

Estate Planning Scenarios and Solutions

Common scenarios and the complexity of people's affairs

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1. The Opportunity

1.1 Complexity of people's affairs

With the introduction of compulsory superannuation for all workers, over 500,000 self managed superannuation funds in Australia, and life insurance inside most of those superannuation funds, the affairs of the average Australian are growing more complex.

Not only do these arrangements add complexity in an Estate Planning context, the value of the average Australian's Estate is also far greater than it has been in the past.

It is also safe to say that as a society we are far more litigious than we have ever been and there has been a dramatic growth in litigation involving deceased Estates, with disappointed beneficiaries challenging Wills and making claims for a share of the deceased's wealth. We have also recently seen the first piece of litigation in Queensland involving a challenge on a Binding Death Benefit Nomination in *Munro & Anor v Munro & Anor* [2015] QSC 61, showing that superannuation is at the same risk as the rest of an individual's Estate.

These factors tell us that there is a need for all Australians to ensure they have an Estate Plan in place, which means more than just having a Will. Where superannuation is concerned, a Will is an inadequate mechanism of transferring wealth to a nominated beneficiary.

Experience tells us that most people are unaware of the complexity of their affairs and the consequences of not having an appropriate Estate Plan in place. Following are nine common scenarios we regularly hear or see, along with how we would seek to resolve the issues raised.

2. Common Scenarios

2.1 I'm young and I don't have much, so there isn't any point in preparing a Will

Statistics show that in 2013 138,232 Australians died, and of these 3,109 were under the age of 30 and 1,284 were between 20 and 30 years of age. The vast majority of these 1,284 would have worked, and as such would have been a member of a superannuation fund and have had life insurance inside that fund.

Each one of those people needed an Estate Plan.

When a person dies with a Will, their Executor usually has to apply to the Supreme Court for a Grant of Probate before they can administer the deceased Estate. If the deceased does not leave a Will then the next of kin has to apply for a grant of Letters of Administration. Below we look at the difference between these applications, both from a time and cost perspective.

The cost of applying for Letters of Administration against making an Application for Probate are as follows:

	Grant of Probate	Letter of Administration
Solicitors Fees (redchip fees)	\$3,000 plus GST	\$4,000 plus GST
Court Filing Fee	\$637.40	\$637.40
Courier Mail Advertising Fee	\$300 - \$400	\$300 - \$400

Queensland Law Reporter Advertising Fee	\$161.70	\$161.70
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It takes approximately 6 - 8 weeks to make and be granted with a Grant of Probate, while it takes more than 8 weeks to apply for and be granted with Letters of Administration. These times factors are dependent on the availability of the Courts to review and process the application.

In applying for a Grant of Probate, the Executor must undertake the following actions:

- (a) Place an advertisement in a newspaper that circulates the area where the deceased last resided. The advertisement must be in an approved form stating, amongst other things, the identity of the deceased, the name of the person applying for a Grant of Probate and the date of what the Executor believes to be the last Will of the deceased.

There is an approved list of newspapers issued by the Supreme Court and a publication in the Courier Mail will suffice. If the deceased resided outside Queensland within 2 years prior to their death then an advertisement would need to be placed in a newspaper that is circulated in the area where they resided along with a newspaper in Queensland.

- (b) The same advertisement must also run in the Queensland Law Reporter.
- (c) The Public Trustee must also be notified of the deceased's passing and given a copy of the advertisement.
- (d) Once 2 weeks has elapsed after all advertisements have run, the application for a Grant of Probate may be lodged with the Supreme Court. The documentation which must be completed and lodged includes:
 - (i) The Originating Application;
 - (ii) An Affidavit of the Executor stating who they are, where their authority to apply for the Grant of Probate arises and exhibiting the original death certificate and Will of the deceased; and
 - (iii) An Affidavit of the person that placed the advertisements (typically this will be the solicitor that is engaged by the Executors) affirming the fact that the advertisements were run, the date of those advertisements and the date upon which the Public Trustee was notified.

Once the above steps have been completed it is a matter of waiting for the Court to review the documentation and then make a decision whether it will award a Grant of Probate to the Applicant.

In applying for Letters of Administration, a similar process to that of applying for a Grant of Probate is followed. Similar advertisements must be placed in the newspaper and in the Queensland Law Reporter. The Public Trustee must also be notified of the deceased's passing. The complicating factor arises in determining who has the authority to apply for Letters of Administration. Rule 610 of the *Uniform Civil Procedure Rules 1999* (Qld) sets out the order of priority of those persons to whom the Court can grant Letters of Administration which are as follows:

- (a) the deceased's surviving spouse
- (b) the deceased's children
- (c) the deceased's grandchildren or great-grandchildren
- (d) the deceased's parent or parents

- (e) the deceased's brothers and sisters
- (f) the children of deceased brothers and sisters of the deceased
- (g) the deceased's grandparent or grandparents
- (h) the deceased's uncles and aunts
- (i) the deceased's first cousins
- (j) anyone else the Court may appoint

It is the role of the solicitor to determine the relationship of the person intending to apply to the Court and gather sufficient evidence to prove their standing as to why they should be granted Letters of Administration over other candidates. Again, the documentation which must be completed and lodged with the Court includes:

- (a) The Originating Application;
- (b) An Affidavit of the Applicant stating who they are, where their authority to apply for Letters of Administration arises and exhibit the original death certificate of the deceased; and
- (c) An Affidavit of the person that placed the advertisements (typically this will be the solicitor that is engaged by the Executors) affirming the fact that the advertisements were run, the date of those advertisements and the date upon which the Public Trustee was notified.

