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SECOND SPOUSES, THE FAMILY HOME AND THE ESTATE PLAN

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1. Introduction

This paper is to accompany the presentation entitled 'Second spouses, the family home and the estate plan' to be presented at The Education Network's live Impact of Family Dynamics on the Estate Plan Live Conference in August 2022.

This paper will consider the following:

1.1 Balancing competing needs of beneficiaries

1.2 Choices of executors

1.3 Earmarking specific assets for specific beneficiaries – eg the family home

1.4 Life interests

1.5 Tax issues and life interests

1.6 Rights of occupation

1.7 Paying for maintenance of the property

1.8 Changing circumstances

1.9 Minimising risk of a challenge

2. Balancing the needs of 'competing beneficiaries'

2.1 In a blended family context, there are often three competing classes of beneficiaries which an estate planner (and their clients) need to take into consideration. They can include:

(a) the Willmaker's surviving (second) spouse;

(b) the Willmaker's adult children (say, from their previous relationship);

(c) the second spouse's adult children (say, from their previous relationship); and

(d) any children (including minor children) with the current (eg second) spouse.

2.2 It is important for the estate planner to consider the competing beneficiaries in a blended family context and balance the testator's intention to provide for all of them. Often, the Willmaker wishes to ensure that:

(a) the surviving spouse is looked after for the rest of their life and is adequately provided for;

(b) the adult children (eg from their previous relationship) are also provided for based on the circumstances of each of them;

(c) the (minor) children (eg from the second relationship) are also provided for;

(d) provision made to any of the children during the parent's lifetime is adjusted for or protected from that child's relationship breakdown.

2.3 There is no "one size fits all" solution for all clients. Often the first meeting will touch on a whole range of issues, including more "sensitive" issues. It is important for the estate planner to be able to have a frank discussion with the individuals and all issues need to be put on the table (including the "awkward" ones) to ensure the estate planner can appropriately advise.

2.4 Some questions we may need to ask include:

(a) whether there is a binding financial agreement in place between the Willmaker and their spouse (whether it be first, second or other);

(b) the relationship between the Willmaker and their children;

(c) the relationship between the Willmaker's (eg second) spouse and the children from the Willmaker's previous relationship including financial or other dependency between the parties;

(d) the relationship between the Willmaker and the (second) spouse's children from the spouse's previous relationship including financial or other dependency between the parties;

(e) the relationship between all of the children and how each of them are perceived relative to each other; and

(f) is there the likelihood of challenge by an aggrieved beneficiary (eg the adult children from a previous relationship)? Where could this challenge risk come from? Notably, it may not always be the beneficiaries challenging the distribution of wealth, but such ideas of challenge may stem from:

(g) the adult children's spouses; or

(h) the parent of the adult children, namely the former spouse/partner of the Willmaker.

2.5 As curious lawyers, we may need to enquire further into those relationships to be able to recommend an appropriate strategy. Whilst we cannot always guarantee an outcome or prevent a challenge down the track, we can try and prepare ourselves if something were to go wrong.

3. Choices of executors

3.1 An executor's obligation is to carry out the terms of an individual's the Will and to maximise the estate for the benefit of the individual's beneficiaries. The choice of an appropriate executor is crucial to a workable estate plan, especially when taking into account competing interests in a blended family context. The wrong choice of executor may result in potential conflicts of interests within the estate and also a badly managed estate for the ultimate beneficiaries. This could frustrate matters, unduly prolong the administration process and/or add to costs.

3.2 Depending on the Willmaker's circumstances and objectives, some choices of executors include:

(a) Appointing the spouse to act by themselves, noting though that the spouse will have full power over the estate (and potentially other structures outside the estate such as family discretionary trusts, according to the terms of the trust deeds).

(b) Appointing adult children as co-executors with the spouse. This may provide the opportunity for there to be a check and balance on each other (particularly in the context of second relationships), but query whether such a move can potentially add to the burden of estate administration with multiple joint executors. Also, this would only be workable if all parties get along. If there is a falling out between the children and the surviving spouse, this may result in disputes and potentially further costs to the estate.

(c) Appointing an independent third party as a co-executor with the spouse. Again, this may also provide a check and balance on the spouse and accountability.

