



De-facto Relationships, Relationship Property and Risk Management

AGENDA

- Personal relationship structures
- Asset ownership structures
- Key estate planning tools (recap)
- Relationship Property Law
- Specific parameters of De-facto relationships
- Risk management considerations



Code of Conduct

- **Standard 3 – Give Financial Advice that is suitable**
 - The nature and scope of the financial advice
 - Any strategy supporting the financial advice
- **Standard 4 – Ensure the client understands the Financial Advice**
 - ensuring the client has sufficient comprehension of the content, risks and consequences
 - whether and when to seek additional financial advice
- **Standard 5 – General Competence, knowledge and skill**
 - particular competence, knowledge and skill for product advice

Personal Relationship Structures covered by relationship property law

Marriage and Civil Unions (since 2005)

- same legal status under PRA
- formal process to begin and end relationship
- division of property rules based on less than or greater than 3 years and event (separation or death)
- de-facto years prior to marriage or civil union treated as part of time

De-Facto Relationships

- no formal steps to begin or end
- starts at stage of 'living together'
- the act defines it as 2 people 18 or older who live together as a couple
- in most cases have lived together for at least 3 years
- exceptions: if there is a child involved or 1 partner has made a significant contribution

De-Facto Relationships

- Defined by The Property (Relationships) Act 1976
- 2 people, 18 or older and live together as a couple
- Complexity of defining what is a couple. Relevant factors according to the Act:
 - duration of relationship
 - extent to which a home is shared
 - extent finances are merged
 - how property is owned and merged
 - if there was/is a sexual relationship
 - shared care and support of children
 - who did household duties
 - mutual commitment to shared life
 - external perception of being a couple
- Relationships of 3 years or more are treated as marriages/civil unions for division of property when the relationship ends



Asset Ownership structures

Joint Tenants

- joint tenants own a complete and equal share of the asset held under the same title and have equal rights
- on death the share of the asset bypasses the estate, survivorship rules apply and surviving owner/s gets full ownership
- the share of an asset cannot be left to someone in a will – Joint Tenancy overrides the will provisions
- a contracting out agreement that meets the rules of the Property(Relationships) Act can apply
- if remaining assets held in own name are less than \$15,000 probate of the will may not be required

Question: what are the implications of this for joint tenants of life insurance if a part of funds were intended for some-one other than the other owner?

Asset Ownership structures

Tenants in Common

- two or more people own assets together
- but asset is held in distinct proportions
- survivorship rule does not apply on death
- asset forms part of the estate
- the Will or the Administration Act, if there is no Will, determines who receives the property on death.

Company

- take care with terminology of ownership of shares
- clients often say shares in company are jointly owned when in fact it is tenants in common
- survivorship rules are unlikely to apply