Here are 2 examples of matters that crossed our desks in 2015:

Scenario 1

- (a) A 24-year-old male signed a Contract to purchase a unit off the plan in October 2014.
- (b) Completion of the Contract is due in December 2015.
- (c) In June 2015 the man died unexpectedly in an accident at a social function.
- (d) He had no Estate Plan and his parents are now left with trying to deal with a property developer who has a contract on the sale of one of the units under which the deceased Estate remains contractually bound to buy the property.

Outcome

- (a) We have negotiated with the developer that the sibling of the deceased will purchase the unit for the same price.
- (b) To achieve this, the parents of the deceased must now apply for Letters of Administration so that they can sign the documentation necessary to terminate the current purchase contract so that a new contract can be entered into with the deceased's sibling.

If the man had completed an Estate Plan after he signed contract we would have recommended:

- (a) He complete a Will to avoid the need to apply for Letters of Administration or Grant of Probate as under the terms of the Will, his Executor would have been able to terminate the Contract without needing to first apply to the Court; and
- (b) Take out life insurance for an amount equal to the purchase price of the unit and associated stamp duty, so that the Estate could have acquired the property if the developer did not agree to the termination of the Contract.

Scenario 2

- (a) Our client was a 30-year-old male who had been in a de facto relationship for eight years.
- (b) Our client's partner was dying of a degenerative motor neuron disease and our client ceased work and cared for him for approximately 6 years until he passed away in December 2014.
- (c) Here, the deceased had done some Estate Planning, including:
 - (i) preparing a Will which removed our client as a beneficiary; and
 - (ii) severing the joint tenancy of a property they jointly owned allowing the deceased to leave his half interest in the property to his family, rather than automatically reverting to our client.
- (d) This was all done without our client's knowledge, and he only discovered what had occurred a matter of weeks before his partner passed away.

Outcome

Our client brought a family maintenance application before the Supreme Court on the grounds that, as the deceased's de facto partner, he was entitled to a share of the Estate. Our client was successful in his claim.

Clearly the deceased was poorly advised in relation to his Estate Plan, which highlights the need for good legal advice to be provided as part of the Estate Planning process. It is quite clear that our client had an entitlement to share in the deceased's Estate and the deceased should have been advised of this by his lawyer at the time that he prepared his Estate Plan in an attempt to prevent this type of claim being made and reduce the costs payable by the Estate.

2.2 I've been to see my accountant and they told me it's enough that I've written down what I want to happen

The requirements for making a valid Will are outlined in section 10 of the *Succession Act 1981* (Qld). There are a number of requirements and include:

- (a) the Will must be in writing;
- (b) the Will must be witnessed by 2 people who sign the Will in the presence of the Testator;
- (c) the Testator must sign the Will with the intention of executing a Will.

Not only must a Will be executed correctly, there are also requirements as to how a Will must be bound and then stored so that it is not damaged and so that it does not give rise to a presumption that another document may have been attached to the Will or that the Will is incomplete. Examples include removing staples, paperclip marks and bull-dog clip marks.

As always, there is an exception to the general position contained in section 10 of the Succession Act which is found in section 18 of the Succession Act and states that a Court can dispense with the rules if it is satisfied that the document purports to state the Testator's testamentary intentions and has not been executed correctly.

A recent example of this is an instance where a man wrote in the notes application on his phone his wishes regarding the distribution of his Estate. He then committed suicide. While this form of Will does not meet the requirements of section 10 of the Succession Act, the Court was satisfied that it met the requirements of section 18 of the Succession in that it was a *document* and, given the actions of the man that immediately followed his creation of the note, the Court was satisfied that it expressed his *testamentary intention*. It remains

to be seen if the Court would have come to the same conclusion if the man did not commit suicide immediately after completing the note.

Another example of this is Immediate Wills. Typically an Immediate Will takes the form of a completed checklist or solicitor's notes which are signed by the Testator after providing instructions to a solicitor to prepare a Will. Courts have said that they must contain sufficient detail to identify the Testator and how they wish their Estate to be distributed. In fact, recent case law has told us that if solicitors do not have an Immediate Will signed by their client then this gives rise to a claim against the solicitor for professional negligence.

We have recently had success in obtaining Probate over an Immediate Will that was completed for one of our clients who unfortunately passed away prior to executing his final Will. Here, the Immediate Will took the form of our Will Making Checklist which we had the client complete and then sign in the presence of 2 witnesses. The Executor submitted this to the Supreme Court to be assessed for a Grant of Probate and it was awarded without issue.