(d) Appointing an independent third party as the executor to ensure impartiality between the spouse and the children.

3.3 Notably, there is no one size fits all solution and the appointment of executors in a Willmaker's circumstances depends on the Willmaker's circumstances and objectives as well as the circumstances of and family dynamics between the intended beneficiaries.

4. Earmarking specific assets for specific beneficiaries

4.1 Depending on the circumstances and ownership structure of the parties a common option is to split the estate up between the second spouse and the children on death under Will and other succession documentation.

4.2 This approach may be taken by:

(a) carving out and dealing with the family home specifically (eg for the second spouse's lifetime benefit, or as an outright gift to the second spouse); and

(b) passing control of a discretionary trust to a particular beneficiary and paying superannuation death benefits to another, or simply specifying the particular assets to pass under the Will assuming those assets are personally held.

4.3 This paper and presentation will focus on earmarking the family home for the second spouse via a life interest or right of occupation.

4.4 In any event, an issue that one must always bear in mind is whether there is a perceived notion of inequality if a beneficiary feels that they deserve more than what they are in fact given. For instance, the surviving spouse may feel 'entitled' to all of the residual estate for the rest of their life instead of being given a 'slice' of the pie.

5. Life interests

5.1 Life interests are commonplace in estate planning involving second spouses and are typically established under a Will. This type of trust usually involves:

(a) a beneficiary's right to income for the rest of their life (ie, the second spouse as the 'life tenant'); and

(b) capital being reserved for particular beneficiaries (eg children from the first relationship as the remainder or capital beneficiaries) on the death of the second spouse or life tenant.

5.2 Importantly, life interests established under Will only capture estate assets. Therefore, one's ownership structure is crucial as assets in family trusts and superannuation death benefits are not necessarily captured under Wills and therefore do not form part of the life interest structure on death.

5.3 Establishing life interest structures over particular assets in the estate (or the residual estate) on the death of one spouse with those assets earmarked for particular beneficiaries on the death of the second spouse may seek to provide certainty for the children that on the death of their stepparent, they will be guaranteed particular assets in the estate.

5.4 The control of the life interest is a key consideration. Who should be the trustees of the life interest? Some options include:

(a) having the surviving spouse together with the adult children as "checks and balances" on each other, provided that they all get along;

(b) having the surviving spouse together with an independent third party as a "check and balance"; or

(c) having an independent third party individually (or a group of independent third parties as checks and balances on each other).

5.5 Furthermore, depending on the state and territories, the Settled Land Act in the jurisdiction may apply to require a minimum of two trustees. The terms of trust ought to be drafted appropriately if the Settled Land Act is to be excluded.

5.6 Other drafting issues include:

(a) enabling income to be distributed amongst the life tenant's extended family (ie, extending the income beneficiary class); and/or

(b) access to capital in certain circumstances such as with the trustee's consent (eg if an income stream is insufficient for the day to day needs of the life tenant).

5.7 Life interests can be drafted to capture all of the residual estate and held for the lifetime benefit of the second spouse or be confined to specific assets (such as the family home). Note though that the following issues arise:

(a) Is it appropriate to 'lock up' the whole of the residuary estate for the rest of the second spouse's life; in those circumstances, the children

from the first relationship will need to wait until the second spouse dies before they get their inheritance.

(b) Should the life interest structure be used to simply carve out the family home for the second spouse's lifetime benefit, with the remaining assets distributed between beneficiaries (including the second spouse, if appropriate).

5.8 Under a life interest structure, the life tenant is generally entitled to an income stream from estate held assets, for the rest of their life. If the family home is held in a life interest structure and the second spouse chooses to move out, the property could technically be rented out as an investment property with the income passing to the life tenant.

6. Navigating the taxation implications of life interests

6.1 There are several tax implications for life interests, namely:

(a) income tax;

(b) definition of income under the trust instrument;

(c) capital gains tax – main residence exemption;

(d) capital gains tax – on the end of the life interest; and

(e) land tax.

Income tax

6.2 The life tenant (second spouse) will be taxed on any income generated within the life interest as the terms are usually drafted such that the second spouse is entitled to income from the life interest for the rest of their life.