Trusts

WILLS AND EPA'S

WILLS

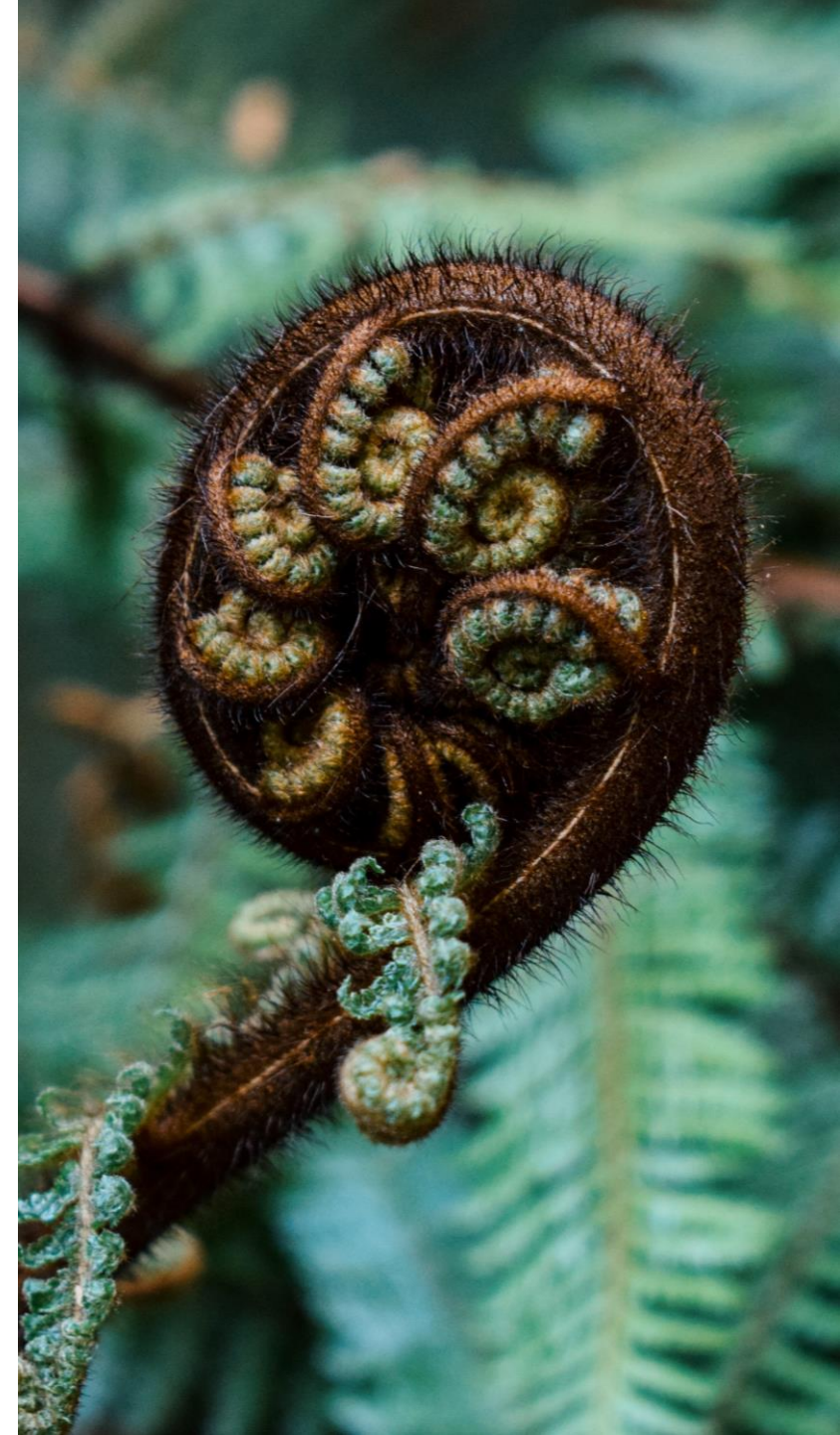
- Public Trust – just over 50% of NZ adults have a will (NZ Herald 28/05/2022)
- Dying intestate (without a will) results in estate being distributed according to the Administration Act.
- All assets jointly owned pass to the survivor e.g. the family home
- If there is a spouse or partner and children: The spouse receives the personal effects (such as furniture, paintings, homeware), \$155,000 and a third of anything left. Children will receive the remaining two thirds, divided equally between them.
- If there is a spouse or partner, no direct descendants but surviving parents, the spouse or partner receives all the personal chattels, the first \$155,000 of the estate and two thirds of the remaining property, with one third going to the surviving parents.
- If there are direct descendants but no spouse the estate goes to the descendants etc

EPA's –Personal Care and Property

- **Personal care and welfare** - Appointment of a **person** to make decisions on a person's behalf when they become are mentally incapable of doing so.
- Can only name one PC&W attorney to act at first and successor attorneys can only act one at a time in the order they are named
- PC&W attorneys can't refuse life saving medical treatment or consent to brain surgery. Living Wills or Advance Directives can be helpful.
- **Property** – Appointment of person/s to manage all property affairs when a person is no longer completely competent to manage their affairs.
- If a person becomes incapable and there is no EPA in place their family may need to apply to the Family Court under the Protection of Personal and Property Rights Act to have someone appointed as the welfare guardian.
- **General Powers of Attorney** – have no legal effect if the person loses mental capacity.
- **NB:** Insurers cannot process a Mental Incapacity TPD claim even when it is jointly owned if there is no EPA, until an administrator is appointed by the family court. This can take months and is costly.