While the Courts are slowly taking a broader view of what constitutes a valid Will, the prima facie view is that statute provides for the form that valid Wills must take and it is only in exceptional circumstances that a Court will consider documents in other formats which express supposed testamentary intentions.

Another consideration to have in this scenario is the process and costs involved in having an Immediate Will or other document assessed by the Supreme Court. There is a wide ranging scale of costs applicable when engaging a solicitor to draft a Will. Typically anywhere from \$100 to thousands of dollars, depending on the complexity of the Testator's affairs. When applying to the Court for a Grant of Probate following the death of the Testator, costs will typically be about \$5,000 (including legal fees, advertising costs and filing fees with the Supreme Court).

In the cases described above where no formal Will was made, while the Testator would have saved on the cost of engaging a solicitor to prepare a formal Will, there would have been excessive legal costs in applying to the Supreme Court to have the matter heard before a Judge. These fees would include increased legal costs as solicitors would need to gather sufficient evidence to present their case and show that the Testator had Testamentary intention and the increased possibility that there will be disappointed beneficiaries as the Testator would not have received Estate Planning advice and may not have made sufficient provision for those he is required to provide for.

2.3 I've got a Will. I did it 20 years ago when my kids were small.

It is commonly believed that because a person has made a Will at some point during their lives that it will continue to apply regardless of their situation. When talking about Estate or Succession Planning generally, the client needs to consider what outcomes they would like achieved if something were to happen now. The solution needs to be based on their current circumstances – their current assets and liabilities and the current circumstances of their family.

Not only should a succession plan only be created for an individual's current circumstances, it also needs to be reviewed when a person's situation changes. People get divorced and remarried, they have blended families, have daughters-in-law and sons-in-law that they don't like or trust, or they develop differences with their own children – for example their children may become spend thrifts, develop drug habits or their relationship breaks down for other reasons.

We also find that typically a client's assets will increase over time. They may purchase assets within family trusts or companies or start up their own business. Succession planning for these structures cannot always be provided for in a Will and as such, a broader conversation needs to be had with the client as to their expected outcomes and how to protect the often significant wealth they have built.

Another issue to consider in these circumstances is Superannuation. 20 years ago, the vast majority of people didn't have superannuation which now comprises a significant part of the average person's Estate. What many people don't know is that superannuation does not automatically form part of a person's Estate and making provisions for superannuation in a Will is not sufficient. Those that are aware of this and complete Binding Death Benefit Nominations are often not aware that in APRA regulated funds, these lapse after 3 years creating further concerns for clients who believe that they have otherwise completed a binding Estate Plan.

2.4 **All of my wealth is tied up in the trust I have with my brother. My family can just split that. I know my brother will do the right thing.**

This is an example of an asset protection strategy that did not end in a desirable or expected way for our client.

Facts

- (a) Our client was involved in some rather risky business ventures which exposed him to significant personal liability.
- (b) Our client was 45 years old, single and never married.
- (c) He established a family trust for the purpose of acquiring properties. He acquired his principal place of residence for \$1.2 million and an investment property for \$700,000. Both properties were purchased within the trust.
- (d) Both properties were subject to mortgages with a combined debt of about \$500,000.
- (e) The family trust was structured as follows:
 - (i) **Trustee:** our client's brother
 - (ii) **Principal:** our client's brother
 - (iii) **Primary beneficiary:** our client's brother
 - (iv) **Secondary beneficiary:** any brothers or sisters of the Primary beneficiary
 - (v) **Tertiary beneficiary:** a wide class including any charity, or not-for-profit nominated by the trustee.
- (f) Our client was not named in the trust deed at all and he had no legal ability to control the trust or determine how the trust assets might be dealt with. Our client, however, was not concerned as he trusted his brother completely, and his brother followed our client's directions in relation to all matters associated with the family trust.
- (e) This arrangement worked well until sadly, our client's brother died in a car accident.

Consequences

- (a) Apart from the tragedy of losing his younger brother, the death triggered a series of legal consequences that worked to disadvantage our client.
- (b) Under the terms of our client's trust deed, upon the death of the Trustee, the Principal is required to appoint a new Trustee. The trust deed also stated that on the death of the Principal, the person nominated in the Principal's Will as their Executor shall have the power of appointment under the trust.

- (c) The effect of the trust deed provisions meant that whomever the deceased brother nominated in his Will as his Executor would have control over our clients trust.
- (d) Clearly at the time of preparing the family trust, our client was not aware of the consequences that his brother's death might have on his trust. Of course, the outcome for our client was to be determined by the contents of his brother's Will, if indeed his brother had a Will.

