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Til Aged Care Do We Part: Later In Life Relationships And The Estate Plan

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'Til Aged Care Do We Part: Later In Life Relationships And The Estate Plan

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Justine Taylor and Daniel Bennett

Uther Webster & Evans

Introduction

Every family and every relationship has its own nuances and subtleties that need to be individually catered for. This is particularly so when dealing with later in life relationships and blended families when viewed through, not only the estate planning lens, but also when appropriately advising on family law rights.

As Dixon J (of the Supreme Court of Victoria) observed in the context of legislation providing that marriage will revoke a prior will unless made in contemplation of marriage[1] in *Steel v Ifrah* [2013] 199; 38 VR 19:[2]

> "*Marriage is an event that it is commonly understood to naturally affect a testator's intentions about the distribution of his or her estate after death. Undoubtedly, the changing mores of Australian society concerning marriage, divorce, children, blended families and the holding and distribution of wealth and assets motivated the reform, in 1997, of the marriage revocation rule. Where once it might have been expected that a marriage would result in an intention not to distribute to the beneficiaries that had been selected prior to a marriage in order to favour the new husband or wife and the children of the union, the legislature considers it unsafe for the law to now make that assumption. An expectation of a second marriage, or a*

[1] *Succession Act 2006* (NSW) s12, *Wills Act 1997* (VIC) s13, *Succession Act 1981* (QLD) s14, *Wills Act 1970* (WA) s14, *Wills Act 1936* (SA) s20, *Wills Act 2008* (TAS) s16, *Wills Act 1968* (ACT) s20, *Wills Act 2000* (NT) s14

[2] *Steel v Ifrah* [2013] 199; 38 VR 19 [12]; *Re Estate Grant, deceased* [2018] NSWSC 1031

marriage following a union that resulted in children, may result in an intention to protect the entitlement of the children of that former union, rather than an intention to recognise the claims of or through a new marriage partner. What is important is that there be contemplation of a marriage when determining how, and to whom, one's estate is to be distributed, because it is the making of a will without contemplation of the relevant circumstances that may apply when it comes into effect that is the mischief".[3]

This paper will be taking a cross jurisdictional and collaborative approach to specifically look at later in life relationships in drafting binding financial agreements, Wills and the estate plan, to specifically cater for blended families, subsequent marriages and/or later in life relationships.

In this context, this paper will address the following:

- Characteristics of late in life relationships and when does a "legal" relationship arise?
- Can a de facto relationship exist when the two parties live separately?
- Does a de facto relationship end if one party goes into care?
- Are Binding Financial Agreements a viable option for succession planning?
- Will keeping assets completely separate minimise risk in the event of a relationship breakdown?
- Will drafting issues including:
    - Ongoing living arrangements for the surviving spouse
    - Aged care funding considerations for the surviving spouse
    - Managing potential claims by disgruntled children

Characteristics of late in life relationships and when does a "legal" relationship arise?

For present purposes,[4] we are dealing with those relationships from which arise legal consequences, either at the commencement of, during the relationship, upon the breakdown or end of the relationship, or on the death of one of the parties to the relationship. In that context, the legal status and type of the relationship will have different consequences to be considered, namely:

[3] Ibid

[4] Of course, other relationships can give rise to legal consequences which are not contemplated by this paper, for example the application of the rules of intestacy in accordance with Chapter 4 of the Succession Act 2006 (NSW).

1. Marriage;
2. De facto relationships for the purpose of both the *Family Law Act 1975* (Cth) and the *Succession Act 2006* (NSW); and
3. Close personal relationships for the purpose of the *Succession Act 2006* (NSW) s57(1)(f) and/or interdependent relationships in the context of SIS Act dependents, (s10A *Superannuation Industry (Supervision) Act* 1993.

Marriage –

Section 5 of the *Marriage Act 1961* (Cth) defines marriage to mean *"the union of 2 people to the exclusion of all others, voluntarily entered into for life."*

In Australia there are significant legal consequences to marriage. From an estate planning perspective, in each state and territory, marriage has the effect of invalidating a will where not made in contemplation of marriage. Similarly divorce revokes a Will to the extent that a beneficial disposition, appointment, and grant of power is made in favour of the former spouse.[5]

Section 79 of the *Family Law Act 1975* (Cth) ("**FL Act**") gives rise to legal rights applicable to married parties enabling parties to property settlement proceedings to alter their property interests beyond what any legal and/or beneficial entitlement might suggest. A more detailed description of those rights will be discussed in the context of financial agreements made under the FL Act in connection with either marriage or de facto relationships, further below.

De facto relationships –

It is often necessary to look at what is meant by de facto relationships, both from a family law perspective and from the estate planning perspective. The Latin translation of course, is a *relationship of fact.*

Prior to embarking more specifically on the topic of Financial Agreements made under FL Act, (referred to in shorthand as "BFA's"), in relation to '*later in life'* relationships, we must understand the meaning of de facto relationships particularly where '*later in life'* relationships are often more in the nature of de facto relationships rather than marriages.

[5] *Succession Act 2006* (NSW) s13.

These relationships similarly attract the jurisdiction of the FL Act to alter property interests (pursuant to s.90SM of the FL Act).

Section 4AA of the FL Act contains the definition of a de facto relationship and the matters that may be considered by the Court in forming the view whether or not a de facto relationship exists. The relevant section is as follows:

> *4AA De facto relationships*
>
> *Meaning of de facto relationship*
>
> *(1) A person is in a de facto relationship with another person if:*
>
> *(a) the persons are not legally married to each other; and*
>
> *(b) the persons are not related by family (see subsection (6)); and*
>
> *(c) having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.*
>
> *Paragraph (c) has effect subject to subsection (5).*
>
> *Working out if persons have a relationship as a couple*
>
> *(2) Those circumstances may include any or all of the following:*
>
> *(a) the duration of the relationship;*
>
> *(b) the nature and extent of their common residence;*
>
> *(c) whether a sexual relationship exists;*
>
> *(d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;*
>
> *(e) the ownership, use and acquisition of their property;*
>
> *(f) the degree of mutual commitment to a shared life;*
>
> *(g) whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship;*
>
> *(h) the care and support of children;*
>
> *(i) the reputation and public aspects of the relationship.*
>
> *(3) No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether the persons have a de facto relationship.*
>
> *(4) A court determining whether a de facto relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.*

(5) For the purposes of this Act:

(a) a de facto relationship can exist between 2 persons of different sexes and between 2 persons of the same sex; and

(b) a de facto relationship can exist even if one of the persons is legally married to someone else or in another de facto relationship.

When 2 persons are related by family

(6) For the purposes of subsection (1), 2 persons are related by family if:

(a) one is the child (including an adopted child) of the other; or

(b) one is another descendant of the other (even if the relationship between them is traced through an adoptive parent); or

(c) they have a parent in common (who may be an adoptive parent of either or both of them).

For this purpose, disregard whether an adoption is declared void or has ceased to have effect.