6.3 The income tax considerations include:

(a) Whether there should be the ability to split income amongst a wider class of beneficiaries, rather than just limiting the income beneficiary to the life tenant. More traditional life interests only allow the second spouse as the life tenant to receive trust income. More modern drafting enables income splitting amongst extended family relations and related entities, with the consent of the second spouse.

(b) The definition of income (see below).

(c) Whether it is possible to stream a capital gain to be taxed in the hands of a capital beneficiary (eg children from the first relationship).

(d) Whether the terms of the life interest should include modern powers such as:

(i) the trustee's power to accumulate income/capital gain;

(ii) the trustee's power to elect to be taxed on the capital gain;

(iii) the power to make family trust elections; and

(iv) the power to reimburse a beneficiary in respect of the tax that they would bear on the capital gain and access to capital for

this purpose (regardless of whether they are an income/capital beneficiary).

6.4 Consideration should also be given to whether family trust elections should be made and also who the test individual ought to be. This is particularly relevant if the life interest holds listed securities which generate franked dividends. Where a life interest has run for five years and if a beneficiary receives more than $5,000 of franking credits, a family trust election will be required.[1]

Definition of income

6.5 Two common definitions of income are:

(a) the section 95 ITAA36 'tax definition' which includes capital gains in the definition; and

(b) the 'trust law / accounting definition' which does not include capital gains in the definition.

6.6 Division 6 of the ITAA36 governs the current taxation of trusts regime and is varied by the specific entitlement 'streaming' provisions of Subdivision 115-C (relating to capital gains) and Subdivision 207-B (relating to franked distributions) of the *Income Tax Assessment Act 1997* (Cth) (**the ITAA97**). Under the current regime:

(a) section 97 of the ITAA36 provides that where a beneficiary is presently entitled to a share of the income of the trust, their assessable income is the share of the net income of the trust estate; and

(b) section 95 of the ITAA36 defines net income of the trust estate to be the total assessable income of the trust estate, less all allowable deductions. Note that the assessable income of the trust estate includes capital gains made within the trust.

6.7 The High Court in *FCT v Bamford* [2010] HCA 10 (***Bamford***) held that:

(a) '**Distributable income**' of the trust or '**trust income**' is to be determined by the terms of the trust instrument or deed; and

(b) the **share** of net income to be included in the assessable income of beneficiaries is to be calculated as a **proportion** of the net income of the trust.

6.8 It is crucial in drafting trust terms, that appropriate definitions of income are used. Where the trust deed is silent, a trust law or accounting definition of income is inferred.

6.9 Under the current taxation of trusts regime, where a life interest has a trust law definition of income, it will be the case that:

(a) the life tenant (income beneficiary, second spouse) will be taxed on the capital gain that is made within the life interest (but which they may not have access to under the terms of the Will); or

(b) where the streaming powers under subdivision 115-C of the ITAA97 are invoked by the trustee, the remainder beneficiaries (capital

[1] See generally, Schedule 2F of the *Income Tax Assessment Act 1936* (Cth) (**the ITAA36**).

beneficiaries, children from first relationship) could be taxed on the capital gain, when they would not be able to access capital until the death of the life tenant.

6.10 A detailed study of the technicalities of the streaming rules and taxation provisions in Division 6 and 6E of the ITAA36 is beyond the scope of this paper, but in essence, a beneficiary may be made specifically entitled to a capital gain by being allocated (but not necessarily paid), provided that

(a) the beneficiary either **receives** or **can be reasonably expected to receive** the capital gain; and

(b) the trustee **records this in the trust's accounts** no later than 2 months after the financial year.

6.11 In instances where capital gains are made within the trust and the specific entitlement provisions are invoked where the capital gains are streamed to capital beneficiaries, those capital beneficiaries will be taxed on the capital gains. It should be noted that those capital beneficiaries may not receive the capital until the life tenant dies and may not have the sufficient amount of liquidity to pay the tax liability.

6.12 The capital beneficiaries in those circumstances may be able to call for the unpaid present entitlement standing to the credit of their account in the trust's books, but this may potentially force the sale of a lumpy asset within the trust.