Outcome

- (a) Unfortunately for our client, his brother had done an Estate Plan and had a valid Will in place which nominated his partner as his Executor. His Will went further to state that if his partner predeceased him, then their best friend would be the Executor of his Will.
- (b) What we didn't state earlier is that not only did our client's brother die in the car accident but his partner and their best friend were in the same vehicle and were also killed in the same accident. So we need to look further as to who would assume control over the brother's Estate and benefit from it if his partner were to predecease.
- (c) The brother's Will stated that in the instance of his partner not surviving him, his entire Estate would go to a charity nominated in his Will.
- (d) Given the death of the brother, his partner and their best friend, the charity as the residuary beneficiary was entitled to apply for Probate of the brother's Estate.
- (e) Probate was granted and the charity became the Executor of the brothers Estate.
- (f) As Executor the charity also became the Principal of our client's trust.
- (g) The charity determined that it wanted to sell the assets in our client's trust and distribute the net proceeds to itself as a Tertiary beneficiary.
- (h) Our client objected to this proposal, and commenced proceedings in the Supreme Court to challenge the charity. Fortunately for our client the charity settled the matter, allowing our client to regain control of his trust and assets.

This example shows how important proper Estate Planning can be, and why a review of the whole of a client's circumstances is required – not simply the assets that they own personally but those that they control or have acquired but do not control.

2.5 I haven't bothered to divorce my first wife. We've both moved on and she is being looked after by her new boyfriend.

When undertaking Estate Planning, it is important to understand the nature of the client's relationship. Are they married or in a de facto relationship? Do they have any previous relationships? If they do, have they been divorced or through a property settlement? If they haven't then this complicates the entitlements of beneficiaries of the Estate.

In this scenario, the client's first wife is entitled to any gift that has been left to her under his Will (if he has one in place) or if not, then she is entitled to part of his Estate through the laws of intestacy. This is the case even if he is now in a new de facto relationship, as his Estate will need to be divided amongst his first wife, his current partner and any children he has (whether they are his or he provides for the children of his new partner).

If there are no children then section 36 of the Succession Act states that the prima facie position is that the deceased's Estate will be divided equally amongst the first wife and the current partner. This position changes if there is agreement between the beneficiaries or if one, or both, applies to the Court for a Distribution Order (in other words, requests that the Court decide how the deceased's Estate is to be divided).

As well as the concerns that the Will Maker's Estate will not be distributed in accordance with his wishes, there are a number of other concerns that come to light in this scenario:

- (a) There is the possibility that the first wife's current partner will get access to the Will Maker's assets. This is likely if, following the Will Maker's death:
 - (i) there is a breakdown in the relationship between the first wife and her new partner. This then puts the Will Maker's assets at risk while a property settlement is being determined; and
 - (ii) his first wife passes away and through her Will, leaves all of her assets (which would now include those that she inherited from the Will Maker's Estate) to her current partner.
- (b) It is unlikely that the Will Maker's wishes in looking after his new partner and any children would be satisfied as a significant portion of his Estate would be given to his first wife, again either through his Will or through the laws of intestacy.
- (c) In the situation where the Will Maker has left a Will leaving the bulk of his Estate to his first wife, his current partner will most likely bring an application for further maintenance. Apart from the ability to bring an application under section 36 of the Succession Act as mentioned above, section 41 of the Succession Act specifies the classes of people who a person must provide for, in the distribution of their Estate. This includes a spouse (defined as wives, husbands or de facto's), children and other dependents.

If such a claim were to be brought against the Estate then there are consequences both of time and cost in nature. If an application is brought then evidence must be gathered and presented before a Court. This involves engaging solicitors to gather evidence, build a case both for the applicant and the respondent and present that case before a Court. Not only are these types of applications costly in terms of the fees that are paid to solicitors, barristers and other professional advisers, but they are also time consuming as it can take months before the Court may have time available to hear the case.

Another issue to be aware of in this situation is that if the applicant is successful in obtaining a greater portion of the Estate then the solicitors fees for both parties (that is the Estate and the applicant) are payable from the Estate.

There has been a recent decision in the Tasmanian Supreme Court of *Calvery v Badenach* [2015] TASFC 8. This case looked to the duties of solicitors when taking instructions from a client and preparing their Will. The facts were:

- (a) A solicitor attended on a terminally ill client and received instructions to prepare a Will leaving all of his Estate to a friend with whom he owned 2 pieces of property.
- (b) The deceased had been a client of the solicitor's for a number of years and in previous Wills had made a bequest to an estranged daughter. This bequest did not appear in the Will which the deceased made shortly before he died.
- (c) After obtaining Probate on the Will, the estranged daughter brought an application pursuant to Tasmania's *Testators Family Maintenance Act 1912* (Tas) and was successful in being granted a significant portion of the deceased's Estate.
- (d) The friend then brought a claim against the solicitor that prepared the Will claiming that he was negligent and owed the friend, as the beneficiary of the Estate, a duty of care and to advise the beneficiary of the possibility that a claim under the *Testators Family Maintenance Act* may be brought given the fact that the Testator did not make provision for his daughter.

In this case, the Court recited the known view point that a solicitor, when preparing a Will, has a duty of care to the intended beneficiaries under that Will. It did not find, however,

that the solicitor had to then advise the intended beneficiaries of the existence of a possible claim under the Testators Family Maintenance Act (or other similar legislation) which would result in the beneficiaries share of the Estate decreasing. It is yet to be seen if the outcome would have been different if the scope of the solicitor's engagement was different or if the beneficiaries under the Testator's Will were family (or others who would otherwise have an entitlement under the Testator's will) rather than a non-dependent as the beneficiary was in this case.