When determining whether or not a de facto relationship exists, any or all of the above factors may be present for the Court to conclude that a de facto relationship exists. As such, the existence or otherwise of a sexual relationship and cohabitation are two of nine factors that the Court would consider when making that finding and the absence of those factors can still result in the Court determining that a de facto relationship exists.

The factors to be considered are broad and, like most provisions in the FL Act, it is dependent upon the facts of the individual case. It is open to the Court when considering the above factors to attach whatever weight to the evidence in respect of those factors it deems appropriate. No particular circumstance attaches any more weight than any other.

Accordingly, the Court may hold that a de facto relationship exists even if the parties do not cohabit or cohabit 7 days a week (for example, 'weekend' cohabitation) and in cases where the parties may maintain their separate households, and the evidence as to the parties' attitudes to the relationship, whether the parties are seen publicly and within their respective families as a 'couple', whether the parties holiday together, whether the parties have any shared financial relations, are all relevant to the determination as to whether or not a de facto relationship exists.

The High Court's decision in *Fairbairn v Radecki* [2022] HCA 18 is a starting point read in the context of *De Facto* relationships in the Family Law setting.

Can a de facto relationship exist when the two parties live separately?

Yes. The nature and extent of the parties' common residence is but one of the factors and is not determinative.[6]

In *Dakin v Sainbury*, [7] the parties had been in a sexual relationship for seven years, they did not live together, they did not spend time together at each other's independent residences or perform household tasks for each other, but would see each other approximately 5 times per week. One gave evidence that the relationship was exclusive the other said it was not. The Court held that a de facto relationship did exist for the duration of the relationship and stated:

> *"In this matter, there is no doubt that the applicant was financially dependent upon the respondent from April 2003 to January 2010. For that period he paid all rental on her accommodation, contributed to her living expenses and during the [V] phase, albeit with some reluctance, totally and completely supported her and her son [Z]…*

Whilst their relationship was unconventional in that the parties did not have a shared residence, the Court accepted that they spent time together almost every day of the week in circumstances that accommodated the realities of "*their personal commitments and their mutual decision not to conduct their relationship by adjoining their disparate family circumstances…"*

In *Hoffman v Braddock* [2019**],**[8] the Court made some useful observations relating to the application of s 4AA, in particular reiterating that:

(a) *Whether a de facto relationship exists or not is a question of fact, not a matter of discretion;*
(b) *A de facto relationship does not need to be akin to a marriage although the nature of the association involved in a marriage relationship may be instructive;*

[6] *Jonah & White* [2011] FamCA 221; *Fairbairn v Radecki [2022] HCA 18*.
[7] *Dakin v Sainsbury* [2010] FMCAfam 628
[8] In *Hoffman v Braddock* [2019] FCCA 144

(c) *The parties determine the nature of their relationship and it may evolve and alter, even dramatically, over time;*

(d) *Whilst a composite expression, it is comprised of two parts 'a couple' and 'living together' each of which must be established;*

(e) *There need not be full time living together;*

(f) *The relationship may be unhappy, but still subsisting;*

(g) *Sexual or other exclusivity is not necessary;*

(h) *The gist of the inquiry is the degree to which parties have merged their lives into one. That connotes financial, emotional and physical interdependence."*

De facto relationship in Succession

In the context of Succession there is no uniform national legislative approach as in the setting of Family Law, instead de facto relationships and registered relationships are governed by the legislative instruments on a state by state basis and there are importance differences from a succession perspective as to that of family law.[9]

At both the federal and state/territory level, whether a relationship of this nature exists again is a question of fact and consideration as to the established intention of the parties.

The legal ramifications attached to the de facto status in each state arises with respect to:

a. The distribution of the estate on intestacy,
b. eligibility to bring statutory claims against the estate, (ie- family provision or TFM's);
c. the effect of the dissolution of the de facto relationship on revocation of clauses in a will; and
d. superannuation.

Practitioners need to be cognisant of the legislative distinctions as to the meaning and effect of de facto relationships on a state by state basis and in different applications.

(a) Intestacy

[9] Example s21C of the *Interpretation Act 1987*. In relation to registration of relationships see Relationships Register Act 2010 (NSW), Relationships Act 2008 (VIC), Civil Partnerships Act 2011 (QLD),Relationships Act 2003 (TAS), Civil Unions Act 2012 (ACT),

In the context of **Intestacy** for example, the statutory entitlements of a spouse in NSW extend to a person who is a party to a domestic relationship, which includes a de facto relationship with the qualifier that:[10]

a. The relationship has been in existence for a continuous period of 2 years; or
b. Has resulted in the birth of a child.

In *Sheen v Hesan* [2023] NSWSC 468, Hallen J considered the question of whether a de facto relationship existed and if so, whether it had broken down and if so *when.* The plaintiff was born in South Korea and had been a member of a Christian cult, (which she had left). The deceased was born in Afghanistan and of Muslim background, which the plaintiff asserted was relevant to why their relationship was known public knowledge to their respect family. Here the Court contemplated the distinction between the 2 year qualification that interposes into the NSW statutory regime of intestacy under chapter 4 (ss104 and 105), as against the more expansive definition that arises with respect to eligibility to bring a family provision claim under chapter 3 (s57(1)(b)) of the Succession Act. The plaintiff sought in the first instance, a grant of letters of administration on intestacy as a spouse of the deceased. In the alternative, the plaintiff sought provision under chapter 3 of the Succession Act, in the category of de facto under s57(1)(b) or alternatively as a wholly or partly dependent member of the household under s57(1)(e), competing against the sister of the deceased if on intestacy she did not succeed.[11]

The Court found that the de facto relationship had existed and had been brought to an end. The Court found that there was no de facto relationship for the purpose of the intestacy regime and also within the meaning of eligibility as a Family Provision claimant. However, the Court nonetheless found that she was a dependent member of the household and eligibility was established under s57(1)(e) and ordered provision.

The Court observed:[12]

> a de facto relationship means a relationship which exists in fact and that is established by determining what the parties to the alleged relationship are doing. Because the status of the relationship between the Plaintiff and the deceased derives over events spanning many years, its definition will depend on many facts and the perceptions of those involved in the

10 *Succession Act 2006*, (NSW) s104 S105
11 *Sheen v Hesan* [2023] NSWSC 468
12 Ibid [at 144]

relationship, and the perceptions of individuals who observed them. Such a case is particularly fact sensitive.

(b) De facto Family Provision

Eligibility as a family provision claimant, under s 57(1)(b) of the Succession Act, extends to a person with whom the deceased person was living in a de facto relationship at the time of the deceased person's death, (there is no 2 year qualification).[13] S 57(1)(b) otherwise adopts the definition of de facto set out in s21C of the *Interpretation Act 1987*.

Pursuant to s 21C of the *Interpretation Act 1987*, a de facto relationship requires the persons to have a relationship as a couple living together, not married and not related by family.

