

## Episode 130: Summary

**Episode name:** The Great Wealth Transfer: Harmonising Family Law and Estate Planning

**Guest(s):** Niki Schomberg and Chelsea Baker

**What area(s) of law does this episode consider?**

Family law; estate planning.

**Why is this topic relevant?**

Australia is on the brink of experiencing the largest intergenerational wealth transfer in its history, which also coincides with increasing rates of separation, divorce, and blended families. It's important to understand the interplay between family law and estate planning, as they both play a major role in the distribution of assets and the resolution of family disputes. By grasping how family law agreements, such as Binding Financial Agreements (BFAs), intersect with succession planning, individuals can ensure their estate plans are comprehensive and enforceable, and can be better prepared for the coming wealth transfer.

**What legislation is considered in this episode?**

[Family Law Act 1985 \(Cth\)](#)

[Succession Act 1981 \(Qld\)](#)

[Succession Act 2006 \(NSW\)](#)

**What cases are considered in this episode?**

[Kozak v Matthews \[2007\] QCA 296](#)

- Peter Kozak, a farm labourer in a de facto relationship with wealthy Jacqueline Messer, entered into a BFA to prevent claims against each other's estates. Messer had terminal cancer and died shortly after. Kozak then made a Family Provision Application claim against her estate, seeking enough funds to buy a house. The Supreme Court of Queensland, led by Justice Helman, ruled that the BFA was not binding but dismissed Kozak's claim, concluding that adequate provision had been made for him. The decision was based on Kozak's financial position, the size and nature of Messer's estate, and the legitimate claims of other beneficiaries. Although Kozak argued he had not read the deed or received legal advice, the Court of Appeal found he understood its effect. The court unanimously dismissed the appeal, affirming that adequate provision had been made for Kozak.

[Singer v Berghouse \[1994\] HCA 40](#)

- The High Court considered an appeal regarding the appellant's claim for family provision from her deceased husband's estate under the *Family Provision Act 1982* (NSW). Singer, the widow, had been married to the deceased for 11 months before his death. His will, reflecting an ante-nuptial agreement, stipulated that property acquired before their marriage would pass to his son, while Singer would receive proceeds from post-marriage acquisitions. Despite Singer's submissions regarding her health challenges and limited earning capacity after moving to Sydney for her husband, the court ruled against her

claim, finding she had not sufficiently demonstrated a lack of adequate provision.

### What are the main points?

- It is vital to consider each client's individual interests and needs, specifically when dealing with intergenerational wealth transfer and international assets.
- Estate planning involves updating documents post-separation, preserving assets during property settlements, and addressing contributions to the estate on death.
- Estate planning requires thorough assessment of various factors like superannuation, trust structures, businesses, taxation, and international laws.
- Drafting a BFA is a formal process with technical requirements, such as the requirement that both parties must seek independent legal advice. BFAs need regular review, especially after significant life events like the birth of a child. It is easier to address changes while the relationship is stable, rather than dealing with issues upon separation.
- The division of property in a BFA depends on how it is drafted. Property held solely by one party remains theirs upon separation. Jointly held property can be divided equally or according to each party's contribution. The specifics of property division, such as in joint tenancy or tenants in common, should be outlined in the BFA based on the intentions and drafting.
- In New South Wales, spouses can release claims, but this is not possible in Queensland, where claims for further provision cannot be contracted out of. The court considers various factors, including contributions made by the claiming spouse to the deceased's assets, in determining provisions. Claims in equity are also available in relation to the claiming spouse's financial contributions.
- In Australia, there are no provisions that exclude inheritances or gifts from the property pool for division between spouses, unlike some overseas jurisdictions like the UK.
- Statements of wishes, declarations, and affidavits do play a role in estate planning as they provide insight into the testator's intentions regarding the distribution of assets among beneficiaries. While these documents are not legally binding, they can influence the division of gifts. However, they are subject to scrutiny and can be challenged in court, especially if poorly prepared, potentially leading to successful claims for further provision.

### What are the practical takeaways?

- In the initial stages with clients, the conversation often revolves around planning for the best-case scenario. Later, it is important to help your clients prepare for all possibilities to ensure they are well-equipped for any future needs that may arise.
- Parents may consider involving their child in a BFA to protect gifts, such as having a loan agreement in place for funds given for property purchases to ensure the money returns to the parent in case of separation.

- When discussing the pool of assets that a child receives gifts or money from family, it is important to consider the contribution made by the child's parents. While the child may receive credit for their contribution, it is unlikely to be a dollar-for-dollar return unless there is a BFA in place that specifies such arrangements.
- If an estate is not closed off properly, it may never be able to be wound up, which may be an exhausting process for beneficiaries. The duration of this process varies, some estates can even take years to finalise. It is essential to address this issue promptly to avoid prolonged delays in the estate settlement.
- Networking and staying in contact with colleagues, including financial advisors and accountants, is crucial for family and succession lawyers dealing with clients with significant asset pools.
- Subscribing to professional memberships, which often provide access to specialised educational materials, also helps in staying updated and informed in the field.

Show notes

[Baker, Chelsea and Niki Schomberg. 'Estate and family law planning for the "great wealth transfer"' \(2024\) \*Law Society Journal\*](#)