financial plan with your estate plan. It's better to pay for professional advice to prepare your plans than to repair them down the track.
- Your broader wealth transfer plan can form the foundation and structure for your ongoing financial decisions. It is not a document to stick in the bottom drawer. As a rule of thumb, review your estate plan every five years or every time there is a major event (i.e. death, illness, sale of business, birth of child, separation or divorce) to ensure that the estate plan achieves your goals.

About Stanford Brown

What is enough? Not easy to answer. Tougher to ensure.

Stanford Brown provides the tough love that fulfills lives. We go deeper on the things that matter. Really listen to what you want, have the difficult conversations, tackle your biggest issues, cover your blind spots, and act. Always in your best interests.

Our clients will tell you, that's more than enough.

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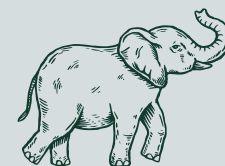
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Kirsten can guide you smoothly through major life transitions, such as riding out separation and divorce, passing wealth to the next generation, and funding your family. She combines her legal expertise with a knack for simplifying financial choices using live modelling that visually demonstrates options. She offers clear insights into complex decisions and tailors financial strategies for each stage of life.

Areas of expertise

- Family Separation and Blended Families
- Intergenerational Wealth Transfer
- Wealth Creation and Protection
- Retirement and Superannuation Strategies
- Self-Managed Super Funds, Family Trusts and Testamentary Trusts

Quick Guide to Estate Planning Terms

Appointments

Executor – A person who is appointed to carry out the terms of the Will and administer the Estate. The Executor is appointed in the Will.

Trustee – A person or company who is obliged to administer the trust for specified purposes and is given powers to control property in a trust but exercises discretion in making decisions under those powers. The Trustee is appointed in the trust deed (Family Trust), the Will (Testamentary Trust) or deed of appointment (if the Appointor of the trust appoints a new Trustee). The Will or trust deed can set out how the Trustee is replaced. For a corporate Trustee, the majority shareholder will usually control the appointment of directors of the company.

Appointor – A person who is given the power to remove and appoint the trustee of a trust. The Appointor is appointed in the trust deed (Family Trust) or the Will (testamentary trust). The trust deed or Will can set out how the office of the Appointor passes, often by nomination of a successor in the Appointor's own Will. An Appointor can also be referred to as a "Nominator", "Principal" or "Guardian" in a document.

Enduring Attorney – A person who is appointed to make financial decisions if you wish them to and/or are not capable of making them yourself. The appointment can come into effect immediately or when you lose the capacity to make decisions. The Enduring Attorney is appointed in the relevant appointment document or by decision of the relevant tribunal in your jurisdiction. The appointment usually ceases in a number of situations, including if you revoke it, you or the Enduring Attorney die or the relevant tribunal in your jurisdiction revokes it.

Enduring Guardian – A person who is appointed to make lifestyle, health and medical decisions for you when you are not capable of making them yourself. The appointment only comes into effect when you lose the capacity to make your own decisions. If this is temporary (for example, you come out of a coma), the Enduring Guardian can no longer make decisions for you. The Enduring Guardian is appointed in the relevant appointment document or by decision of the relevant tribunal in your jurisdiction. The appointment usually ceases in a number of situations, including if you revoke it, you or the Enduring Guardian die or the relevant tribunal in your jurisdiction revokes it.

Guardian of minor children – A person who is appointed to make decisions for your children who are under 18. The Guardian is appointed in your Will, but the Family Court can make the final decision if the matter comes before it.

Documents

Will – A legal document which sets out who receives your estate assets upon your death, appoints someone to act as your executor and sets out their powers, can set up a testamentary trust and appoint someone to act as trustee and set out their powers, can appoint a guardian of your minor children, and can pass on control of a Family Trust.

Superannuation death benefit nomination – A legal document which determines or guides who will receive your superannuation benefits. It can be binding or non-binding, lapsing or non-lapsing. It will only be valid if the beneficiary is your Legal Personal Representative (in effect, your estate) or a dependent under the *Superannuation Industry (Supervision) Act 1993* ('SIS dependent'). This includes your spouse, your child (of any age) or a person with whom you have an interdependency relationship (generally, with whom you live and provide domestic support and personal care).

Trust deed – A legal document which establishes and governs a trust and sets out the powers of the trustee. In the case of a testamentary trust, the Will fulfils this role.

Appointment document – The required document will vary from state to state. Some states have a single document to appoint someone to make financial and personal decisions. Others have separate documents.

Financial Agreement – A financial agreement allows you to formally note your intentions for future asset ownership should your relationship break down. However, they can be set aside by the court in some circumstances, such as where there is a material change in circumstances relating to the care, welfare or development of a child of marriage that leads to financial hardship for a party; where there has been undue influence; where the parties have failed to comply with disclosure requirements; or where there has been a significant change in circumstances of the parties (often the case if the agreement is many years or decades old).

Ownership structures

Investment Bond – A long-term investment with features similar to a managed fund combined with an insurance policy. As it is a life insurance policy, you need to nominate a life to be insured and a beneficiary to whom the proceeds can pass directly without going via the policy holder's estate. Investment bonds can be tax effective for long-term investors with a marginal tax rate higher than 30%, as long as certain rules are followed. They are designed to be held for at least 10 years to be more tax effective.

Family Trust – A type of discretionary trust which has made a Family Trust election. The trustee, either a person or company, holds property for the benefit of the beneficiaries.

Testamentary Trust – A type of trust that is set up under the Will upon the death of the Will-maker.

Joint Tenancy – An ownership arrangement in which property is owned jointly by two or more parties, with each having a right to the whole asset, and the share of each passing to the other or others upon death under the law of survivorship.

Tenancy in Common – An ownership arrangement in which property is owned jointly by two or more parties, with each having their own distinct share that they can pass on under their Will.

Family Provision Claim (or Further Provision Claim) – An application before the Court by an eligible person where they are not satisfied that you made an adequate provision for their proper maintenance, education or advancement in life.

Provision Claims

Notional Estate – NSW is the only Australian jurisdiction to have Notional Estate legislation. Notional estate refers to the assets that you don't own directly at the time of your death because the assets were transferred to another person or a trust without full valuable consideration in the three years prior to your death or on or after your death. The transfer may occur because of an act (e.g. gifting assets into a trust) or an omission (e.g. failing to sever a joint tenancy). In NSW, eligible persons (s 57) are entitled to bring an application before the Court for a family provision claim where they are not satisfied that you made an adequate provision for their proper maintenance, education or advancement in life. There is a common misconception that if your assets are transferred out of the estate before death, then they can reduce the pool for family provision claimants. But in NSW, where the Court considers there are insufficient assets in the estate to make adequate provision for a beneficiary, then the Court may apply the assets of the Notional Estate to satisfy the claim.

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