The indicia of living together as a couple is a question of fact that again requires consideration similar to the Family Law Act, namely:

(a) The duration of the relationship
(b) The nature and extent of their common residence;
(c) Whether a sexual relationship exists,
(d) The degree of financial dependence or interdependence and any arrangements for financial support between them,
(e) The ownership, use and acquisition of property,
(f) The degree of mutual commitment to a shared life,
(g) The care and support of children,
(h) Performance of household duties,
(i) The reputation and public aspect of the relationships;
(j) It can exist, regardless of whether one of the persons is married to another.[14]

In considering these discretionary factors the totality of the relationship must be considered including the evolving nature over time.

In *Sadiq v NSW Trustee and Guardian [2015],* the Court cautioned against too much of a mechanical application of s21C and emphasised the essential ingredient of *living together as a couple* stating *"it*

[13] *Sun v Chapman* [2022] NSWCA
[14] *Acts Interpretation Act 1987* 21C

need not necessarily be a commitment intended to last forever, or indefinitely. Nor need it be a commitment to a long term relationship. But it should at least be a mutual commitment for the foreseeable future."[15]

In NSW a de facto partner meeting this description, is of course eligible to bring a family provision claim provided they were in a de facto relationship at the time of the deceased's person's death.[16]

Living Together or separately?

In *Sun v Champman* **[2022],**[17] the Court of Appeal accepted eligibility of the de facto status of the plaintiff (overturning the Court's decision at first instance). The plaintiff asserted that she had met the deceased in a caravan park and lived with him until his death. She asserted that they had a sexual relationship which had ended prior to his death, but that the de facto relationship remained current as at the date of death. The plaintiff deposed that she slept some nights with the deceased in his room, but otherwise had her own room. She said they had a sexual relationship for about 5 years but that had ended given his natural age and health. They continued to live together for 15 years. The Executor of the estate asserted that the plaintiff had responded to an ad for the provision of domestic services that did not meet the indicia required of a de facto relationship. She had been introduced as a housekeeper, cleaner and carer. The primary judge found that a de facto relationship had existed but did not exist as at the date of death.

The appeal was allowed and Ms Sun was found to be in a de facto relationship at the time of death. Consequently, an order for provision was made in her favour in the sum of $555,000. The Court engaged in an analysis of the factual matrix of the particular case, in finding that it was not a discretionary exercise but rather an evaluative decision as to the characterisation of facts as found against the statutory phrase *living together as a couple* having regard to the indicia of s21C. This decision recognises the natural evolution of relationships over a long period of time and is has been accepted that there is nothing in the statutory definition that ties the concept of a de facto relationship to that of a formal marriage.[18]

[15] *Sadiq v NSW Trustee and Guardian [2015] NSWSC 716* Hallen J at [214]
[16] *Succession Act 2006* (NSW) s57
[17] *Sun v Champman* [2022] NSWCA 132
[18] *Estate Pamplin* [2017] NSWSC 1477

The Court has considered what is meant by the term *living together,* as a couple. Living together does not necessary involve *cohabitation* and one common residence is not necessarily an essential element to be proved.[19] On the other hand, repeated visits to a single place, or two adults spending time occupying the same place, does not necessary meet the threshold.[20]

The judgment of *Khadarou v Antarkis [2021*],[21] considered this expression in the context of a plaintiff who sought eligibility to bring a family provision claim under a *close personal relationship.*[22] There the Court reaffirmed that the test is an objective one, requiring consideration of the nature and extent of living together in a common home. Whilst it is not necessary for each of them to spend the whole of their respective times in the home, it is necessary to look at a range of factors such as the common residential address, sleeping at the same premises, maintain clothing and personal effects, being simultaneously present at the same time, sharing facilities on a recurrent basis, and deciding household questions together, regarding the residence as their *home.*

(c) Effect of dissolution of relationship of will

In NSW the dissolution of a de facto relationship is not the same as a formal divorce in automatically revoking gifts made to that person under a will upon breakdown of the de facto relationship and the same applies in Victoria.[23]

In contrast, Queensland's section 15B of the *Succession Act 1981,*[24] specifically mirrors the effect of a divorce on a will, so that the ending of a testator's de facto relationship ordinarily revokes the disposition to the de facto under the will. In Tasmania, the revocation of a registered deed of relationship under Part 2 of the *Relationships Act 2003,* can revoke a testamentary disposition,[25] and similarly in the ACT the formal end of a civil union or civil partnership will revoke the disposition in the same way as a divorce. [26]

In Western Australia the qualification for de facto relationships is set out in s 15 of the Administration Act 1903 and includes a two year relationship qualification. In *Blyth v Wilken* [2015] WASC 486, the WASC considered a will in which the estate was primarily gifted to "*my de facto Katherine Mary*

[19] *Vaughan v Hoskovich* [2010] NSWSC706
[20] *Smoje v Forrester* [20217] NSWCA 308
[21] *Khadarou v Antarkis* [2021] NSWSC 743
[22] Ibid s57(1)(f).
[23] Succession Act 2006 s13
[24] *Succession Act 1981* (QLD) s15B
[25] Wills Act 2008 (TAS) s17.
[26] *Wills Act 1968* (ACT) 20A.

Murray", but the relationship had ended before the deceased died. The former de facto, argued that this was descriptive language only and the de facto status was not a requisite to the gift. This is a particularly interesting case, because it was the description of the de facto within the will that led the Court to consider the gift to fail, whereas had those qualifying words been left out, it is likely the gift would have been upheld.

Does a de facto relationship end if one party goes into care?

The High Court case of *Stanford v Stanford*[27] concerned an elderly couple who had been together for 37 years but where the wife had suffered a severe stroke, had been admitted to an aged care facility, and was subsequently diagnosed with dementia. Of note was that both parties had been married previously (albeit 37 years prior) and had, by the time the proceedings commenced, adult children from those previous relationships.

The husband continued to reside in the former marital home, which was registered in his name and which he had, 37 years previously, brought into the marriage, and he set aside moneys to fund the wife's needs. The husband cared for the wife's needs, and it was not a case where he elected to separate. The separation occurred as a result of the wife's stroke.

One of the wife's daughters applied to the Court as a case guardian for property settlement (that is, an 'alteration of property interests', as is the specific wording in S79 of the FL Act,[28] and noting that the former matrimonial home was registered in the husband's name only), and the Trial Judge made orders requiring the husband to pay to the wife a sum of money, essentially an alteration of property interests in recognition of her contributions during a 37 year marriage and, notwithstanding that the husband was meeting her costs at the nursing home, in consideration of what are known in the family law jurisdiction as the 'section 75(2) factors'.

The husband appealed to the Full Court. After the appeal was heard but before Judgment was entered, the wife died, and her adult daughters continued her case as legal personal representatives. There were two judgments of the Full Court. One found that the lower Court erred in considering that it was just and equitable to make an order having the effect of altering the property interests of the parties, and the second judgment, in spite of the finding that the lower court erred, made orders to

[27] *Stanford v Stanford* [2012] HCA 52.
[28] *Family Law Act 1975* (Cth) s79

the effect that the sum of money specified by the trial judge, be paid to the wife's estate after the husband's death.

