

Wills for Blended Families

When you marry or re-marry there are a few things that you should know regarding your will.

A will is cancelled by marriage unless it is expressed to be made in contemplation of that marriage.

A will is not cancelled by divorce but the following occurs:

- an appointment of the former spouse as executor is revoked;
- any gift to a former spouse is revoked; and
- the rest of the will is interpreted as if the former spouse died prior to the will maker.

A matter which commonly arises is the making of wills by married or de facto couples who have children from previous relationships. These families are often referred to as blended families. In these circumstances the traditional simple will whereby the entire estate is given to the surviving spouse and when the surviving spouse dies is given equally among the children may not be entirely appropriate.

It is human nature for someone with a blended family to be concerned when making a will that should they die first, their partner will not adequately provide for their children from the previous relationship.

While it is possible that both spouses will provide equally for all children from previous and present relationships, consideration must be given to the fact that unless special steps are taken, there is nothing at law to prevent a surviving spouse from changing their will to reduce the benefits paid to the children of their deceased spouse.

There are at least three solutions to this potential problem.

Direct Gifts to Children

The simplest solution if the couple's estate is sufficiently large is for each spouse to directly make provision for their own children in their own will in addition to the primary provision for the surviving spouse. For example, each spouse might provide in their will for a gift of cash to their children from their previous relationship while leaving the marital home and other assets to their surviving spouse.

If this solution is desired, in order to ensure that there are sufficient assets to provide both for the surviving spouse and for the children of the previous relationship, recourse can be had to life insurance or the utilisation of binding death benefit superannuation nominations.

Contracts for Mutual Wills

The second possible solution is to enter into a contract to make mutual wills. This method involves both spouses executing wills which provide benefits for the children of both previous relationships. The spouses then enter into a contract in which they agree not to revoke their will without the permission of the other spouse. Additional provisions can be included in the contract requiring the surviving spouse to not unduly dissipate their assets so as to reduce the size of their estate available for distribution on their death.

This arrangement has the benefit of being appropriate for modest sized estates and being relatively inexpensive both to prepare and in terms of compliance costs after death.

Testamentary Discretionary Trusts

The third solution is to incorporate into each will what is known as a testamentary discretionary trust. As a rule of thumb this solution is generally more appropriate for estates in excess of \$1,000,000.

The phrase testamentary discretionary trust generally refers to a will in which one or more trust funds are set up with the intention that the bulk of the funds are held in trust for several years.

Testamentary discretionary trusts generally operate in a similar way to a normal family trust. A parcel of assets is gifted into the trust, a trustee is appointed and instructions are given to the trustee as to whom that trustee may make payments from the income or capital of the trust.

A typical testamentary discretionary trust may allow a trustee to distribute income generated by the assets held on trust to any of a class of people, generally made up of a spouse and surviving children. The class of potential beneficiaries may also include grandchildren and spouses of children.

There are several advantages to testamentary discretionary trusts. They can allow income to be paid to beneficiaries who are subject to a lower tax rate. Income can

also be withheld from beneficiaries who become bankrupt or experience marriage difficulties.

The primary advantage of a testamentary discretionary trust over a family trust created during one's lifetime is the ability to avoid paying the stamp duty which is generally payable when assets are transferred into a trust during one's lifetime.

The primary disadvantage to including a testamentary discretionary trust in one's will is the compliance costs associated with the trust after your death. These costs include the cost of the separate tax return which the trust will need to file each year along with the cost of seeking advice upon and documenting the decisions of the trustee as to the distribution of income.

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