SUPERCENTRAL

When you've seen one blended family – you've seen one blended family

Many lawyers talk about "blended families" as if they are all pretty much the same. Like, if you've seen one, you've seen them all.

But that is not the case at all. Really. In fact, nothing could be further from the truth!

There's the classic style of blended family where two persons (who may be widows / widowers and / or divorcees) who come together bringing with them one or more children each from a previous relationship.

Or it could be that only one of them brings children from a previous relationship.

In either of the above situations, the couple may also end up having one or more children together – who may be significantly younger than their other children from their respective previous relationships.

It could be that the couple are similar in age, or it may be that there is a significant age difference between them (particularly in the case where the older person has children of a previous relationship and the younger of them does not). Sometimes the younger spouse is also younger than the children of their partner.

Each of the above situations can be further complicated by issues such as:

- Children being adopted, or not being adopted, particularly in a "step" relationship;
- A previous relationship having ended due to divorce rather than by the death of the previous spouse;
- The previous and / or current relationship being legal or de facto,
- LGBTQIA relationships;
- Multiple de facto spouses and their respective children are involved;
- One of more children having special needs;
- Animosity between children of different relationships of their parents / step-parents;
- One partner having significantly more or less personal wealth than the other;
- Assets being held in structures such as family trusts and self-managed superfunds;
- The State or Territory in which the parties are domiciled;
- The types and locations of the assets in the estate of the Willmaker, which will determine which laws of which State or Territory will apply in the event of a challenge to the Will.

In each of the above scenarios, the objectives and obligations of the person who is the Willmaker in relation to their spouse and the children of either and / or both of them may differ enormously, and having regard to diverse considerations, such as:

- How close or otherwise the new spouse is to the children of the Willmaker;
- The length of any spousal relationship;
- Whether or not a new spouse made any significant financial or non-monetary contributions towards their living arrangements and capital assets;
- The legal ownership of assets;
- Promises made by one spouse to the other.

So when someone is in a blended family, their Will needs to reflect the complexity and fullness of their individual situation – especially where it comes to dividing up that person's estate amongst their intended beneficiaries, and working out what happens when certain persons pass and in what order (such as assuming that the children will survive the spouse, and that grandchildren will survive the children, and so forth).

In other words, how will the assets of the Willmaker "cascade" down the generations – and what if someone who is expected to survive another person passes before they do instead, causing the assets (or a significant portion of them) to "flow" in a different and unexpected direction. This is especially possible in a blended family situation.

A simple example of this would be to apply the standard Will approach to a classic blended family situation. Suppose each parent made a Will that simply said that when I die, everything goes to my spouse, but if they do not survive me then everything goes to my children in equal shares. If the father dies first, the wife takes all of his assets, then when she dies all of her assets (which also includes her husband's assets) will flow to her own children on her death and none of the husband's assets would flow to his own children. A similar and equally unfair result occurs if the wife dies first, because when her husband dies then her own children all miss out on the flow of inheritance.

Clearly a more sophisticated approach is needed here to bring a more equitable result for all the children once both parents have passed. For instance, if the couple came together at a time when all their children were very young and each person in the couple considers all of their children to be their "joint" children, they could make it clear in their Wills that a reference to children means all of the children of the couple, to ensure that all the children are treated equally once both of the couple have passed away, irrespective of who died first. In this instance, it may be wise for the couple to also consider putting into place a "Mutual Wills" arrangement to ensure that the survivor of the couple is not persuaded (perhaps by a future new spouse!) to change their Will so as to disinherit the children of their deceased former partner.

Alternatively if each person in the couple wishes to look after the survivor of them for life, but then ensure that their own assets are inherited by their own biological children after the survivor of the couple dies, they might decide to set up a special testamentary trust in their Will that provides the survivor of them with the income for life (or perhaps until they re-marry) but with no or limited access to the trust assets (or capital), and after their death (or re-marriage) the income and assets of the trust are held only for the benefit of the

children of the deceased person. Further, if the family home was held by the couple as "tenants in common" (so that each person has a discrete share of ownership in the home) they might grant each other a right of residence in the deceased's interest in the home so that the survivor can continue to live there and the home can continue to attract exemptions from land tax and capital gains tax as a principal place of residence during that time. Later when the survivor dies (or re-marries) the deceased person's interest in the home can thereafter be held only for the benefit of the children of the deceased person.

Then there's different legal implications arising from the different types of beneficiaries in the blended family, which can vary greatly depending on the State or Territory in which the Willmaker is domiciled. In particular, the so-called "notional estate" rules under the *NSW Succession Act 2006* can easily lay waste to many strategies that might work in other States and Territories to protect the Willmaker's assets from a claim against their estate.

For instance, if the Willmaker and the family home are located in Queensland, if the Willmaker wishes to ensure that their surviving spouse receives the family home without fear of it becoming exposed to a family provision claim by one of their children from a prior relationship, an effective strategy to prevent the family home from forming part of the Willmaker's estate (and therefore potentially exposed to a successful claim under family provision laws) is for the Willmaker to hold it as "joint tenants" with their spouse. On the death of the Willmaker, the family home will not form part of their estate but will instead pass by right of survivorship to their spouse, and not be subject to any potential claim made against the deceased estate.

However, if the Willmaker and the family home are located in (or sufficiently connected to) New South Wales, it may be possible in the course of a family provision claim against the estate for the Court to utilise the "notional estate" provisions to "claw back" the interest of the deceased in the family home from the surviving joint tenant and into the estate so as to be able to satisfy a successful claim.

This is illustrated by the recent NSW case of Carusi-Lees v Carusi [2017] NSWSC 590, in which the deceased made a Will which left the whole of his estate to his second wife of 39 years, and made no provision for his surviving children. His daughter made a claim against her father's estate. There were very few assets in the estate, because most of the assets passed to her step-mother by way of survivorship as the assets were held with her as joint tenants. The deceased's jointly held assets that could be designated as notional estate were worth $4.5 million.

To be included as notional estate, assets must be found to be the subject of a "relevant property transaction" at undervalue that occurred with the intention to defeat a family provision claim, either within 12 months after the deceased's date of death, or within 3 years prior to the date of death. In this case, the relevant property transaction was the deceased not severing the joint tenancy of his assets with his second wife prior to his death, resulting in those assets not forming part of his estate. Having regard to all the circumstances of the relationship between the daughter and her father over the years, the judge ruled that the step-mother had to pay the daughter the sum of $400,000.00 plus her legal costs of $123,000.00 from the notional estate of the deceased.

So when considering estate planning for a blended family, just remember that each blended family situation is as individual as the Willmaker themselves, and that if you've seen one blended family – you've only seen one blended family.

For more information on any aspect covered in this article, please call SUPERCentral on 02 8296 6266 or email info@supercentral.com.au.