The husband appealed to the High Court. The husband's appeal was successful on the basis that the wife's needs in the aged care facility were being met, or could be met, by a maintenance order, and that it was not just and equitable for there to be an order altering the property interests of the parties in the circumstances of the case.

One could infer that the court was cognisant that those who would benefit from a property alteration order would be the wife's adult children, and not the wife.

In relation to the provisions that may be included in a BFA covering possibility of aged care, it would largely depend upon the parties' respective assets and the super mix and any income stream available to either of the parties, as to how the costs of aged care may be met. Nursing home bonds are a significant expense and whether there are sufficient assets to provide for a bond and the costs of aged care would depend upon the size of the estate.

In late in life relationships, these matters would need to be discussed with the client and to the extent possible provided for in a BFA.

Again, it would be prudent for parties prior to entering into a BFA to obtain a financial plan from a suitably qualified professional that to the extent possible covers the possible admission to aged care, nursing and home care needs, and medical expenses.

In the case of *Stanford*, the husband argued before the High Court that the Court had no power to make an order under the FL Act because the marriage was intact. That is, separation had occurred because of the wife's stroke, and not because of any formal breakdown of the marriage. If that argument failed, the husband argued that the Court could not find it just and equitable, given the circumstances of this case, to make an alteration of property interests under S79 of the Act.

The husband referred to the Constitution and Sections 51(xx(i) and xx(ii) thereof.

The High Court rejected the submission that there was no power to make a Section 79 Order on the basis that the parties had not separated in any formal sense. That is, in circumstances where the

separation was simply by virtue of the wife's stroke. However, it also held that notwithstanding this finding, it was not just and equitable given the circumstances of the case to make an order altering the property interests of the parties.

In short, whilst going into aged care does not constitute separation and hence a '*breakdown'* of the relationship, the Court still has power if the circumstances of the case warrant it to make an order that has the effect of altering the property interests of the parties.

Are Binding Financial Agreements a viable option for succession planning?

The legislation

There are various types of BFAs that may be entered into in accordance with the FL Act, depending upon the nature of the relationship and the stage of the relationship that the BFA is to be entered into.

BFAs under Sections 90B, 90C and 90D of the FL Act relate to married spouses (Section 90B, colloquially 'a Pre-Nup', Section 90C, a BFA made during marriage and before divorce, and Section 90D, a BFA made after divorce), and BFAs under sections 90UB, 90UC and 90UD of the FL Act relate to de facto spouses (Section 90UB, a BFA in contemplation of a de facto relationship, Section 90UC, a BFA made during a de facto relationship, and Section 90UD, a BFA made after separation).

Before delving into specific matters the subject of this paper, it is relevant to review and be familiar with High Court case of *Thorne v Kennedy* [2017] HCA 49,[29] against the notion that BFAs are unshakeable or that they beyond doubt ensure the preservation of anticipated inheritances of adult children. That is, to show how fraught BFAs can be (particularly those at the commencement or in the early part of a relationship) and that the independent legal advice to parties when entering into a BFA should.

Whilst it is no doubt sensible for the wealthier spouse to have a BFA in order to protect to the extent possible the assets with which they came into the relationship, the circumstances in which the BFA is entered into can lead a Court at a later date to set aside the BFA.

[29] *Thorne v Kennedy* [2017] HCA 49

In relation to BFAs, the purpose is to determine how the assets of the parties will be dealt with in the event of separation. Separation is usually defined in the BFA to the effect that it arises when one or both of the parties regard the relationship as having broken down irretrievably and advising the other party of this view.

A BFA requires, for it to be enforceable, that a separation declaration has been signed by one of the parties to the Agreement. The BFA is of course entered into when everything is rosy, but if the relationship breaks down, whether that is one party's or both parties' view, the Agreement, for it to be binding and enforceable, requires a party (and only one is needed) to sign a specific separation declaration.

Separation is not defined as such in the FL Act. Section 48 of the Act does define separation in the context of a marriage and for the purposes of a divorce proceeding, in that a Court can only make a divorce Order if and only if the Court is satisfied that the parties have lived separately and apart for a continuous period of 12 months and that there is not a reasonably likelihood of cohabitation being resumed.

Parties can maintain a joint residence (although sleep in separate bedrooms on the basis that the marriage is over) for various reasons (usually financial) but be regarded as separated for the purposes of a divorce.

If one party to a BFA goes into aged care or becomes incapacitated (due to dementia, or stroke or a brain injury), then there could be a situation where a party to whose advantage it is to enforce the BFA signs a separation declaration notwithstanding that there is no formal or recognize breakdown of the relationship. The other party clearly does not have the capacity to challenge that the parties have in fact separated.

It would in those circumstances be wise in late in life BFAs to ensure that the definition of separation excludes separation due to incapacity or entry into aged care.

Thorne v Kennedy occupied the minds of Judges and Justices at three levels of the Court (the Federal Circuit Court, as it was then known, the Full Court of the Family Court, again as it was then known, and the High Court, as it is still known).

Briefly, the facts in *Thorne v Kennedy* were as follows:

- the husband was a 67-year-old property developer with assets worth up to $24,000,000
- the husband had three adult children from his previous relationship
- the wife was a 36-year-old Eastern European national, whom Mr Kennedy met on the internet
- the husband made clear to the wife that if he was to marry her, she would have to 'sign papers' on the basis that his assets were 'to go' to his children
- on that basis, the wife signed two BFAs, one a few days before the wedding, and another some 4 to 5 weeks after the wedding. The circumstances of the wife obtaining this advice and signing the BFAs were highly relevant to the findings of the various Courts
- the lawyer from whom the wife obtained independent legal advice on both occasions advised her that the BFA was the worst she had ever seen, and that it was not to her advantage to enter into the Agreement
- despite that advice, the wife signed both Agreements
- sadly, the marriage lasted approximately 4 years, with the husband signing a Separation Declaration forming part of the BFA to the effect that the marriage had broken down irretrievably and that separation had occurred. Upon signing this Declaration, the BFA was effectively activated

The wife was not happy with the terms of the BFA and applied to the Federal Circuit Court to set aside the BFA. The Federal Circuit Court Judge in the first instance essentially found that the circumstances surrounding the wife entering into the BFAs constituted unconscionable conduct on the part of the husband, that there was 'undue influence', and made Orders setting aside the BFAs.

The husband appealed to the Full Court seeking to overturn the Trial Judge's decision. The husband died during the course of the Appeal and his estate (constituted by two of his adult sons) continued with the proceedings. The reasons why are obvious.

The Full Court, conversely, found that the BFAs were hunky dory and that the Trial Judge erred in setting aside the BFAs. The Full Court was constituted by three Justices of the Family Court.

The matter then proceeded to the High Court. The High Court was constituted by seven Justices, who held that the Trial Judge did not, in fact, err in finding that there was unconscionable conduct on the part of the husband, that the Full Court got it wrong, and that the BFAs should be set aside.

I raise this case simply to show that a total of 11 Judicial Officers were involved in three separate decisions to set aside the BFA, to affirm the BFA, and again to set aside the BFA.

