

# The kids are all right

If you've got a blended family, take steps to ensure your last wishes are carried out.

**S**o, if you've repartnered and have children from previous relationships, what's the best way of ensuring your will won't be contested after your death and your wishes will be met?

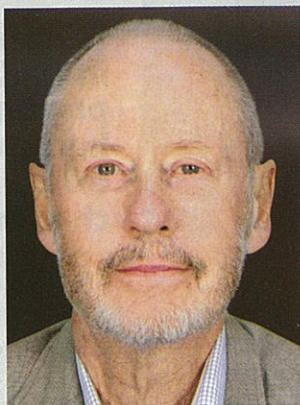
Auckland trust and wills specialist Bill Patterson offers this advice:

Identify your objectives. Joint ownership of assets, where the estate goes to the survivor is dangerous unless you really want that. If you do want your children to be provided for, make sure your lawyer knows that when you discuss how property should be owned and

what should go into your will.

If you want to protect your children by putting your assets into a trust, ideally

you should have your own trust, even if your partner has one. State in your will who can appoint and remove trustees in the future. If you have a single trust containing the assets of both, each partner should have the right to nominate a trustee to continue after they have died, or become incapable. If only one side of the family holds the power of appointment, there is a



Trust and wills specialist Bill Patterson.

danger the other side might miss out.

Understand the difference between mirror wills and mutual wills. It's a common misconception that if a couple make wills on exactly the same terms, it will constitute a mutual will, but that's not true in 99% of cases. Under the Wills Act, a mutual will is a contract between the two will-makers, usually the husband and wife. If one dies not having changed the will, the other person can't change theirs. However, if the will is simply identical to the spouse's, it can be changed after the spouse dies.

Instead of leaving your estate outright to your spouse, a better idea is to leave a life interest with the power to resort to capital, so the surviving spouse has the economic benefit of the whole lot. It may even be used up, depending on how



big the estate is and what the surviving partner's needs are, but if it isn't all used up, then the wishes of the person who made the will – that it go to their family – get carried out.

If someone marries a much younger partner, leaving the similar-aged children of a first marriage out in the cold, it's best to identify the problem and not leave it to be sorted out under the FPA. It probably won't be easy for a court to do so, "because the whole point of the FPA is the primary obligation to the partner". If the estate is not large, it's best to tell the children not to expect anything. If it's larger, the life-interest solution is probably best – at least the grandchildren might benefit.

Many of these issues don't apply to the first marriage where only the nuclear family is concerned. However, even in these cases, especially when the parents are ageing, and new trustees may need to be appointed, there are issues to be considered. For example, is it wise that only one or two of the children are appointed as trustees? If the kids don't get on, consider an independent trustee or trustees.

If you put assets into trust, always do a statement of your wishes to help future trustees understand your intentions.

## What if there's no will?

A Public Trust survey in 2012 found that about 12% of people aged 55 and over don't have a will.

■ If you die without a will, and have a partner and children, the first \$155,000 of assets and chattels goes to the partner. The partner then gets a third of what's left, and the children two-thirds.

■ If there are no children, but surviving parents, the partner gets two-thirds of the balance and the parents a third.



from the first marriage. It's so common."

It's also not uncommon that the second wife is little older than the children of the first, and if she is bequeathed a life interest in the whole estate, including, say, an investment portfolio, there can be issues with how the investments are made. "She probably wants more cash than capital growth, so life interests are very messy in these situations."

There's no magic solution, Moses says, but family trusts do give more flexibility around succession planning

Trust and estate law specialist Juliet Moses and inheritance law specialist Greg Kelly.

because the assets in them aren't subject to the FPA.

### "ASKING FOR TROUBLE"

One of the biggest problems, says Wellington inheritance-law specialist Greg Kelly, is that about 20 different statutes deal with aspects of succession law. Kelly, who wrote a master's thesis on the subject in 2010, says different laws being introduced at different times have made for an ad-hoc approach and "a tide of litigation".

Kelly wants recognition or moral-duty awards removed and says there is no consensus in New Zealand that a will-maker is obliged to provide for adult children. He believes claims should be limited to children under 21 who need support.

He told the *Listener* he was sure many adults would feel miffed if they had no claim on their parents' will.

"But if your parent cuts you out of the will – and there is usually a reason for it – I don't see how forcing the others [beneficiaries] to make a payment remedies that.

"If you bring your kids up, educate them, give them every opportunity, you've already

done your job, haven't you? You should have some freedom to deal with your assets as you see fit."

It's not uncommon, he says, for a parent to "take a snitcher" against a child, and sometimes the child is an innocent party of the falling out. "As people get older, they

**"As people get older, they can get quite difficult and you've got to calm them down and say, 'Don't do that. That's just asking for trouble.'"**

can get quite difficult and you've really got to calm them down and say, 'Don't do that. That's just asking for trouble.'"

Kelly's thesis suggests an inheritance code be introduced, making testamentary freedom the cornerstone of "long-overdue" reform.

However, one senior lawyer who disagrees with the need for new legislation is

Auckland trust and wills expert Bill Patterson, who believes judges have done well in dealing with the "many shades of grey" in family-protection disputes. He believes the legislation works because it gives judges flexibility. "They're getting results that reflect the current views of society. The Act, because of the way it's worded, is highly susceptible to changes in attitude."

A bigger problem, he says, is that lawyers are "not putting enough energy into getting this right" when wills are drawn up, and are failing to help clients identify their objectives and how best to achieve them.

Carol Fry, who paid out her stepson to end the court battle because of the emotional and financial cost of pursuing an appeal, says something has to change.

"After the hospital and the funeral, and the global financial crisis, it just seemed overwhelming to have this. It was devastating getting nasty legal correspondence sometimes twice a week or twice a month for more than five years and not knowing whether you were going to financially survive. I think it's really cruel. There has to be a better way." ■

## Succession plans

Farming families often come into disputes over succession plans, says Rotorua rural law specialist Ian Blackman. In his book *Keeping Farming in the Family*, he says the best solution lies in the right structure of a company and trust.

■ The company owns all the farming assets, including land.

■ The trust owns the shares in the company, and also owns non-farming assets.

■ Shares in the farming company are sold to the succeeding child over a long period.

■ Using this structure means the parents have financial and emotional security, the succeeding child has a flexible long-term plan and the non-farming children are treated fairly.