6.13 In the event that the section 95 ITAA36 taxation definition of trust income is used in a life interest context, capital gains would be included in the definition of income and when distributions of income are made at the end of a financial year, the capital gain would pass to the life tenant. This is not ideal as it is usually the testator's intention that the capital accumulates within the trust over time, for the benefit of the ultimate beneficiaries on the death of the life tenant and not for the life tenant to have access to during their lifetime.

6.14 Given the current taxation of trusts regime, in drafting the terms of trusts where income and capital beneficiaries' entitlements differ, a power or direction to reimburse the beneficiaries who are taxed on the capital gain should be considered to ensure that no beneficiary would be out of pocket for payment of any CGT liability.

Capital gains tax – main residence exemption

6.15 Where a life interest extends to a main residence, it is important to consider the main residence CGT exemptions under Subdivision 118-B of the ITAA97 which exempts a taxpayer's main residence (up to an area of 2 hectares) from any capital gains tax on the sale, transfer or disposal.

6.16 In a deceased estate context, the CGT main residence may be extended under section 118-195 of the ITAA97. Three key provisions that extend the main residence exemption are that:

(a) the main residence is sold (and settled) within two years of the deceased's death;[2]

[2] Also see ATO Practical Compliance Guideline PCG 2019/5 in relation to the Commissioner's discretion to extend the two year period.

(b) the main residence was lived in by the deceased's spouse immediately before their death; or

(c) an individual had a right to occupy the dwelling under the deceased's Will.

6.17 Rights of occupation are further discussed, below.

Capital gains tax on the ending of life interests

6.18 There are complex CGT implications on the collapsing of a life interest and the Commissioner has provided his views relating to the operation of the capital gains tax rules in TR 2006/14.

6.19 There are CGT implications which need to be considered for the parties involved when life interests end, are surrendered or disclaimed.[3]

6.20 Furthermore, the Division 128 deceased estate rollover may also be lost, particularly where assets in the life interest are acquired after the deceased's death.

Land tax

6.21 The land tax principal place of residence exemptions differs slightly between States and Territories and are relevant to the extent that real estate is held within the life interest structure. All states and territories provide a principal place of residence exemption for land in which an individual (such as the second spouse) has a right of occupation.[4] Note that land situated in the Northern Territory has no land tax at all.

6.22 Real estate held in trusts are potentially subject to higher rates of land tax in New South Wales,[5] Victoria,[6] and Queensland.[7] However, in Victoria, a trustee is able to nominate a principal place of residence beneficiary in respect of real estate which is used as an individual's main residence which provides a concession on the amount of land tax payable by the trustee of the land.[8] In particular, the trustee would be assessed at general rates rather than surcharge rates ordinarily applicable to trusts.[9]

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[3] See in particular, TR 2006/14 and the application of the CGT 'E events'.
[4] *Land Tax Act 2005* (Vic), s 54; *Land Tax Management Act 1956* (NSW), Schedule 1A, s 2; *Land Tax Act 2010* (Qld), s 41; *Land Tax Act 2000* (Tas), s 6; *Land Tax Assessment Act 2002* (WA), s 21; *Land Tax Act 1936* (SA), s 5(10)(a)(i); *Land Tax Act 2004* (ACT), ss 9, 10.
[5] See *Land Tax Management Act 1956* (NSW), *Land Tax Act 1956* (NSW), Schedule 13.
[6] See, *Land Tax Act 2005* (Vic), s 46A re general land tax surcharge for trusts, but note s 46H and s 46I re nomination of PPR beneficiary for land tax purposes.
[7] The land tax-free threshold applying to Queensland property held in a discretionary trust is $349,999, compared with a tax-free threshold of $599,999 for property held by individuals: Schedule 1 and Schedule 2 of *Land Tax Act 2010* (Qld).
[8] *Land Tax Act 2005* (Vic), s 46H.
[9] *Land Tax Act 2005* (Vic), s 46I.

7. Rights of occupation in respect of property

7.1 A lesser interest is a 'right of occupation' which provides a beneficiary such as a second spouse (sometimes referred to as 'the occupant') a right to reside in the property for a finite period of time expressly specified under the Will, for example:

(a) for the rest of their life;

(b) for a finite number of years; or

(c) until such a time as they wish to vacate the property.