2.6 **I've done my Will. My lawyer told me that it divides up all of my assets including the ones sitting inside my trust and in super.**

Section 8 of the Succession Act 1981 makes it quite clear that you can only use a Will to dispose of property that you are "entitled to" at the time of your death:

Section 8 Succession Act

Property that may be disposed of by will

- (1) ***A person may dispose by will of any property to which the person is entitled at the time of the person's death.***
- (2) *Subsection (1) applies whether or not the entitlement existed at the date of the making of the will.*
- (3) *A person may dispose by will of any property to which the person's personal representative becomes entitled, in the person's capacity as personal representative, after the person's death.*
- (4) *Subsection (3) applies whether or not the entitlement existed at the time of the person's death.*
- (5) ***A person may not dispose by will of property of which the person is trustee at the time of the person's death.***

As such, you cannot dispose of property which you hold as trustee in your Will.

Simply put, where you control property, for example in the capacity of trustee of a trust (or director of a corporate trustee of a trust) or as trustee of a self managed super fund, you cannot dispose of those assets using your Will.

Where assets are held inside a trust or otherwise controlled by the Will Maker, then their Estate Plan will need to involve more than just the preparation of a Will.

Superannuation

Superannuation is administered by the *Superannuation Industry (Supervision) Act 1993 (SIS Act)*, which grants to the trustee of a superannuation fund the discretion to dispose of a member's accrued entitlements at the time of their death. This discretion, however, can be removed through the use of a Binding Death Benefit Nomination if permitted by the governing rules of the superannuation fund. The SIS Act limits those people who may benefit from such a distribution to the member's spouse, dependents or their legal personal representative.

There have been numerous cases before the Courts involving circumstances where the deceased member of the fund did not have a Binding Nomination in place. Most recently, in the case of *Munro & Anor v Munro & Anor*, the Courts were presented with a case where a Binding Death Benefit Nomination was challenged and they found it not binding on the trustee of the superannuation fund.

Given the strict requirements that the governing rules of the fund must be adhered to, the restrictions imposed by the SIS Act on who may receive death benefits and also the tax

implications of paying death benefits, it is important that professional advice is given in relation to the preparation of a Binding Death Benefit Nomination.

Discretionary Trusts

Family Discretionary Trusts are another common structure where wealth is accumulated, which cannot be dealt with in a person's Will.

Quite often the Will Maker will either control the discretionary trust as the trustee or co-trustee, or they may be the Principal who is empowered to remove, replace or add trustees. Where a Will Maker has assets inside a family discretionary trust, the Estate planning objective is to put steps in place to ensure an orderly transfer of control of the trust to people nominated by the Will Maker. The ability to ensure an orderly transition is dependent upon the terms of the trust deed and how the deed deals with the power of trustees and principles when they pass away. Typically, the trust deed will state that a trustee is automatically removed as trustee on death, and has a similar provision in relation to the Principal. The trust may nominate an alternative Principal, or allow the Principal to nominate their replacement in their Will.

It may therefore be possible to ensure the orderly transition by nominating a replacement Principal in the Principal's Will. Another option is to amend the trust deed as part of the Estate Planning process and insert an alternative Principal to ensure a smooth succession of control over the trust.

As most working Australians have employer-sponsored superannuation entitlements, it is always prudent to ensure that the trustee of those funds are approached, enquiries made as to whether the fund allows for Binding Death Benefit Nominations, and if so, ensure that it is completed in accordance with the rules of the fund and in a manner that is consistent with the testamentary intentions of the Will Maker.

2.7 Everything I've got is tied up in my business but my kids have said that they don't want to be involved in it when I'm gone.

There are over 2 million active businesses in Australia with over 97% of those being small businesses.

This is becoming a common scenario in that mum and dad commence a business with perhaps a hope that one day their children will develop an interest in taking it over. As their children grow up, they develop different interests and it becomes apparent that they will never take over the running of the business.

It is also common in this scenario that mum and dad's wealth will be tied up in the business.

When discussing Estate Planning, the critical issues to determine here are:

- (a) How can the wealth from the business be extracted and distributed to the children?
- (b) What are the possible exit strategies for the business owners?
- (c) How can the debt within the business be extinguished?
- (d) Once a strategy has been developed, how can some certainty be provided?

A resolution to this scenario is obviously dependent on the circumstances of the individuals that are involved in the business. Is there an employee who would be willing to purchase the business? Is there another business owner that would be willing to purchase the business? If the client is able to identify and then reach an agreement with such a person,

then this will enable some value to be extracted from the business and made available to the Will Maker's intended beneficiaries.