Family lawyers, as a result, continue to be wary of acting for a party in relation to BFAs, although primarily in relation to 'Pre-Nups'. Some firms refuse to act at all in relation to these types of BFAs.

Capacity of the parties to enter into a BFA and comprehension as to its terms and effect

Sections 90G (in relation to married spouses) and 90UG (in relation to de facto spouses) of the FL Act require for a BFA to be binding, the following:

(1) that it is signed by both parties;
(2) that each party is provided with independent legal advice as to the effect on that party's rights and the advantages and disadvantages of entering into the Agreement;
(3) that a statement of independent legal advice is signed by the lawyers and given to the party;
(4) that the party is also provided with a statement of independent legal advice signed by the other party's lawyer; and
(5) that the BFA has not been terminated by the parties or set aside by a Court.

The sections make no specific reference to an obligation on the part of the lawyer to ascertain the capacity of the party or their ability to comprehend the implications of entering into the BFA. Merely that the effect on the party's rights under the Act and the advantages and disadvantages of entering into the BFA have been explained to the party.

However, clearly a lawyer is obligated (as they are in the context of testamentary capacity) to ensure that the party does in fact have the capacity to enter into the BFA, particularly if the client is elderly.

In this respect, the observations of Kunc J's as to the assessment of testamentary capacity in *Ryan v Dalton,*[30] is also relevant in this setting, as observed by the Court at [107]:

1. The client should always be interviewed alone. If an interpreter is required, ideally the interpreter should not be a family member or proposed beneficiary.

[30] *Ryan v Dalton; Estate of Ryan* [2017] NSWSC 1007, Kunc J at [107]

2. A solicitor should always consider capacity and the possibility of undue influence, if only to dismiss it in most cases.

3. In all cases instructions should be sought by non-leading questions such as: Who are your family members? What are your assets? To whom do you want to leave your assets? Why have you chosen to do it that way? The questions and answers should be carefully recorded in a file note.

4. In case of anyone:

    a. over 70;
    b. being cared for by someone;
    c. who resides in a nursing home or similar facility; or
    d. about whom for any other reason the solicitor might have concern about capacity,

    the solicitor should ask the client and their carer or a care manager in the home or facility whether there is any reason to be concerned about capacity including as a result of any diagnosis, behaviour, medication, or the like. Again full file notes should be kept recording the information which the solicitor obtained, and from whom, in answer to such inquires.

Undue Influence of Adult Children

In relation to BFAs (and noting the legal and equitable principles in relation to contract, of which a BFA is one), the focus in terms of undue influence and duress is usually on the other party to the particular agreement. *Thorne v Kennedy* is a prime example of where one party's conduct was the basis upon which the (High) Court set aside the BFAs.

The issue here, in contrast, is the potential for undue influence to be exerted by a party's adult children. As in *Thorne v Kennedy*, these adult children have a strong vested interest in ensuring that their prospective inheritance is protected.

As a practitioner, alarm bells would surely ring if an adult child accompanied their parent to a client conference in relation to a BFA to be entered into with their parent's new or intended spouse. In

those circumstances, you would clearly ensure that you convene with your client alone and not in the presence of the adult child (or children!).

When in conference with a more elderly client who is seeking advice in relation to a BFA, whether in terms of instructions to draft a BFA or to provide advice on an existing BFA, questions would need to be carefully asked during the conference to ascertain whether hiding behind the request to enter into a BFA is an adult child who is attempting to ensure that their prospective inheritance or their 'entitlement', as they see it, is protected.

Impact of the relationship on the eligibility for pension or government benefits

It is essential that practitioners recognise and call on external recourses in order to consider the implications that may arise in connection with eligibility for pensions and government benefits. Eligibility to a government pension is subject to the ordinary threshold asset tests. The asset tests for a single person will be distinguished for a couple and they can be found at https://www.servicesaustralia.gov.au/assets-test-for-age-pension?context=22526

Centrelink should be consulted as to how the proposed characterisation of the relationship (and indeed any proposed alteration of property interests or the provision of maintenance in a BFA in the event of separation) may affect the client's entitlement to any pension or government benefit and referral for such advice is routine.

Caution should be exercised against providing, or attempting to provide, that advice (unless you are particularly informed about such matters). If it is not our area of expertise a referral should be made to a specialist financial advisor who has expertise in advising more elderly members of society in relation to pensions (government and other), superannuation, and government benefits. Having said that, obviously those factors are important, and they should be ascertained to the extent possible before the final terms of the BFA are agreed.

Financial support now and in the future

A BFA may contain provisions relating to how ongoing bills are to be paid during a relationship and how one party (or their estate) is to provide for the other in the event separation.

Advice as to the drafting of these clauses would depend upon your client's financial situation at the commencement of the relationship (or at the time the BFA is proposed to be entered into), what the capacity and financial situation is of the spouse, and what their needs may be in the event of separation, bearing in mind the provisions as to property division, if any, in the BFA.

The parties may still be working at the time of entering into the BFA, but retirement may be around the corner. Whether it is prudent for there to be a superannuation split as part of the BFA in the event of separation would require the assistance of a suitably qualified financial advisor. That advisor must also be cognisant of any tax implications of certain provisions and the impact of any provisions of the BFA on a party's pension entitlements and other government assistance.

Each case depends upon the ages of the parties to the proposed BFA, their financial circumstances, their employment or superannuation entitlements or pension, and their state of health. Focus should be on how your client will support themselves for the duration of their lives both in the event of separation or if the relationship endures, and this is largely dependent upon income streams available to both parties both before and after retirement.

Binding the Estate after death: The interplay between the Family Law Act and the Succession Act

How enforceable is a BFA following the incapacity or death of a party?

The situation is clear in relation to the death of a party. Sections 90H (married spouses) and Section 90UK (de facto spouses) provide that the BFA is binding on the parties to the Agreement and that it 'continues to operate despite the death of a party to the Agreement and operates in favour of and is binding on, the legal personal representatives of that party'. [31]

Interestingly, Section 90UK has an additional note that if the parties are still in a de facto relationship when one of them dies, the de facto relationship is not taken to have broken down for the purposes of enforcing the matters mentioned in the BFA. This note does not appear in Section 90H of the Act, dealing with married parties.

Section 4(1) of the FL Act defines 'breakdown' in relation to marriages and de facto relationships:

> in relation to a marriage, does not include a breakdown of the marriage by reason of death; and

[31] *Family Law Act 1975* (Cth) s90H

in relation to a de facto relationship, does not include a breakdown of the relationship by reason of death.

As a result, if the marriage or relationship ends as a result of death, then this does not constitute a breakdown of the relationship and hence it would follow that the BFA would not be binding or enforceable because its provisions are only effective if there has been a breakdown of the relationship. [32]

The situation is less clear if one party simply no longer has capacity. As indicated above, the party who continues to have capacity could execute the separation declaration if it is in their interests for the BFA to be enforced. Again, it is prudent for a provision to be inserted into the BFA to the effect that a lack of capacity does not constitute a breakdown of the relationship.