7.2 If a right of occupation is over the deceased's main residence:

(a) Ownership of the home remains with the executors of the estate. Unlike a life interest, a right of occupation will not allow an individual to derive income from the property, but depending on how its terms are drafted, it may allow the executors to purchase a substitute property for the individual to occupy.

(b) If the property is one the deceased held in their personal name prior to death, the CGT main residence exemption may extend to the property passing under the right of residency, provided that it was the property held by the deceased prior to their death and that an individual has an express right to occupy the dwelling under the deceased's Will.[10]

7.3 To ensure that the main residence CGT exemption and principal place of residence land tax exemptions are maintained as much as possible, it is common for rights of occupation to be drafted into terms of life interests (or other types of testamentary trusts), noting that the National Tax Liaison Group (NTLG) 5 March 2005 minutes provided a view that the main residence exemption is usually available to executors where there is an express right of occupation under a testamentary trust.

7.4 A right of occupation (unlike a life interest) does not give the occupant the right to derive rental income from the property (for instance, if they move out). The terms of the right of occupation are usually drafted such that when the right of occupation comes to an end, the residency right extinguishes and the property (or its proceeds thereof) would pass under the terms of the Will to beneficiaries stipulated therein.

7.5 Where rights of occupation are used, there are issues including:

(a) whether the right of occupation extends to substitute residences and if the Willmaker intends this to be the case, the terms of the right of residency should also be drafted to cover substitute residences; and

(b) whether the spouse is able to fund an accommodation bond (now referred to as a 'refundable accommodation deposit') where they need to move into aged care.

7.6 A right of occupation is a right to reside in a particular property (freehold of which is held by the executors and trustees of the estate) and hence, does not ordinarily extend to aged care where the refundable accommodation deposit needs to be funded by the individual moving into aged care. If for example, the

[10] See section 118-195 of the *Income Tax Assessment Act 1997* (Cth).

second spouse has limited savings and is relying on what the Willmaker is providing them, they may not be able to move into aged care and obtain a suitable residence for the rest of their life. These issues are considered further, below.

8. Paying for maintenance of the property

8.1 Wills are often drafted with life interests and/or rights of occupation to require the second spouse to pay for the upkeep of the property (rates, utilities and other outgoings) and to keep the property in a state of repair, to the trustee's satisfaction.

8.2 A key consideration is how these costs should be funded, particularly where a property's upkeep costs are significant. One cannot assume that a second spouse can continue to financially support the upkeep of the property on the death of the Willmaker. This is the case whether the main residence is subject to a life interest or a mere right of occupation.

8.3 Whilst it may be prudent to provide the second spouse with a 'nest egg' for life's contingencies, an additional amount could be set aside in a fund under Will for the costs of maintaining the property. In this regard, care needs to be taken in the drafting of such terms, expressly setting out:

(a) how much ought to be held back – eg a static figure or a percentage of the residuary estate;

(b) the purpose and use of these funds;

(c) the duration of the trust – eg linked to the term of the life interest or right of residency under the Will; and

(d) what is to happen to the remaining funds when the life interest or right of residency ends – consistent with those terms.

8.4 Furthermore, to the extent that the property is used as the second spouse's main residence (and provided the terms of the Will are appropriately drafted), land tax should be avoided.

9. Changing circumstances

9.1 Other considerations are that the second spouse may require some flexibility if the initial family home is no longer suitable accommodation for them. For instance:

(a) the original home may be too big and they may need to downsize into a more manageable residence; or

(b) they may no longer be able to reside independently and may need to move into aged care or retirement living.

Upsizing, downsizing and substitute residences

9.2 In the context of downsizing and upsizing, in a modern estate planning age, it is important for the drafting of life interests and rights of occupation to extend to substitute residences. In this regard:

(a) the trustees of the life interest or right of occupation should be required to purchase a substitute residence for the second spouse's lifetime benefit;

(b) the interests of the second spouse ought to be prioritised (over the interests of the remainder beneficiaries at the end of the life interest or right of occupation's term);

(c) any right of residence under the Will should extend to the substitute residence; and

(d) the term of the life interest or right of occupation should extend for a longer period of time (eg the end of the second spouse's life rather than the date of sale or vacating the original family home).