The issue then arises as to how certainty can be given to any agreement reached. In order to be enforceable, there must be a contractual relationship between the Will Maker and the intended purchaser of the business. Simply stating in a Will that the Will Maker wishes to sell their business to the purchaser will not be enforceable against the purchaser if they change their mind and refuse to acquire the business. In this scenario, a Buy Sell Agreement may be used as part of the client's Estate Plan. It works to create options so that on the death of the Will Maker, an option to sell the business is triggered. The Buy Sell Agreement can then contain details as to how the purchase price is to be determined, how the purchase price will be payable, when the acquisition is to take effect along with any other requirements specific to the business or the parties.

If the Will Maker cannot find a person who is willing to purchase the business then there are other considerations to have such as:

- (a) Does the Executor have the skills or qualifications to operate the business?
- (b) Is there sufficient capital inside the business to keep it operating until it is sold, a manager is found and appointed or some other outcome is achieved?
- (c) What will comprise the Will Maker's Estate and be available for distribution to the intended beneficiaries? Is the Will Maker satisfied with the legacy that he/she will be leaving?

The operation of the business will be left to the Executor until such time as they can find a purchaser, wind up the business or pass ownership onto the intended beneficiaries. In this case, not only should the Will Maker be cognisant of this possibility when selecting their Executor but the terms of the Will should also allow for the Executor to operate a business.

The last issue to consider in either of these scenarios is dealing with debt within the business. On the death of a person, their Executors must ensure that all debts of the deceased are extinguished or that the Estate of the deceased is released from any future payment of the debt, prior to making a final distribution of the Estate Proceeds. If the Executor does not do this then they become personally liable for the repayment of such debts.

It is common in the operation of a business that the owners (and often their spouses) will be requested to provide personal guarantees. The obligations of a guarantor will continue to exist even though that person has passed away. On death, the bank may require some or all of the debt to be paid down which must be done prior to a final distribution being made. The Executors will need to negotiate this with the bank at the relevant time, along with securing a release of the deceased Estate from any future repayment of the debt.

2.8 I've got 2 kids and helped them both out. One more than the other. They're paying me back but slowly. I know they'll sort it out between them when I'm gone.

The cost of living and wealth of some parents means that it is more common these days to see parents assist their children in buying a car, a home, repaying student loans or starting up their own business. All undocumented loans are repayable on demand to an Estate unless they are forgiven in the lender's Will, or there is an alternative payment agreed in a written loan agreement.

When meeting with clients we are often told that while they have made a sometimes significant loan to one or more of their children, they do not want it to be mentioned in their Will and that they trust their children and Executors to sort it out.

The Courts are littered with cases involving disputes over Estates because the beneficiaries and Executors could not 'sort things out' after the deceased had passed

away. As described earlier in this paper, disputes and then bringing the matter before a Court increases the costs to be payable by the Estate and also lengthens the time it takes for the Estate to be administered.

Dealing with loans within a person's Estate Plan is not only critical but adds a level of complexity to their Estate Plan. Firstly the Will Maker's wishes must be dealt with in their Will:

- (a) Do they wish the loan to be forgiven?
- (b) If interest is payable on the loan, is the repayment of both principal and interest to be forgiven?
- (c) Has any security been taken out when the loan was made and does this need to be released?
- (d) Who will bear the costs of arranging for the release of the security as this can be expensive if, for example, a mortgage needs to be released over real property?
- (e) If they do not wish the loan to be forgiven, will the loan be repayable immediately or will the Executor be entitled to enter into a repayment plan?

Even though the Will Maker may wish to forgive the loan, they may still want their children to benefit equally from their Estate. In this instance, an equalisation clause will need to be included in the Will to take into account the benefit that has been received by forgiving the loan and then equalising the residual of the Estate between the children.

As well as dealing with all of the issues to be included in the Will, the loan should also be documented. Such loan agreement needs to include the principal amount loaned, whether any interest is payable and the rate of interest, by what time the loan must be repaid and whether there has been any security taken out. These details in the loan agreement will assist the Executor in not only alerting them to the existence of the loan but also notifying them of the details surrounding the loan and in calculating the amount of the loan which remains outstanding as at the time of death.

2.9 My affairs are too complicated. There is so much to consider with my 3 kids, my business and all these trusts and companies my accountant put me in to make things simpler. Cameron is alright though I think Damian is going to split up from his wife soon and I don't know who is going to look after Mary when I'm gone.

To finalise matters we will take you through a case study focusing on how we would approach the situation and what type of solution we may reach.