In the context of Family Law resolution, by the time the binding financial agreement and/or consent orders are finally achieved, consideration as to the prospect of a party bringing a later claim against the estate after death is low on the list of priorities.

It is well understood that a Binding Financial Agreement does not prevent a party from bringing a Family Provision Claim otherwise known as Testator's Family Maintenance Claim as a party cannot contract out of such statutory entitlements.[33]

Eligibility of a former spouse or de facto to bring such a claim is not uniform across our states and territories. A former spouse is a category of persons that is or may (depending on jurisdiction), be eligible to bring a claim against the deceased's estate and here each of the states are slightly different with respect to eligibility to bring such a claim. Most of the states contain a qualifier that eligibility of a former spouse or de facto is limited to a person who was receiving or entitled to receive ongoing maintenance from the deceased pursuant to a Court Order or ongoing financial agreement so that eligibility is subject to some ongoing level of dependence, (being the case in Qld, Vict, Tas, WA, ACT and NT).[34]

[32] Ibid s 4(1)

[33] *Lieberman v Morris* (1944) 69 CLR; [1944] HCA 13

[34], *Succession Act 1981* (QLD) s41(1)&s5AA, Administration and Probate Act 1958 (VIC) s90(e), *Testator's Family Maintenance Act 1912* (TAS) s3A, *Family Provision Act 1972 (WA)* s7, *Family Provision Act 1969* (ACT) s7, , *Family Provision Act 1970* (NT) s 7

That qualifier does not exist in NSW and South Australia so that a former spouse is eligible in their own right to bring such a claim against a deceased's estate without the further requirement as to ongoing dependency,[35] although of course any Binding Financial Agreement or consent orders made between the parties during the deceased's lifetime will be materially relevant to the prospects of such a claim and the quantum of provision ordered (if any).

The well known case of *Lodin v Lodin* [2017] NSWCA 327 is particularly relevant here.

Dr Lodin met his former spouse, Magdalena initially when she had been a patient and they had had a child to their relationship. They were together for about 6 years in total and went through a bitter, acrimonious divorce, which included the wife lodging professional conduct complaints to the medical board and civil proceedings for damages against Dr Lodin during his lifetime. Following Property proceedings in the Family Court, the wife had already received a property settlement totalling about 38% of the matrimonial asset pool. Almost 25 years after the separation, Dr Lodin died intestate, which left the entirety of his $5million estate to his daughter. The former wife brought family provision proceedings in circumstances where she had subsequently been involved in a debilitating motor vehicle accident altering her circumstances after the property settlement and was by the time of death on a disability pension.

The Supreme Court at first instance made a substantial family provision order in favour of the former spouse in the amount of $750,000, finding that a moral obligation arose and taking into account the ex wife's substantial needs. Perhaps unsurprisingly, on appeal, the NSWCA Basten JA, White JA and Sackville JA overturned this decision, placing particular emphasis on the lack of moral responsibility following the plaintiff's conduct, the short lived period of the marriage and the significant time that had passed since the relationship had ended. The Court made the following observations:

> The fundamental question posed by s 59(1)(b) of the *Succession Act* in relation to a claim by a former spouse of the deceased is whether the claimant can be regarded as a natural object of testamentary recognition by the deceased. If the respondent's persecution of the Deceased was the product of a psychiatric illness or genuine disability induced by the Deceased's conduct or perhaps by the nature of the parties' relationship, the respondent's persecutory conduct might be given relatively little weight. But in the absence of evidence establishing a

[35] *Succession Act 2006* (NSW)s 57(1)(d) (NSW), *Inheritance (Family Provision) Act 1972* (SA) s6(b).

causal relationship of this kind, the respondent's conduct towards the Deceased counts against her entitlement to make a family provision claim against his estate.

As a balance against the uncertainty of future claims that may be brought by a former spouse, Section 95 of the *Succession Act* (NSW) enables the Supreme Court to grant a release against a claim for future provision being made under the Act. As such, at least in NSW, any Binding Financial Agreement and or consent orders reached should contemplate approval of the release so as to bring certainty against a future claim being brought and finality between the parties.

In considering a s95 release, a Summons will need to be filed, together with a supporting Affidavit to enable the Court to take into account all the circumstances of the case, including whether:

(a) it is or was, at the time any agreement to make the release was made, to the advantage, financially or otherwise, of the releasing party to make the release, and

(b) it is or was, at that time, prudent for the releasing party to make the release, and

(c) the provisions of any agreement to make the release are or were, at that time, fair and reasonable, and

(d) the releasing party has taken independent advice in relation to the release and, if so, has given due consideration to that advice.[36]

In the recent decision of *Mikhaiel v Breene,*[37] Ward CJ in Eq, reiterated that there must be sufficient material independently put before the Court to enable consideration of all the circumstances of the case and there must be active consideration by the Court of the terms on which the release has been agreed and the circumstances of the case. [38]

In *Austin v Austin* [2019],[39] the Court considered the making of an inter vivos release under s95 of the *Succession Act* by a husband against his wife's estate. Unusually in this case, there was no conflict,

[36] *Succession Act 2006* (NSW) s95.
[37] *Mikhaiel v Breene* [2022] NSWSC 102
[38] Ibid, Ward CJ in Eq at [5]
[39] *Austin v Austin* [2019] NSWSC 1397

the husband and wife had been married for 13 years, together had 3 minor children and enjoyed a loving relationship at the time the application was made. The wife had significant resources, both internationally and in Australia and had created an income stream and a right of residence for her husband, free of any obligation.

Notwithstanding the significant disparity between the husband and wife's financial position, the Court did consider it to be to the husband's advantage to approve the release because he had taken careful independent legal advice, it brought to an end the wife's concerns and enabled the parties to continue their relationship in a manner appropriate to them. The Court also excluded from the release about $6million worth of assets in which the husband could make a claim, to satisfy any future necessary order for provision that could be made.

In *Kelly v Kelly* [2019],[40] the Court there considered approval of a release against the estate and set out some general guidelines applicable to the Court's exercise of discretion, which practitioner's should be familiar with when applying for such a release, as follows:

- The parties should put before the Court all material relevant to the application that lend support for the release and details of the binding financial agreement, and evidence that there has been no coercion,[41]
- The Court is not limited to circumstances only in existence when the agreement for release was signed;[42]
- Active parties to the ligation are usually expected to be the best judge of what is in their own best interests,[43]
- Whether at the date of giving the release, it is prudent for the releasing party to give such release. A prudent person is someone who acts with care and thought for the future, exercising care and good judgment in relation to their own interests;[44]
- Regard to fairness and reasonableness. If when all the circumstances are considered the right outcome is that the plaintiff should have further provision, approval would not be forthcoming;[45]

[40] *Kelly v Kelly* [2019] NSWSC 994
[41] Ibid
[42] *Neil v Jacovou* [2011] NSWSC 87
[43] *Bartlett v Coomber* [2008] NSWCA 100, per Mason P,at [57]
[44] *Russell v Quinton*, at [70].
[45] *Mulcahy v Weldon* [2001] NSWSC 474 at [10]

- Whether the releasing party had taken independent advice in relation to the release and, if so, has given due consideration to that advice.[46]

Drafting considerations for Wills - estate planning for second or subsequent relationships

There are practical considerations to be considered at the time of drafting the wills and advising on the estate plan in the context of late in life relationships and blended families. In particular, there are options and tools we can utilise in preserving and balancing the competing rights of the *blended* family.