Retirement and aged care living

9.3 Furthermore, flexibility should be built in to contemplate the payment of refundable accommodation deposits and bonds and the fact that aged care agreements involve the following parties:

(a) the resident (or the legal personal representative of the resident such as attorney, administrator or financial manager); and

(b) the aged care provider;

9.4 Where the refundable accommodation deposit is being funded by an executor or trustee on behalf of the second spouse resident, the executor or trustee should then have the means of advancing funds by way of a loan to the second spouse for the second spouse to meet their obligations under the aged care agreement.

9.5 Rights of occupation are a 'lesser interest' which provides a right of residency in property held within the deceased estate. A right of occupation generally does not contemplate the moving into aged care accommodation and the ability to fund a refundable accommodation deposit or the sale of property and loan of proceeds. One view is that rights of residency may not be adequate or proper provision in the event a second spouse needs to move into aged care and portable life interests have ordered by the Court.[11]

9.6 Life interests generally allow the second spouse as the life tenant to occupy and use the family home and also allow them to derive an income stream from the assets for the rest of their life. However, a question that arises is whether this is adequate and proper provision for the second spouse who may need to relocate to aged care or retirement living and where the second spouse does not have adequate financial resources themselves to fund the accommodation bond.

9.7 The approach taken by Courts has been to award portable life interests to anticipate the changing needs of the second spouse. In this regard, modern drafting should include requirements for the trustees to:

(a) sell the family home; and

(b) loan necessary funds to the second spouse (or their legal personal representative) to fund aged care living for the rest of the second spouse's life.

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[11] See eg *Re Marsella; Marsella v Wareham* [2018] VSC 312; *Crisp v Bruns Philip Trustee Co. Limited* (NSWSC, 18 December 1979, unreported).

9.8 Such loan would then be repayable from the second spouse's estate on their death, back into the initial Willmaker's estate to be divided between the children from the first relationship.

10. Minimising risk of a challenge

10.1 A useful tool in minimising a challenge against an estate may be a binding financial agreement prepared under the *Family Law Act* 1975 (Cth) (**the Family Law Act**) alongside the estate plan.

10.2 A detailed family law discussion is beyond the scope of this paper, save to say that there is an intersection of family law and estate planning in the blended families' context.

10.3 If parties separate, the Family Court has power under the Family Law Act to make orders *inter alia* to divide property between the couple, make orders against third parties and declaration and partition orders. It also has orders to regard property as 'financial resources'.

10.4 To avoid the uncertainty of the Family Court, a couple may enter into a binding financial agreement under Part VIIIA of the Family Law Act where the parties set out in writing what is to happen to their assets should they separate. This is common tool used in a blended family context, where the objective of the parties is typically to protect assets for the children from the first relationship in the event of separation.

10.5 A comprehensive study of binding financial agreements under the Family Law Act is beyond the scope of this paper. However, an interesting issue is the relevance of financial agreements in the context of family provision claims being made by the surviving spouse/domestic partner against their estate. The Queensland Supreme Court of Appeal in *Hills v Chalk & Ors*[12] considered this issue and addressed the significance of a financial agreement in the context of a family provision claim.

10.6 In *Hills v Chalk*, Mr Hills and Mrs Chalk, a married couple, both had children from previous marriages. During their marriage, the majority of their assets were kept separate, and they cohabited on a genuine basis in Mrs Chalk's home. A pre-nuptial agreement was prepared prior to their marriage which provided that they were to retain their own assets in the event of separation. Another term of the agreement was that no claim for property settlement or maintenance from the other was to be made on separation. The agreement also recited their joint intention to preserve their assets for their respective children (and grandchildren).

10.7 Mrs Chalk passed away 8 years after their marriage. Under her Will, Mrs Chalk provided Mr Hills the right to live in Mrs Chalk's home after her death (subject to certain conditions) and a lump sum of $20,000. Mr Hills brought a family provision claim under the *Succession Act 1981* (Qld) as he was in ill health, could no longer live in Mrs Chalk's home and wanted funds to build a small granny flat on his daughter's land.

[12] [2008] QCA 159.