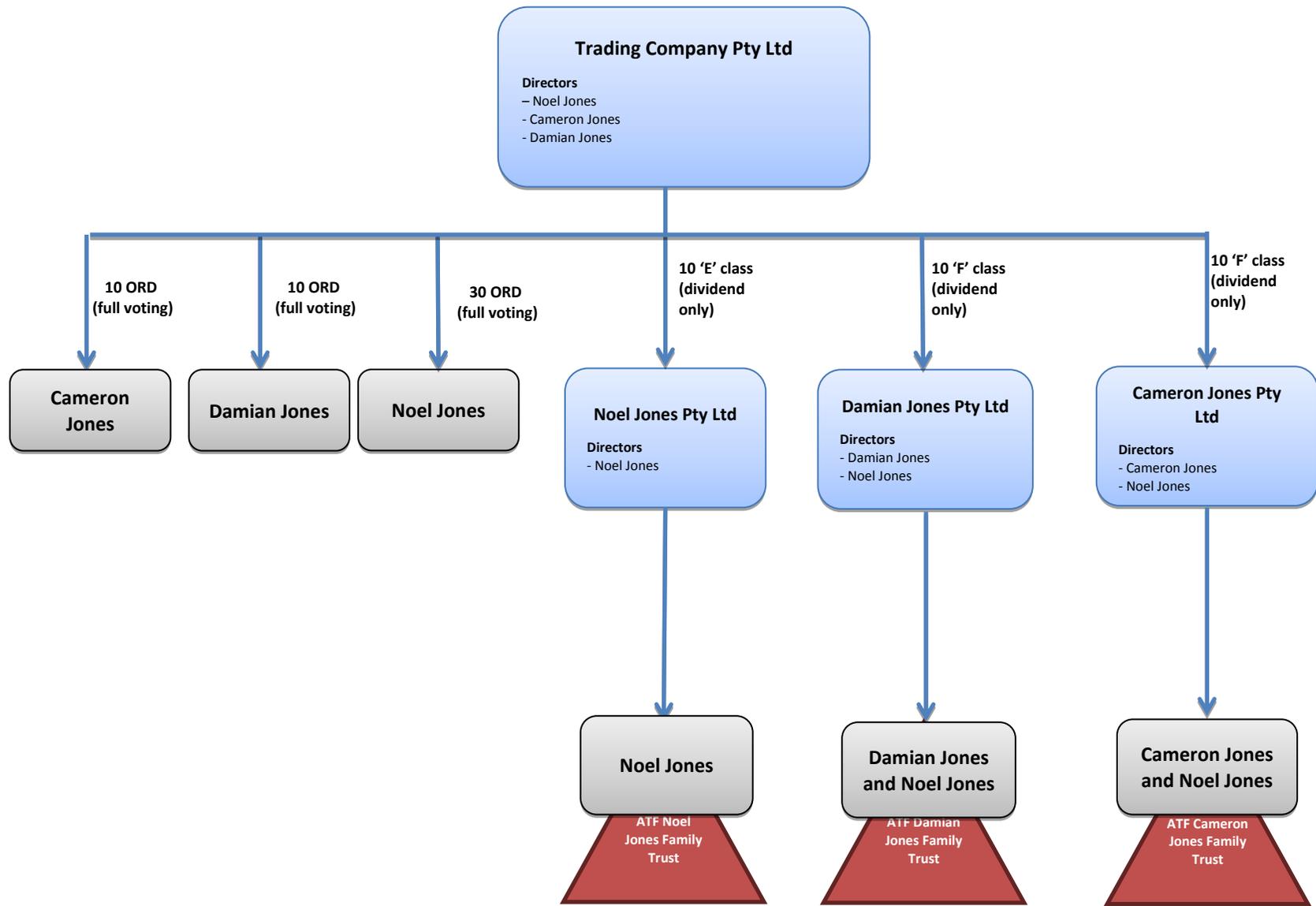
Facts:

- (a) Noel Jones started a business from his company Trading Company Pty Ltd.
- (b) He has 2 sons, Cameron Jones and Damian Jones, both who are interested in taking over the business when Noel decides to retire.
- (c) Noel also has a daughter, Mary, who has a mental disability. She works a couple of days each week for the Red Cross however will never be able to hold a full time position. She also receives a pension. Noel is Mary's legal guardian and has been appointed as such by the Queensland Civil and Administrative Tribunal.
- (d) Noel's wife has passed away and this has prompted Noel to start to sell down ownership of Trading Company Pty Ltd to Cameron and Damian.
- (e) Cameron and Damian currently hold 10 ordinary shares each in Trading Company Pty Ltd while Noel retains control over the company with 30 Ordinary Shares.

- (f) There are further classes of shares on offer which are dividend only shares. Noel, through his company Noel Jones Pty Ltd, holds E Class shares while Damian and Cameron, through their companies, hold F Class shares.
- (g) Noel has concerns regarding Damian's relationship and thinks that Damian and his wife may separate in the near future.
- (h) Noel has also made a loan to Cameron of \$200,000 to assist him in purchasing his first home. Cameron is slowing repaying the loan though most of it remains outstanding.
- (i) Noel has \$1.8 million in assets (which includes the value of his shareholding in Trading Company Pty Ltd and the loan that he has made to Cameron) and no debt though he has given personal guarantees to some suppliers to the business.
- (j) Noel has also been making contributions to his Self Managed Super Fund and would like these entitlements to be dealt with in the same manner as the rest of his assets.

