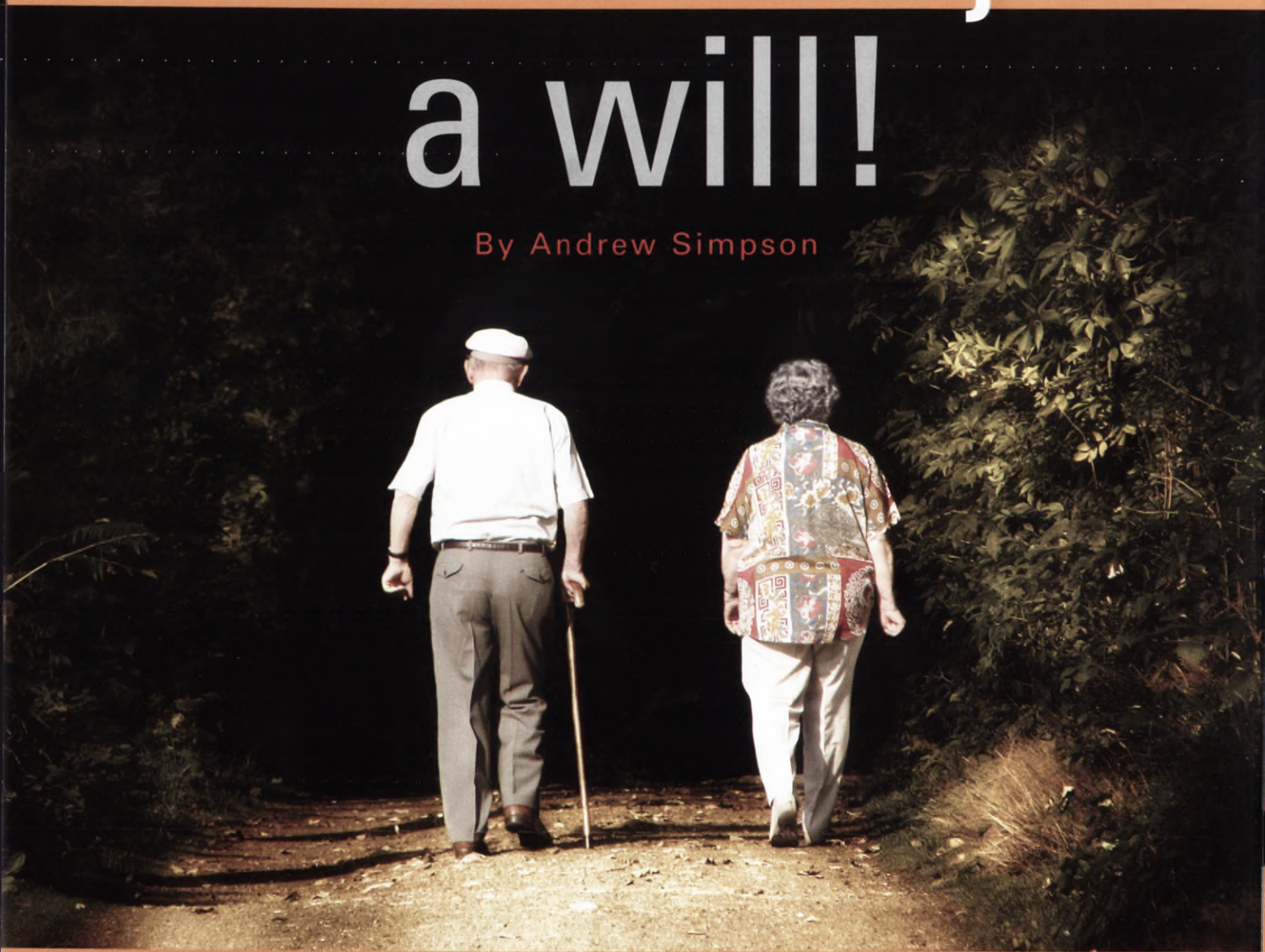
Estate planning – it's more than just a will!

By Andrew Simpson



Australia is on the threshold of a significant demographic movement. This change will increase the demand for legal and other professional services relevant to the needs of an older population. It will also inevitably bring with it complex and novel legal questions to which the law must adapt.

Estate planning is an area that has grown in importance with the 'greying' of Australia's baby boomers. The enormous transfer of wealth between the generations that will occur in the next 20 years guarantees its longevity as a practice area.

WHAT IS ESTATE PLANNING?