10.8 In summary, a family provision claim generally depends on the following issues:[13]

(a) Whether the claimant has standing – are they recognised in the state/territory as an eligible person to bring a claim;

(b) Whether provision made to the claimant was inadequate; and

(c) What would have been a proper provision, having regard to:

(i) The characteristics of the estate;

(ii) The totality of the relationship between the claimant and the deceased; and

(iii) The relationship between the deceased and other potential beneficiaries.

10.9 Notably, New South Wales is the only state that allows individuals to contract out of family provision legislation[14] (commonly referred to as a "section 95 release"). Furthermore, the Court must approve of the release for it to be valid.

10.10 The relevant question considered in *Hills v Chalk* was the terms of the financial agreement and its relevance to whether adequate provision had been made to Mr Hills in the circumstances. The Queensland Supreme Court of Appeal found that the terms of the financial agreement were indeed relevant in considering the totality of Mr Hills and Mrs Chalk's relationship. In particular, Keane JA held that:

> *"…the pre-nuptial agreement made by the parties, although not of itself directly decisive against Mr Hills' claim, is of significance to the assessment to be made by the Court of Mr Hills' application… The mutually agreed intentions and expectations of the Testatrix and Mr Hills expressed in the pre-nuptial agreement in relation to their adult children, and their acknowledgement that each should not seek to defeat the intentions of the other in that regard, was a consideration which should be regarded by the court as illuminating the totality of their relationship, and as suggesting that the provision made for Mr Hills by the Testatrix was adequate for his proper maintenance and support within the meaning of the Act."*

10.11 Therefore, the financial agreement was relevant in the circumstances given that:

(a) The parties' contemplated their estate plan together with their family law matters and this illustrated their intentions to provide for their respective families; and

(b) The terms of Mrs Chalk's Will were consistent with the parties' intentions as agreed upon in the financial agreement and should not have come as a surprise to Mr Hills.

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[13] See *Family Provision Act 1969* (ACT); Chapter 3 of the *Succession Act 2006* (NSW); *Family Provision Act* (NT); Part 4 of the *Succession Act 1981* (Qld); *Inheritance (Family Provision) Act 1972* (SA); *Testator's Family Maintenance Act 1912* (Tas); Part IV of the *Administration & Probate Act 1958* (Vic); *Family Provision Act 1972* (WA) and the *Family Provision Regulations 2013* (WA).

[14] See in particular, section 95 of the *Succession Act 2006* (NSW).

10.12 Therefore, estate planning practitioners (in particular those assisting blended family clients) commonly prepare individual's estate plans in conjunction with a carefully thought-out binding financial agreement to minimise the risk of a family provision claim on death and family law claim during their lifetime, to protect assets for each spouse's side of the family.

11. Conclusion

11.1 There are many sensitive issues that need to be properly addressed in estate plans involving blended families. In particular, the estate planner needs to balance the needs of competing beneficiaries including taking care of the second spouse whilst guaranteeing assets to pass to the adult children from the first relationship. There may be a misalignment of beneficiaries' interests and for that reason the estate planner needs to be equipped with appropriate tools to deal with potentially awkward situations.

11.2 Whilst there is no one size fits all approach to succession planning blended families, it is important that one considers all options in light of the Willmaker's family circumstances and estate planning objectives. All families are different; some families may get along and others may not.

11.3 Ultimately, protecting the family home for the second spouse's lifetime benefit to ensure they have a roof to live under may be key in managing the risk of a successful challenge on death, in the estate planning exercise. However, even then, given an ageing population and people living longer, it is very possible that an existing family home may no longer be suitable and further, supported retirement living may be needed in the future.

11.4 Life interests may be useful to ensure that the second spouse has a roof to live under for the rest of their life and to guarantee capital for the children from the first relationship. It is important to draft life interest terms in a modern sense, taking into account:

(a) income tax – including the definition of income and how capital gains are treated;

(b) capital gains tax – the main residence CGT exemption;

(c) the trust to extend to substitute residences;

(d) the ability to fund retirement and aged care living eg refundable accommodation bonds through interest-free loans from the trust to the second spouse.

11.5 Careful attention and being sensitive to client circumstances and objectives is crucial in managing one's expectations when devising an estate and succession plan for blended families.

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