Consideration of Adult Children and Family Provision claims with the Competing Spouse

Family Provision claims and in particular the competing claims between a subsequent relationship and children to the earlier relationship provide guidance on the estate plan. It useful to review these decisions considered proper and adequate provision for a spouse and/or the competing adult children, to worth through solutions that might carve out particular assets in the estate that may be best earmarked for a spouse as opposed to children and review the different estate planning options. In doing so, it is important to stay up to date with the most recent cases so that we can advise on the likely provision a Court may order and thus consider proactively meeting that provision from the outset in the estate plan.

There is an expectation reflected in recent judgments to consider carefully the moral obligation that a testator holds towards their spouse or de facto as paramount so as to evaluate against the competing interests of their *adult children.*

A useful case stepping through the moral expectation of the Court towards Family Provision claims made by adult children is set out by Hallen J in the case of *Koellner v Spicer* [2019].[47]

With respect to the obligation towards the spouse, in *Spiteri v Vassallo* [2020],[48] the Court made an order for provision in favour of the deceased's de facto partner of 12 years where no provision had been made in the will at all apart from a 4 month right to occupy the property. The deceased's will bequeathed the whole estate to his children from the earlier marriage. It should have been obvious at the time of drafting and from the outset of the claim that provision would be ordered, the question was the quantum.

[46] *Russell v Quinton*, at [65-66]
[47] *Koellner v Spicer* [2019] NSWSC 1571 (Hallen J)
[48] *Spiteri v Vassallo NSWSC 890* Williams J at [19]

The Court held at [19]:

> "The adequacy of the provision made by the deceased's will is concerned with quantum, whereas proper prescribes the standard of maintenance, education and advancement in life. The inquiry into adequacy is not limited to considering whether the plaintiff has enough to survive or to live comfortably without provision (or further provision, as the case may be) from the deceased's estate. Adequacy is a broader concept that requires consideration of matters necessary to guard against unforeseen contingencies. In deciding whether adequate provision has been made for the plaintiff's proper maintenance, education or advancement in life, attention may be given to how the parties lived and might reasonably be expected to have lived in the future. The concepts of adequate and proper are not assessed in a vacuum, but in the context of all of the circumstances of the case, including the plaintiff's financial position, the size and nature of the deceased's estate, the totality of the relationship between the plaintiff and the deceased and the relationship between the deceased and other persons who have legitimate claims on the deceased's estate."

In *Sarant v Sarant* [2020],[49] the plaintiff was the deceased's spouse of 48 years, although he was separated from the deceased (under the one roof) for the last 4 years of her life. Still, that is a relationship of considerable length. The court provided a useful analysis of the principles to be considered particularly with respect to the moral obligation towards the spouse including:

1. A spouse, particularly of a long marriage, has a primary right to be considered by the deceased, but the extent that he, or she should provide for that spouse is to be governed by his, or her, needs, both at present, and in the foreseeable future and also the needs of any competing claimants.
2. The capacity of the spouse, himself, or herself, to provide for those needs must also be considered.
3. The general duty of the deceased to the spouse, to the extent to which her, or his, assets permit her, or him, to do so, is to ensure that the spouse is secure in the matrimonial home, to ensure that he or she has an income sufficient to permit him or her to live in the style to which the spouse is accustomed, and to provide the spouse with a fund to enable her to meet any unforeseen contingencies. Generally speaking, the amount should be sufficient to free the

[49] *Sarant v Sarant* [2020] NSWSC 1686

mind of the spouse from any reasonable fear of any insufficiency as he, or she, grows older and his, or her, health and strength fail;[50]

4. Concern as to the capacity of the spouse to maintain himself, or herself, independently, and autonomously, may also bear upon the notion of what is proper provision;[51]
5. Where, after competing factors have been taken into account, it is possible to do so, a spouse ought to be put in a position where he, or she, is the master, or mistress, of his, or her, own life, and in which, for the remainder of his, or her, life, she is not beholden to beneficiaries;[52]
6. Greater weight may be given to the claims of parties who have entered "a formal and binding commitment to mutual support".[53]
7. On the other hand, the age of the spouse may also be taken into account, where a large capital sum to an elderly spouse would simply result in a substantial benefit to relatives contrary to the deceased's wishes. [54]

Financial Status of the Surviving Spouse

However, the second or subsequent spouse should not always assume that provision will automatically be granted solely by reason of their position as spouse, especially when there has been a clear documented intention from the outset of the relationship to preserve the estate primarily for their respective children to an earlier relationship.

This was illustrated in the recent case of *Schneider v Kemeny* [2021].[55] Here the Court was tasked to consider a claim by the second husband against his late wife's estate, competing against the deceased's children to the earlier relationship. The deceased, Mrs Kemeny, had two adult children to an earlier marriage and had proportionately more wealth than her second husband. The second husband, Mr Schneider, (who had actually been the deceased's high school sweet heart before her first marriage), also had an adult child to his first marriage. Mr Schneider was a solicitor, practicing in

[50] *Permanent Trustee Co Ltd v Fraser* (1995) 36 NSWLR 24 at 47 (Sheller JA, Handley JA agreeing). See also Brereton JA in *Steinmetz v Shannon* at [101], citing Powell J in *Elliott v Elliott* (Supreme Court (NSW), 18 May 1984, unrep), which decision was affirmed by Glass JA (with whom Kirby P and McHugh JA agreed) in *Elliott v Elliott* (Court of Appeal (NSW), 24 April 1986, unrep).
[51] *Richard v AXA Trustees Ltd* [2000] VSC 341 at [31] (Eames J).
[52] *Langtry v Campbell* (Supreme Court (NSW), Powell J, 7 March 1991, unrep) at 29.
[53] *Marshall v Carruthers; Marshall v Marshall* [2002] NSWCA 47 at [63] (Hodgson JA, Young CJ in Eq and Palmer J agreeing); *In the Matter of the will of G.G. Sitch (deceased)* [2005] VSC 308 at [109] (Gillard J); *Sellers v Scrivenger* [2010] VSC 320 at [68] (Daly AsJ).
[54] W*hite v Barron* at 444–445 (Mason J)
[55] Schneider v Kemeny [2021] NSWSC 524

the area of estate planning, and accordingly, on their wedding day, the couple had executed wills documenting their intention to primarily look after their respective children to their earlier marriages. The deceased felt so strongly about her intentions, that she later appointed her ex-husband as the executor of her estate, to represent her children's interests. Mr Schneider brought a claim for provision against the estate pointing to his care of the deceased during her 10 year battle with Melanoma, his financial position and the modest provision left for him comprising of her superannuation, car and artwork of approximately $103,000. The Court found that such provision was appropriate in all of the circumstances and dismissed the second husband's claim, placing particular emphasis on the couples' expressed intentions and the plaintiff's capacity to support himself.