'Estate planning' describes the process of developing and recording arrangements for the transition of owned and controlled wealth after death. It is often assumed that estate planning is a straightforward exercise that requires little more than the preparation of a will. This is a simplistic view. Estate planning is a complex discipline for a number of reasons:

- Overall wealth has increased. This is due partly to the significant increase in superannuation contributions since the beginning of compulsory mass superannuation in Australia, following the introduction of the Superannuation Guarantee in 1992.[1] Clients approaching retirement now have considerably more superannuation than did previous generations.
- Australia's social fabric has changed enormously. The traditional family structure is now no longer the norm. Statistics published by the Australian Bureau of Statistics confirm that 'couple families' with children comprise a smaller proportion of all families. These statistics also demonstrate that trends in divorce and remarriage have contributed to changing numbers of one-parent, step and 'blended' families.[2] As a result, more deliberate planning is required to deal with this modern diversity of family structures.
- The use of alternative investment structures such as trusts, companies and self-managed superannuation funds has increased.

Estate planning is a particularly broad topic, partly because of its inter-relationship with other areas of law including family law, property law, business structuring and superannuation. A comprehensive discussion of estate planning is therefore beyond the scope of this article, which focuses on the duties and obligations of a practitioner in assisting an older client.

DUTIES OF A PRACTITIONER

In accepting a retainer to advise on estate-planning matters, a legal practitioner immediately assumes a number of duties in relation to the client. These duties include:

1. a duty to prepare a will;
2. a duty to ensure that the will gives effect to the will-maker's intentions;
3. a duty to ensure that a will is validly executed and attested;
4. a duty to advise against accidental revocation; and
5. duties arising from the custody of the client's original will.[3]

As well as these duties, others emerge when acting for an older client. For example, coupled with the duty to prepare a will is the duty to act with expedition and care. In giving effect to a will-maker's intentions, there is a duty to address a succession of non-estate assets, such as superannuation and trusts.

This article explores the duty to give effect to the will maker's intentions and, in doing so, will address the following:

- the scope of the retainer;
- preparing the will;
- protecting the will from challenge;
- dealing with non-estate assets; and
- beneficiaries and the use of trusts.

THE SCOPE OF THE RETAINER

Estate planning commences at the point of retainer. Understanding the scope of the retainer is thus a fundamental first step. For example, does the retainer allow for a complete review of the client's personal, business and financial circumstances, or is it limited to the preparation of a will?

If the latter, a practitioner must determine whether the parameters of the retainer are sufficient to discharge the duty to give effect to the will-maker's intentions. If there is doubt, a practitioner should seek to extend the limits of the retainer or decline to act. This is particularly the case where the practitioner is aware of the existence of other non-estate assets held in a family trust or superannuation fund. >>

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PREPARING THE WILL

The practitioner's primary duty is to prepare a valid will within a reasonable timeframe that gives effect to the will-maker's instructions. A failure to achieve this has been held to give rise to a claim against the practitioner instructed to act.[4]

Satisfying this duty is potentially time-consuming and usually requires rigorous questioning of the will-maker, and independent research into the will-maker's assets and liabilities (provided the retainer allows for it). This questioning and investigation process is aimed at establishing whether:

1. the will-maker has testamentary capacity; and
2. the will-maker owns the assets being disposed of by the will.

Testamentary capacity

A practitioner must be aware of the legal test for testamentary capacity,[5] and take reasonable steps to establish the existence of capacity or otherwise. This may include questioning the client directly in a manner that satisfies the elements of the test, or medical evidence where capacity is questionable. A practitioner's over-riding duty is to prepare a will promptly where the client is capable of giving instructions, even if there remains some doubt as to capacity. In these circumstances, it is ultimately the court's responsibility to determine the matter. A failure to do so may result in a claim against the practitioner.[6]

Estate and non-estate assets

A practitioner must understand the client's personal, investment and business circumstances. Understanding the client's asset ownership arrangements is essential in ensuring that the client's instructions can be implemented. The information that should be sought includes:

- the client's financial circumstances;
- the existence of family trusts and companies;
- business interests and any agreements affecting the succession thereof;
- the nature, extent and ownership of life insurance;
- superannuation member balances and the status of beneficiary nominations; and
- assets held jointly with another person.

It should never be assumed that clients understand their corporate structure and asset positions. The practitioner should insist on reviewing copies of relevant documents such as trust deeds, business succession agreements and titles, and seek clients' permission to make contact with their accounting and financial planning advisers.

PROTECTING THE WILL FROM CHALLENGE

Wills are not always administered as written and are often the source of legal argument and family dispute. Typically, a challenge is made on one of two grounds:

1. the will fails to make adequate provision; or
2. the will itself is invalid.

It is a practitioner's responsibility to make the client aware of the potential risks to the will and the distributions contemplated by it. This is part of implementing the will-maker's intentions.

