

BLENDING FAMILIES AND ESTATE PLANNING WEBINAR Q&A

1. The focus has been on the risk the children of blended families face; though, what happens in a de facto relationship where the deceased leaves everything to their children from a previous relationship and leaves the de facto partner out?

Yes, the presentation focuses on the dynamic between providing adequately for spouse (married or de facto) and children of a prior relationship. Estate claims can be made by certain other people in a relationship with the Willmaker – but these minor groups vary depending on the state or territory where the Willmaker and their property are located.

2. What timeframe does a spouse or child have if there is insufficient provision in the will of the deceased?

It varies depending on the State. For example, in Queensland, the claimant should indicate their intention to make a claim within 6 months from the Willmaker's death. Time limits are specified in each State's Succession legislation. Claimants can ask for the court to extend the time, but the court will look at the factors and if the estate has already been fully distributed then it is probably too late.

3. One recent case involved an adult child objecting to the trustee's decision to pay 100% of the benefit to the spouse. My question is: on what grounds can the adult child rely?

Super is a commonwealth law not State (estate) law, so it is not as defined as to how they make their decision. There are some general provisions that are a bit similar, but nowhere near as structured and hard to appeal the decision.

4. Can a claim be made by stepchildren if they are not reliant on the deceased assets to meet living needs?

There are a number of factors that the court looks at with an eligible claimant (such as stepchildren – note however that in NSW, being a stepchild alone is not sufficient to satisfy eligibility – there are other factors). A child (or stepchild, where eligible) may be successful in their claim even though they are not dependent on the Willmaker – such as adult children. But the court will look at a number of factors, such as contingencies that the child will face in the future (ill health, income in retirement, or lack thereof, etc.) and will also factor in the child's behaviour and assistance to the Willmaker (moral duty). The key is not whether you are dependent, but whether you have been adequately provided for in your circumstances (and taking into account other factors such as the size of the estate, who are the competing claimants, etc.).

5. Can you make a provision in a SMSF that a reversionary pensioner is only entitled to an income stream and on the death of that annuitant the capital goes to the estate of the deceased?

I'm assuming that you are asking – can a reversionary pension set up by W1 in favour of W2, be payable to the estate of W1 after W2 dies. This is a subject of some controversy amongst my senior colleagues in the industry – some say yes, while others say no. I'm of the view that if W1 grants a reversionary pension to W2, it becomes W2's super to do with as W2 pleases. But I may be wrong! There are no cases on the point or ATO ruling yet so it's up in the air. Personally, I wouldn't want to risk it. W1 should consider alternatives such as putting the super into a capital protected trust for W2 to enjoy the income and when W2 dies the trust specifies who the capital beneficiaries are. There are other ways too, to minimise the super death benefits tax.

6. If a residential property is in QLD and it doesn't form part of the estate of the deceased who was the owner, then it can't be considered part of the notional estate as it can in NSW?

There is no concept of notional estate in Qld or any other State/Territory apart from NSW. So, a property held as joint tenants on its face, is not an estate asset so not subject to claim. There are other equitable arguments that may come into play – such as, was the property transferred by the Willmaker when they were incapacitated or under undue influence – that could pull the property back into the estate. That is why it's important that if a client wants to do this strategy, they should get our legal advice so that all of the bases are covered against any future attack on the transaction itself.

7. Is there any plan available for advisers who want to experience the process and meet the team?

The best way to get a good understanding of how we deliver our estate planning service is to refer a client and ask them if they can sit in on the initial meeting. Advisors who have done that have often commented to me how much they got out of it and how much better placed they are to advise their clients. We are doing another training session with you all in August – this time on gifts and loans.

8. If a person owns a property in New Zealand is this covered in their QLD will?

Yes, but the estate administration becomes more involved and slower - so better to have a Will that deals with the NZ asset - ensure it is not revoked by the Aus Will

9. Should these figures be based on the financials at the start of the relationship and what each party brings into the relationship?

Yes, we should consider what they brought in at the outset and then look at how they contributed during the course of their relationship to date. Also - what are the contributions likely to be in the future. So, it is more involved than our simple case study example and the conversation can take a while before it comfortably reflects the clients' thoughts.

10. What about the scenario that Bruce has passed, and Kathy remarries or enters another domestic relationship? Is her new spouse entitled to stake a future claim?

Yes, Kathy's new partner can claim. There are strategies for Kathy that will help in this regard - such as BFAs, Inheritance Agreements, reducing her estate so the partner can't claim, which we would go through with Kathy (and not act for the new partner preferably).

11. How can you stop, if at all, the surviving spouse changing the will? A binding will?

There is no ability to do a binding Will or stop testamentary freedom - but an Inheritance Agreement between the two parties can be very powerful to achieve the same result even where the Will is changed. We go through this with the clients at our meeting with them and can do it for them.

12. Are the upfront gifts prior to death?

When Kylie talking about upfront gifts in this context, it is referring doing that in the Wills, so the kids get the gift after the Willmaker passes away. Of course, you can gift before death - but it better be factored into the Will unless you are wanting them to have the gift + a percentage share in the Will.

13. For super (generally, not part of the estate asset), in what situation, it would pay to its estate if non-binding nomination is in place for super?

A non-binding nomination leaves the decision regarding the death benefit to the discretion of the super fund trustee. Often, they will select a spouse to receive the benefit, sometimes they pay it to the Estate. It's hard to pick what they'll do as the decision is made by super fund employees who are not lawyers and will go with the information they are provided at the time. Best to do a binding nomination and take away this uncertainty.

Please note the answers to these questions should not be legally relied upon as they are general in nature and provided only for the purpose of providing general information/education to attendees. Attendees should seek specific legal advice for their client's situation.

