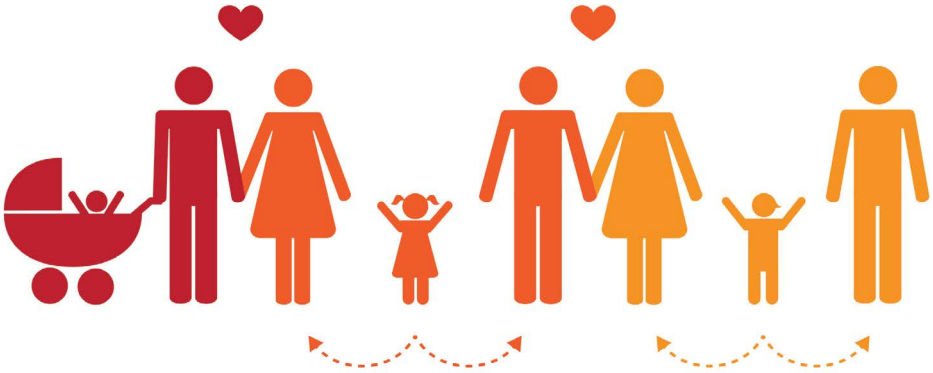
FAQ

A BRYANT MCKINNON RESOURCE

Estate Planning for Blended Families

This document summarises some of the more commonly asked questions regarding estate planning for blended families. Refer to the resources section of our website for more general information on Wills and Estate Planning. If your question is not answered here or you need further advice on Wills, Estate Planning or any related matter please phone us on 02 6651 8440 or email info@bryantmckinnon.com.au.



Couples in blended families who work together to arrange an estate plan have lots of options. But be aware that if conflict arises between the beneficiaries and surviving spouse, even the most careful mutual arrangements can be subject to judicial review.

Can I leave my share of the family home to the children, without forcing my surviving partner to sell up and move?

The first step is to understand how your family home is owned. You may own it solely, as joint tenants or as tenants in common.

If you own it as joint tenants, the home will automatically pass to your spouse on your death.

If you want to leave it to your children, you should consider buying the home as tenants in common. Tenants in common each own a share of the house. If you die, you can leave your share to your children.

If you own your home in your own name or as tenants in common, you could leave it to your children but give your spouse a life interest. A life interest can allow them to reside in the property until their death (or some other point), at which time your children can dispose of it as they wish.

A life interest in real estate allows your spouse (the life tenant) to treat the property as if it was their own. However, you can establish conditions in your Will to protect the value of the property for your children. These might include obligations to maintain the property or keep it insured. A simple right to reside in the home is another option.

How can I support my surviving partner but ensure that my children ultimately receive my assets?

You can provide your spouse with housing, as explained above. To provide your spouse with income,

you can create a protective trust. This provides that your personal assets (for example, any shares you hold) are held on trust for the benefit of your spouse. The trust then pays out a pension to your spouse during their lifetime, with the balance going to your children when your spouse dies. Life insurance products can be a useful way of ensuring your partner or children receives a lump sum in the event of your death.

You can also do this with your superannuation by establishing a Small APRA Fund (SAF). This is essentially a self-managed super fund, but run by a professional trustee (APRA). APRA distributes the superannuation death benefit to your spouse as a pension for the remainder of their life.

What is a Testamentary Trust?

A testamentary trust is a trust created by a Will and which comes into effect upon your death. It is used to protect assets from third parties or creditors, and sets conditions on the beneficiaries. It also carries tax benefits for beneficiaries.

It is ideal for blended families, as a way to provide for your current partner as well as any children from a previous marriage. A Financial Planner should be consulted to advise on what would work best for your family.

If I have been paying child support, is the executor of my estate required to continue making child support payments from the estate funds?

If your child support is paid via the Child Support Scheme, and you are up to date with your payment, the answer is no. Your death is a terminating event. However, if there is an outstanding debt and there are sufficient funds in your estate to cover it, the Registrar may collect the funds from your Executor.

A testamentary trust is a trust created by a Will and which comes into effect upon your death

Some families choose to create a private child support agreement instead of going through the mandatory child support scheme. These agreements are often more flexible, and allow parents to agree the amount, how the payments are paid and might include payment of non-cash items (for example, school fees or health insurance).