This is an interesting case because it factors in the importance and role that Binding Financial Agreements and estate planning will have on provision ordered (if any). Whilst in that case the couple did not enter into a Family Law Binding Financial Agreement, the execution of wills on their wedding day and the deceased's expression intention was paramount.

Options for Protecting or supporting the living arrangements of the Surviving Spouse

As addressed above, the approach taken to estate planning needs to be individualised for the particular family involved. Whilst Mr Schneider was not found to be a person of significant need, the Court has identified that the Spouse certainly has a primary right to be considered in the context of the estate. Getting that balance right requires an evaluation of the likely future needs of the spouse or de facto, their resources and their present expectations. There is no clear formula we can deploy but there are options we can consider.

i. Mutual Wills

Consideration of mutual wills is a valuable option to discuss and consider in the context of late in life relationships, especially when there are children to earlier relationships on either side that both parties wish to preserve benefit for.

A mutual will is not actually a will itself, it is a separate contract, which sits outside of the will, binding the parties and their estate. Parties must however understand that entering into mutual wills does not prevent a party from amending or revoking their will at a later date, instead it creates a binding

and separately enforceable contractual obligation, in which a party can seek damages on any breach. Similar claims can arise in the context of equitable and proprietary estoppel. [56]

This principle of mutual wills was expressed in *Baird v Smee,*[57] in which the Cout made these observations:

> A will is by its nature revocable, and may be revoked inter alia by the making of a later will. A testator may, however, enter into a binding contract not to revoke his will. On ordinary principles, breach of the contract by the revocation of the will may entitle the other contracting party to damages (see Synge v Synge (1894) 1 QB 466 at 471).

Some practical advantages in the context of late in life relationships include:

- They involve open dialogue, useful planning and communication in which there can be a joint intention, documented in writing as to the wishes and understanding recorded between parties to a second or subsequent relationship.
- The entering into mutual wills can create a general deterrent to the parties against breaching the agreement and the mutual understanding reached;
- Mutual wills can bring comfort and a sense of certainly for the parties to know that their families to earlier relationships are protected;

- They can be tailored individually to carve out certain assets that may be excluded from the agreement, (for example, post acquired matrimonial property);

- Departure from the agreement as recorded, of course entitles the other party, (their heirs and assigns), to relief in Court by way of damages sought.

Similarly, there are disadvantages to discuss and consider, which include for example:

- Mutual wills can create a level of fixed inflexibility that may not take into account such as changes within the family dynamic, that we know are ever evolving. Parties can not significantly alter or diminish their respect estates that may frustrate the agreement, as

[56] *Moore v Aubusson* [2020] NSWSC 1466
[57] *Baird v Smee* NSWCA 253, Giles JA at [64]

party's age their needs may evolve and change such as the need for nursing home accommodation and RAD's;

- Mutual wills do not prevent revocation or alteration, they simply give rise to recourse to enforce the contract by means of litigation, the very thing that most planning practitioners aim to guard against;

- Without a formal release, mutual wills will not circumnavigate later Family Provision or TFM claims.[58]

ii. The Life Interestanticipating health and aging issues of the surviving spouse

With an aging spouse, careful consideration needs to be afforded to their future needs and here we might consider the utility of a will that establishes a life interest, a right to occupy or right to reside in the matrimonial home that then passes to the children or other relatives after death.

There are variations on the terms of a life interest, but generally this involves a period of time in which the spouse would be permitted to reside in the matrimonial home, until death, partnership or some other event.

In *White v Barron,*[59] the Court consider that a mere right of residence will, usually, be an unsatisfactory method of providing for a spouse's accommodation. This is because the spouse may be compelled, by sickness, age, urgent supervening necessity, or otherwise, with good reason, to leave the residence. The spouse may then be left without the kind of protection which is normally expected should be provided by a deceased who is both wise and just.[60]

As such, a portable life interest, otherwise known as a crisp order can be appropriate.

[58] *Lieberman v Morris* (1944) 69 CLR; [1944] HCA 13
[59] *White v Barron (1980)* 144 CLR 431
[60] *Moore v Moore* (Court of Appeal (NSW), Hutley JA, 16 May 1984, unrep) at 1; *Golosky v Golosky* (Court of Appeal (NSW), Kirby P, 5 October 1993, unrep) at 17.

In the recent case, *The Estate of Ken Kui Yuen Lau,*[61] the Court considered a claim for family provision brought by a 74 year old widow from the second marriage, again competing against his only child from the deceased's first marriage. A life interest in the matrimonial home had been provided for in the deceased's will, however, it failed to address what the Court described as the *reality* that the second spouse would need to move from that home into flexible accommodation in the near future. Accordingly, the Court made an order of the kind made in *Crisp v Burns,*[62] (often referred to as a Crisp Order), giving the second wife a portable life interest in the matrimonial home on the condition that the son renounce probate so that the connection between the two would be severed and the spouse would have flexibility to use the proceeds of sale on the property to secure future accommodation, such as a RAD. The spouse was also given a small pecuniary legacy of $45,000.

As a practical consideration when looking at a portable life interest, regard should be given to:

- Who is to be appointed as the Executor/ Trustee to ensure they will have a constructive and working relationship with the life tenant so as to preserve and accommodate the interests of both the life tenant and the remainderman free of any conflict;

- Whether there is a mortgage on the property, in practice, it is difficult to record the registration on title and refinance a mortgage, when the life interest is subject to mortgage. The preference would be for the property to be unencumbered;

- Consider building in conditions into the life interest such as the obligation to keep the property in good repair, and optionality around the life tenants preference towards new suitable accommodation.

iii. Other Options

Other than the matrimonial, or family home, there are other assets within the estate portfolio which might be suited to being earmarked for the spouse, to meet an expectation of provision. Superannuation is the obvious choice, where there are no dependent children, there are significant tax advantages to quarantine superannuation death benefits for a dependent spouse so that other assets of the estate can be preserved for the lineal descendants.

[61] *Ng v Lau; In the Estate of Ken Kui Yuen Lau* [2020] NSWSC 713, Kunc J
[62] *Crisp v Burns Philp Trustee Company Ltd*, Holland J NSWSC 18 December 1979 (unreported).

Another useful alternative often considered is utilising the structure of a testamentary trust, which guards for example against re marriage of the spouse and can preserve intergenerational wealth. Whilst a testamentary trust can be very utilised well in the setting of blended families there are some assets less suited to falling into a discretionary testamentary trust, such as the matrimonial home and superannuation. Independent Tax advice should be sought so as to factor in the consequences, particularly with respect to CGT, land tax ramifications and non tax law dependents.

Justine Taylor and Daniel Bennett
Directors
UTHER WEBSTER & EVANS PTY LTD
16/201 Elizabeth Street, Sydney NSW 2000
DX 141 SYDNEY | **E** khuntsman@uwe.com.au
T 02 9290 1177 | **F** 02 9290 1181
W www.uwe.com.au

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