Wills

- Marriage or civil union automatically revokes a previous will unless made in contemplation of the relationship
- Revocation applies even if a person was a beneficiary under the will
- Provisions in wills remain valid until the relationship is legally dissolved
- Legal dissolution will void any provisions made in a will unless the will-maker has made it clear they are to remain valid
- Entering a de-facto relationship does not revoke an earlier will
- Ending a de-facto relationship does not revoke any provisions made to the partner in the will



Property (relationships) Act (PRA)

- Deals with the division of relationship property when a relationship ends by separation or death.
- Replaced the Matrimonial Property Act 1976
- PRA can override a will
- PRA presumes that each partner contributes equally in a relationship
- Aims to provide a just division (**almost always equal**) of the relationship property and takes into account interests of children
- Short duration (less than 3 years) marriage and civil unions **separations**- property generally divided on basis of contributions.
- Short duration of marriage and civil unions by **death** – treated as long duration i.e. survivor has rights to an equal share of relationship property
- Short duration de-facto relationships – usually an order dividing property cannot be made unless there is a child of the relationship or the applicant has made a substantial contribution
- Where neither of the above apply then distribution is usually equitable principles
- Contracting Out Agreements can enable couples to prevent the PRA equal sharing regime to apply to their property

Property definitions

What is Property?

- Tangible property – houses, cars, furniture, jewellery, money etc
- Intangible property – interest in a business, future benefit in investments/kiwisaver, fishing quota etc
- All property both partners own irrespective of when it was acquired must be disclosed

Relationship Property

- Family home – no matter when it was acquired or how e.g. inheritance, gift, trust
- Family chattels – even if in one persons name only
- Common or jointly owned property
- Property that has been intermingled and/or acquired before the relationship began but was intended for couples use
- All income earned and property bought after the relationship began
- Any value added during the relationship to investments and life insurance

Property definitions

Separate Property

- Property acquired from a third person by inheritances, gifts or trust beneficiary
- Heirlooms and taonga
- Property acquired before the relationship began and increases in value or income earner from it
- Property acquired with proceeds of separate property and was not intended for benefit or use of the couple
- Property separated through a Contracting Out agreement