If you want to ensure that your children are provided for, you might include a clause that the child support will continue to be paid from the estate. It is important that you let an intended Trustee know that you expect periodic child support to continue to be paid to whoever the children's guardian is, until they reach adulthood.

It's important to get specialist advice before finalising a child support agreement to ensure that it reflects your wishes.

Of course, there are other ways for providing for your children's maintenance and educational needs, through for example, a trust in your Will.

Am I required to leave assets to adult children who have become estranged?

No, but be aware that they may be able to contest your Will if you do not.

Children, including adopted children and sometimes even step children (If they lived with you as a member of your household or were otherwise dependent on you), are eligible persons and can make a claim.

For a person to succeed in such a claim they need to establish that they had a special relationship with you and that they were particularly financially or morally dependent on you. The Courts will take into consideration the age, the financial resources, dependency and any mental or physical disabilities of the applicant.

A child who is under 18, a full-time student under 25, or disabled, may have a good claim. An independent adult in full employment is less likely to succeed.

How can I ensure that my assets go to my children and not my step children after my death?

Most people leave their estate to their surviving partner, and then to their children on that partner's death. This presents a problem if you want to ensure that only your children inherit your assets.

Not only will they have to wait until their step parent passes before inheriting, there is a risk that your surviving spouse changes their Will and leaves everything to their own children.

Instead, you can provide your children with an immediate gift.

If you own property as joint tenants, this might include changing it to tenants in common. That way, your share can be left to your children.

Can my step children be beneficiaries of my Superannuation after my death?

Your superannuation may be one of your major assets, but it does not automatically form part of your estate dealt with under your Will.

You should ensure that you have a Binding Death Nomination in place indicating who you want the payout to go to. Generally, the beneficiary must be a spouse (including de facto spouse) and/or a dependent child/ren (including step-children). Generally, a binding death benefit nomination lapses every three years so it is your responsibility to ensure you renew your nomination. If there is no valid nomination in place, the trustee has discretion to decide what happens to your super.

If you have a Self-Managed Superannuation Fund, you should ensure that the Trust Deed makes

provision for what is to happen in the event of your death.

What's the difference between a Simple Will and Mutual Will?

A Simple Will is a stand-alone document that sets out your wishes for your estate. It is not affected by anyone else's Will.

A Mutual Will is an agreement between you and your partner. Each of you agree to be bound by obligations in the event that you survive your partner. For example, two people enter into a second marriage and each have children from a previous relationship. They may agree that the surviving spouse inherits the entire estate on the condition that on their death the balance is divided equally between each set of children. That negates the risk that the surviving spouse will change their own Will to favour their children over your own.

Am I required to leave assets to a former partner?

There is no law that compels you to do so. However, if your ex-partner was named as a beneficiary of your Will before you separate, they will remain a beneficiary until you change your Will or you formally divorce.

If you have not formally divorced, and you die intestate (without a Will), the laws of intestacy may see your ex-partner inherit your entire estate. This may include your superannuation.

In NSW your former spouse will always remain an eligible person to claim on your estate if they feel that they were not adequately provided for, for example, no property settlement was ever done.

Can a former partner or a step-child contest my Will?

They can, but they won't always be successful.

Section 57 of the Succession Act requires a person to be an 'eligible person' in order to contest a Will. The definition includes 'the deceased's spouse', which includes a former husband, wife or registered partner. It also includes 'the deceased's children', which may include step-children if they lived with you as a member of your household or were otherwise dependent on you.

If an eligible person believes that they have been left without adequate provision for their maintenance and support, they have grounds to contest the Will.

The court will consider the history of the relationship, any statements you made about how you would divide the estate, the respective financial positions of all claimants and a number of other matters.

Most people leave their estate to their surviving partner, and then to their children on that partner's death.

Unfortunately, you cannot guarantee that your former partner will receive nothing. However, a well drafted Will helps ensure that your wishes are carried out.

Refer to the resources section of our website for additional information on Wills & Estates.

This is general information only. We are here to advise you on your specific circumstances; please get in touch to set up an initial consultation.

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