Provision claims

In relation to the adequacy of provision, the following should be explained to the client:

- The failure to provide for a spouse or child is likely to expose a will to challenge, even where the client considers that there is a justifiable reason for the exclusion. It is difficult to prove 'disentitling conduct' to defeat a claim by a spouse or child.
- The client should avoid creating expectations in others, whether by word or action, regarding the manner of distribution of their assets after death.[7] A claim may be stronger where the applicant can demonstrate that s/he acted to his or her detriment based on representations made by the will-maker.[8]
- Complete and honest disclosure from the client about the existence of potential claimants is essential. This is particularly relevant in jurisdictions where the category of claimant is broader than spouse and children.
- Lifetime loans or advances and their intended treatment after death must be documented.

Invalidity claims

The most common arguments raised in favour of complete invalidity are that:

1. the will-maker lacked testamentary capacity;
2. the will-maker was under the undue influence of another;[9] and
3. the will does not comply with the required legal formalities.

To minimise the risk of invalidity:

- The practitioner should be familiar with the test for testamentary capacity, and comprehensive file notes of the questions asked of clients and their responses must be retained indefinitely.
- The client's instructions should be taken from the client in private, away from others who may be attempting to exert pressure or influence.
- The practitioner should have a detailed understanding of the legal formalities required for the preparation of a valid will and ensure that they are complied with. While this may appear trite, there are decided cases where this did not occur.[10]

DEALING WITH NON-ESTATE ASSETS

Wealth can be owned in a range of structures other than personal ownership. As the definition of estate planning suggests, succession of 'controlled' assets is an essential part of the planning process, and should be covered by part of a practitioner's retainer.

The two most common wealth vehicles are superannuation and family trusts. Assets held in these structures are distributed at the discretion of the trustee of the fund and are, therefore, not always governed by the terms of will (except where the trustee of the superannuation fund determines to pay the death benefits to the estate).

A failure to deal with superannuation and trusts can defeat a will-maker's estate planning objectives. The most obvious example is where a beneficiary of the will also assumes control of the family trust and receives the superannuation directly from the fund. If the will does not allow for the adjustment of the residuary estate to account for the benefits received from these non-estate assets, one beneficiary will receive a greater proportion of the total wealth than was intended.

It is in this context that the estate planning implications of superannuation and trusts are relevant.

Superannuation issues

Because superannuation is regarded as a non-estate asset, it is often not adequately covered in an estate plan, or overlooked altogether when wills are prepared. For this reason, thorough estate planning demands a review of the following:

- Is there a superannuation death benefit nomination in place?
- Does the governing trust deed of the fund allow for the making of a binding death benefit nomination? If yes, how long is the nomination valid for?
- Should the death benefit nomination be binding or non-binding?
- Is the definition of 'dependant' in the trust deed wide enough to include an 'interdependency' relationship?
- Should the estate be considered as a potential beneficiary of the superannuation? If so, what are the tax consequences of the payment?
- What payment alternatives may exist at death to reduce the potential taxation liability?
- In the case of a self-managed super fund, who is to assume control of the trustee company?

Discretionary trusts

Discretionary trusts are created by clients during their lifetime for asset protection and tax-planning purposes. Many clients do not understand that assets held in a discretionary trust are not theirs to dispose of by will. For those who hold significant wealth in a discretionary trust, the terms of the trust deed and questions of succession of control are critical. For example:

- Who holds the power to remove and appoint the trustee of the trust ('the appointor')?
- Does the trust deed provide for the succession of the appointor's role?
- Where the power of appointment is to be held by more than one person, does the deed contain provisions for dealing with a dispute between appointors?
- Has a family trust election been made, and what impact will the death of the testator have on the definition of the family group?
- Is a statement of wishes required to assist with the future management of the trust?

CIRCUMSTANCES OF BENEFICIARIES AND THE USE OF TRUSTS

As part of the fact-finding process in the initial stages, a practitioner should seek to fully understand the current and likely future circumstances of the proposed beneficiaries. A failure to do so can have disastrous consequences.

Special needs

Practitioners should ask their clients to advise them if any of the beneficiaries:

- have a gambling or substance addiction?
- have a history of poor financial decision-making?
- have exposure to creditor or liability risks?
- suffer from an intellectual disability?
- earn sufficient income to put them into the top marginal tax bracket?

If the answer to any of these questions is 'yes', the preparation of a 'simple' will is insufficient to address the >>

client's estate-planning requirements. The practitioner has a responsibility to tell the client this and advise on alternative solutions. These would include testamentary trusts.