Outcomes

- (a) Noel has informed us that he wishes his sons to take over control of Trading Company Pty Ltd on his death; however he still wishes all of his children to benefit equally from his Estate.
- (b) Noel wishes to forgive the loan to Cameron but wants that to be taken into account when making a distribution of his Estate.
- (c) While Noel wishes Mary to receive 1/3 of his Estate he does not want that to affect her ability to receive the pension.
- (d) Noel wants to ensure that Mary will be looked after both personally and financially and, as Mary does not have a great life expectancy, he wants certainty that if she were to pass away, her share of his Estate would be given to Cameron and Damian equally.
- (e) Finally, Noel wishes to protect his Estate from Damian's wife, in the event that their marriage was to break down and provide both sons with some asset protection, as they will be operating the business and likely incur personal risk.



Solution

1. As Noel clearly trusts his children and they are already involved in the key asset of his Estate, being the business, we would suggest that Noel consider appointing Cameron and Damian as Executors of his Estate. Given Mary's disability, she could not act as an Executor.
2. We then start from the base position that Noel would like his Estate shared equally amongst his children however we need to consider the following complicating factors:
 - Noel wishes his sons to assume full control over the business so does the composition of assets in Noel's Estate allow for these shares to be given to Cameron and Damian while still leaving 1/3 of Noel's Estate in other assets to be given to Mary?
 - Noel has made a loan to Cameron which needs to be forgiven in his Will. An equalisation clause would also need to be included stating that Cameron's share of Noel's Estate is to be reduced by the outstanding amount of the loan. Again, can this be achieved on the composition of assets in Noel's Estate to still achieve the outcome that Cameron and Damian control the business while still leaving Mary 1/3 of the Estate?
3. Noel has told us that he has concerns regarding Damian's relationship and that he wishes to provide his sons with some asset protection as they will be taking over the business. This would lead us to have a discussion with Noel regarding Testamentary Trusts and their ability to provide Noel with the capability to provide this type of protection to his sons.

In addition to asset protection and potential protection from a family breakdown, Testamentary Trusts will provide both Cameron and Damian with the ability to undertake some tax planning and make distributions to their family members who are on a lower marginal rate of tax.

4. In finding a solution for Mary, we would discuss with Noel putting in place a special disability trust. These trusts are established under a Will however they must be drafted carefully so as to protect the intended beneficiary but also ensure that the amount placed into the trust does not then disentitle the beneficiary to receipt of their pension. There are various tests which must be met in determining if a person is entitled to a disability pension, one of which is an asset base test. If the individual has more than \$500,000 worth of assets then they are not entitled to receive the pension.

a strategy to achieve Noel's outcomes is to include directions in his Will that an amount of money which would not place Mary at risk of exceeding the threshold of \$500,000 be gifted to the special disability trust. The balance of her 1/3 share of the Estate would then be gifted to a testamentary trust which would be controlled, possibly by Cameron and Damian and from which Mary would be entitled to receive distributions.

If Mary were to then pass away, Cameron and Damian would be in control over Mary's Testamentary Trust and, would then be able to make a distribution to their own trusts (or themselves).

5. The above deals with Noel's personal Estate Planning although there are still 2 aspects which remain to be dealt with – his shareholding in Trading Company Pty Ltd and his superannuation.
6. With respect to his shareholding in Trading Company Pty Ltd:
 - the ordinary shares that he holds personally would be dealt with under his Will and gifted to Cameron and Damian;
 - the shareholding held by Noel Jones Pty Ltd would remain in that company as the company would continue to exist even though Noel has passed away. As such, we

need to look to the shareholding of Noel Jones Pty Ltd which is held in Noel's Family Trust. Noel is the sole trustee of the trust.

Assets within trust structures do not form part of an individual's Estate so Noel cannot include a direction in his Will that he wishes his shareholding in Noel Jones Pty Ltd to be gifted equally to his sons.

Instead, we must look to the terms of the Noel Jones Family Trust deed and determine what does the terms of the trust allow for on the death of the trustee. Each trust deed can be different which is why it is important to read and understand the terms of the trust and amend those terms if it does not allow for the outcome that the client wants to achieve.

It is common that a trust deed will either allow for the Legal Personal Representative of the trustee (that it their Executor) to assume control or alternatively it allows for the trustee to name in their Will who they would like to assume control of the Trust when they pass away.

In this case, either outcome would be acceptable as Noel's wishes are that Cameron and Damian take over control which can be stated in his Will or which will automatically happen by virtue of their appointment as Executors of his Estate. Noel would have to be careful though if he were to amend his Will and nominate new Executors that this would have an impact on the succession planning for his trust.

- Finally Noel is a co-trustee with Damian over the Damian Jones Family Trust and that he is a co-trustee with Cameron over the Cameron Jones Family Trust. While these trusts have been established for the benefit of Damian and Cameron's families, we would need to review these trusts deeds to ensure that on Noel's death, control over the trusts is appropriately passed to Cameron and Damian.
7. The last issue to deal with is that of Noel's self managed super fund. Here, the governing rules of the Fund would need to be reviewed to ensure that a Binding Death Benefit Nomination can be entered into and if so, what form it needs to take. From there, the Nomination must be prepared so that it directs Noel's entitlements to his Estate, using the correct terminology as stated in the governing rules of the Fund, where it can be distributed in accordance with the balance of his Estate.