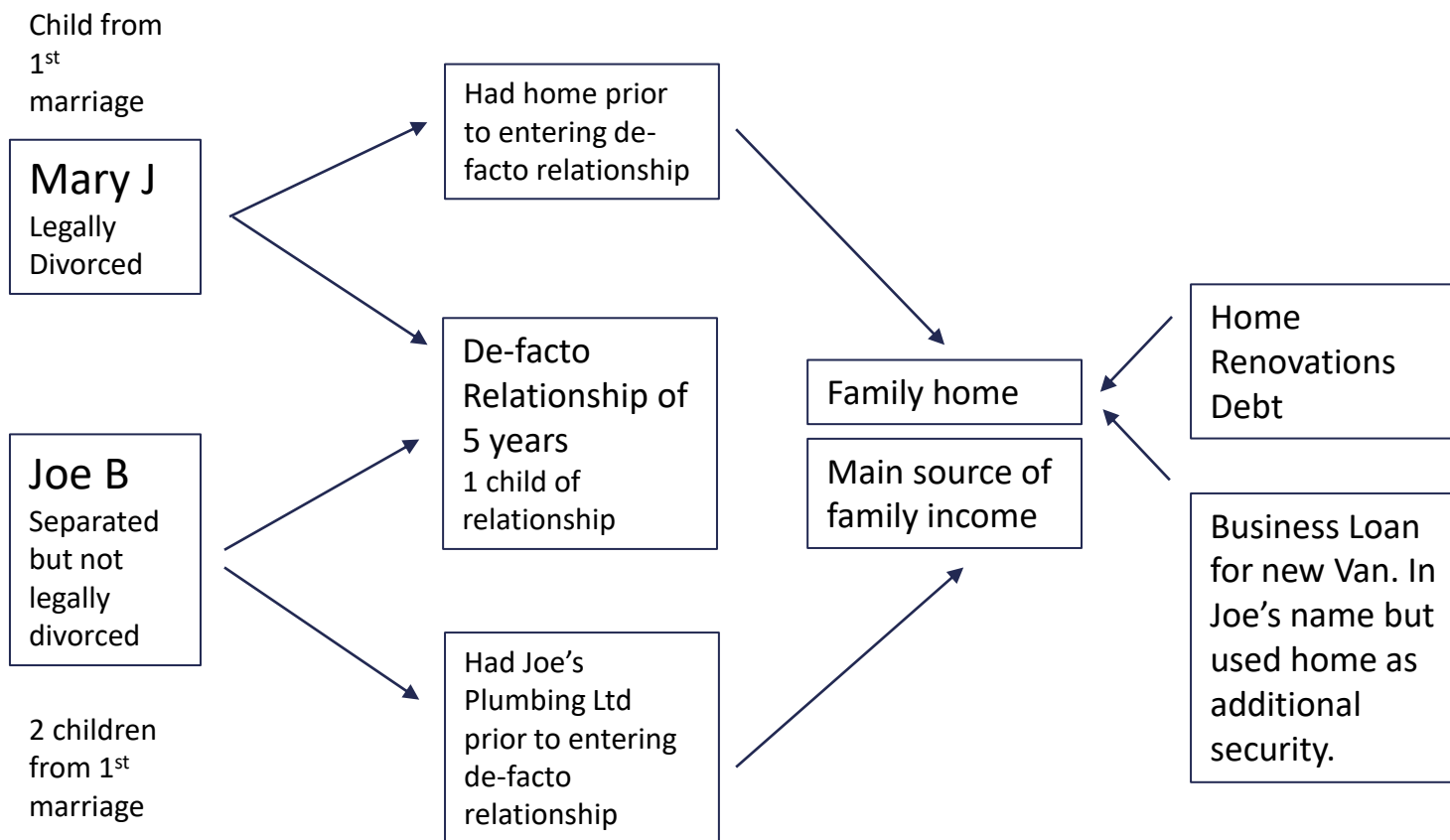
Separate Property can become Relationship Property if:

- It gets mixed or is used for family purposes
- When the value of a partner's separate property is increased by:
 - direct or indirect actions of the other partner
 - the use of it as relationship property
- The increase in value becomes relationship property

DEBTS

- **Personal Debts**
 - responsibility of person who took it out
- **Relationship Debts**
 - shared responsibility
- **Relationship Debts include:**
 - debts incurred jointly
 - debts in a business that benefits both partners
 - bank loan or similar to acquire, improve or maintain relationship property
 - debts taken out for household needs
- The purpose of the debt will be considered to determine if it is personal or relationship debt

Case Study



Estate Planning Status

- Mary changed will at time of divorce to 1st child but not updated since
- Joe has never made a will
- Neither have EPA's
- No contracting out agreement

Insurance Needs

- Clear debt on home
- Pay of Joe's debt
- Income bridge for survivor/able person
- Income support for children of past relationships
- Inheritance for each child

RISK MANAGEMENT

- Are you getting enough information about the relationship duration?
- Do you get details of the status of past relationships?
- Are you identifying the classification of assets and debts (relationship or personal)?
- Do you get details of any Contracting Out agreements?
- Do you know how assets are owned (jointly or tenants in common)?
- Are you paying attention to Will's and EPA's?
- Do you consider how insurance should be owned based on the relationship structure, the estate planning in place (or not) and the purpose of the insurance?