The type of trust prepared depends on the specific issues to be addressed:

- If the relevant beneficiary is a poor financial manager, or is prone to gambling and substance abuse, then a Capital Protected Trust (CPT) would be suitable. This enables a trustee to manage the entitlement on behalf of the beneficiary and avoid dissipation.
- If the beneficiary suffers from an intellectual disability, then an 'All Needs' Protective Trust (ANPT) or Special Disability Trust (SDT) should be considered.[11]
- A Beneficiary Controlled Testamentary Trust (BCTT) is applicable to a beneficiary on a high marginal tax rate, or one exposed to occupational or other liability risks. For example, a BCTT offers a high income earning beneficiary the ability to tax effectively split trust income with other discretionary beneficiaries of the trust on lower marginal tax rates. This is attractive because concessional rates of tax apply to income distributed to minors from a trust created by will.[12] A BCTT also offers asset protection in the event of bankruptcy, because the beneficiary 'controls' rather than 'owns' the assets of the trust.

In creating a CPT, an ANPT or a SDT, the appointment of the executor and trustee and the nomination of remainder beneficiaries requires careful consideration.

The blended family

As discussed earlier, Australia's social make-up has changed enormously in recent decades. These changes have resulted in the emergence of the 'blended' or melded family, created by the repartnering of individuals following relationship breakdown. As people live longer, the number of blended families will increase.

Blended families provide an estate-planning challenge for both the practitioner and the client. A delicate balancing act is required between the competing interests of the second spouse and the children of the first relationship. The perceived risk is that if assets are left directly to a second spouse, that spouse may leave a will that does not include their step-children (that is, the children from the client's first relationship).

The client needs to be made aware of the risks and the alternatives for dealing with them. In particular, the practitioner should canvass the preparation of mutual wills agreements and the creation of CPTs.

Mutual wills

'Mutual wills' describes an agreement between will-makers that crystallises into a binding arrangement when the first party to the agreement dies. Equity imposes a constructive trust over the estate assets for the lifetime of the surviving spouse.[13] While recognised in law, mutual wills agreements are potentially difficult to administer. They are most commonly used where the parties do not want to impose restrictions on the survivor's use of the funds, but want to control the ultimate distribution.

Capital protected trusts

CPTs are more commonly used as a solution to estate planning in the context of blended families. Typically, the trust allows an income stream for the life of the spouse and preserves the capital for the ultimate benefit of the children or others. This arrangement is sometimes referred to as a 'life-interest'.

A practitioner should discuss the following with the client in a blended-family scenario:

- To what extent does the client want to 'rule from the grave'?
- Is a CPT the preferred method of provision in the circumstances?
- Will there be sufficient assets in the estate to fund the CPT?
- Who is to be appointed trustee of the fund during the lifetime of the spouse?
- How is the client's superannuation to be dealt with? Is it to form part of the CPT and, if so, is the client aware of the tax consequences of this strategy? Is a binding death benefit nomination required?
- Does the structure of the will allow for a change in the spouse's circumstances? For example, does the will allow for the substitution of assets within the fund?
- Are the trustee powers wide enough to authorise the use of the fund capital to pay an accommodation bond under the *Aged Care Act* 1997 (Cth)?
- Has adequate provision been made for the spouse?

CONCLUSION

The preparation of a will represents one aspect of the estate-planning process. However, thorough estate planning demands a retainer that goes beyond the will, so that the practitioner can ensure that the instructions given and the strategy recommended are achievable and tailored to the circumstances of the will-maker. A failure to do so can potentially expose the practitioner to a claim brought by a disappointed beneficiary. Extra care is required where the client may be experiencing the frailties of age. ■

Notes: **1** *Superannuation Guarantee (Administration) Act* 1992 (Cth). **2** Australia Bureau of Statistics, *Australia Social Trends*, 2003. **3** R Mortensen, 'Solicitors' Will-making Duties' [2002] *Melbourne University Law Review* 4. **4** *White v Jones* [1995] 2 AC 207, *Carr-Glynn v Frearsons* [1997] 2 AER 614. **5** *Banks v Goodfellow* [1870] LR 5 QB 549 at 565. **6** *Ryan v Public Trustee* [2000] 1 NZLR 700. **7** *Richardson v Armistead* [2000] VSC 551. **8** *Giumelli v Giumelli* (1990) 196 CLR 101. **9** *Re Peddy* [1940] SASR 354; *Re Bennett* [1940] VLR 389. **10** *Hill v Van Erp* (1997) 142 ALR 687. **11** Part 3.18A *Social Security Act* 1991 (Cth); Division 11B *Veterans Entitlement Act* 1986 (Cth). **12** Section 102AG(2)(a) *Income Tax Assessment Act* 1936 (Cth). **13** *Birmingham v Renfrew* (1937) 57 CLR 666.

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