

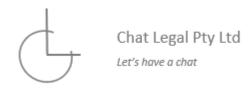
Let's chat

Estate planning, 'it's simple"? - September 2021

With:

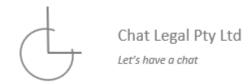
Darius Hii – Tax and estate planning lawyer; Chartered Tax Advisor; and Director at Chat Legal

Information provided is general in nature; precise application depends on specific circumstances

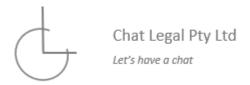


Estate planning

- Client's mind:
 - 'Can't I just do a post office Will'?
 - 'It's simple, nothing difficult'
- But more than just Wills:
 - Enduring power of attorney documents
 - Superannuation
 - Jointly held assets
 - Trusts
 - Companies
 - Business assets
 - Overseas assets and beneficiaries
 - Potential challenges



- Enduring power of attorney document:
 - What if I lose capacity?
 - Who makes financial decisions on my behalf?
 - Who makes personal decisions on my behalf?
 - Relevant even for 'young/healthy' people
- Superannuation:
 - Does not automatically form part of Will.
 - Only certain people can directly receive superannuation (spouse, child, dependent), otherwise to legal personal representative.
 - Tax issues depending on who receives.
 - To nominate or not to nominate
- Joint assets:
 - Assets held joint automatically passing to surviving co-owners

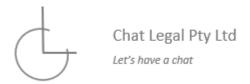


• Trusts:

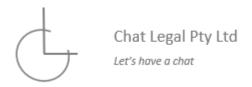
- Assets do not form part of estate
- Who takes day to day control of the trust?
- Who takes ultimate control of the trust (by being able to change the trustee)?
- Is there a difference depending on if key people die or lose capacity?
- What happens if persons cannot agree on how decisions are made who benefit on default?

• Company:

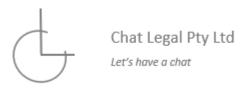
- Assets do not form part of estate, other than potentially shares in company held personally
- Who takes the decision-making role on board?
- Who can change the directors?
- Are there other shareholders?



- Business assets:
 - Depends on structure.
 - Are there other business owners?
 - How do you protect your interest in the business?
 - How do you protect yourself from dealing with business owner's family on their death or loss of capacity?
- Overseas assets and beneficiaries:
 - Overseas Wills as unsure of international tax consequences
 - Australian taxing event if assets distributed to overseas beneficiaries?

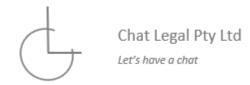


- Will challenges:
 - Family provision application
 - Eligible person able to challenge Will:
 - Spouses (including ex-spouse, children (including step-children) and persons who are dependent on you
 - Prove they have not been adequately provided for
 - Financial position of person and needs now and into the future
 - Physical, intellectual or mental disability of eligible person
 - Size of estate
 - · Contributions made by eligible person to deceased's estate or deceased's welfare
 - Competing claims from other beneficiaries
 - Standard of living of the eligible person during deceased's lifetime
 - Relationship between deceased and the eligible person
 - Wishes of the deceased
 - Other includes not properly executed and promises made to kept in Will



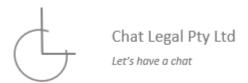
Example 1 – Mandy Chan

- It's easy:
 - · Give everything in my name to my daughter
 - Give everything in my superannuation to my partner
 - · Also, I want my partner to be able to live in my house
- What's not so easy:
 - Risk of challenge by partner (particularly in view that partner gets nothing under Will potentially)
 - Ensuring superannuation passes appropriately (there was a retail fund)
 - Putting in place an appropriate right to occupy clause in the Will:
 - What happens if want to sell the current house after death?
 - What happens if current house sold?
 - Was mentioned from daughter that Mandy 'adopted' a niece (whose family lives in China, but the niece is living in Australia with Mandy).
 - Also, there's a company that has proceeds from a business sale.
 - Also, there's two properties in China, one in Mandy's name and another which her brother purchased for her (who now has dementia)



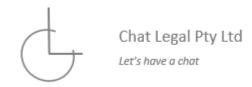
Example 2 – Mark Smith

- It's easy:
 - Give everything equally between my three sons
 - Assets include, house, superannuation and some cash
- What's not so easy:
 - Mark has a partner (although they do not live together)
 - Partner's Will refers to Mark as a 'de-facto'
 - Partner has other children who are not fond of Mark
 - Mark is actually nominated as receiving a 'fair' bequest under Partner's Will.
 - Mark also holds significant credits in a time-share and places importance of having such credits maintained



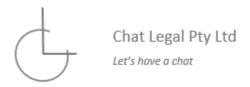
Example 3 – John and Anna

- It's easy:
 - Give everything to my partner, and if my partner predeceases me, then to my children
 - No entities
- What's not so easy:
 - 2 children between John and Anna (they are minors)
 - John had 2 other children with his previous partner (they are in their 20s)
 - Balancing who should receive what percentages
 - Also assessing whether John is comfortable that Anna will not change her Will is John predeceases Anna is there a need for mutual Wills?



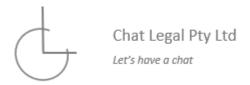
Example 4 – John

- It's easy:
 - Let me wife control my affairs
 - If my wife predeceases me, then my sister will manage my affairs
- What's not so easy:
 - 3 discretionary trusts from 3 different providers
 - Trust 1 states on the Principal passing away or losing capacity, their legal personal representative takes control
 - Trust 2 states on death of the Principal, their legal personal representative takes control **no mention as to loss of capacity**
 - Trust 3 same as Trust 1
 - On further thinking, client wanted guardians for minor children to manage trusts on death; but those were not the same persons appointed under the enduring power of attorney
 - Potentially different persons managing on different circumstances occurring



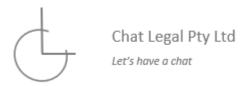
Example 5 – Leslie

- It's easy:
 - My family members will manage my assets in certain order
- What's not so easy:
 - Has a family trust holding significant investments
 - Mother is the Trustee of the family trust
 - Leslie is the appointor
 - Trust deed confirms legal personal representative succeeds Leslie as appointor on death or loss of capacity but query how day-to-day operations work:
 - No-one in family has background with structures other than Leslie (accountant)
 - Mother is directed by Leslie in how to manage family trust
 - Practical consideration for cryptocurrencies held in family trust



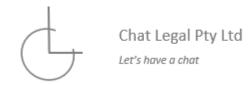
Example 6 – Melinda

- It's easy:
 - My family members to look after assets for my children
- What's not so easy:
 - Fear that family members has the ability to change beneficiaries of a testamentary trust
 - Possible to tailor testamentary trust to reduce this risk
 - · Bigger issue relates to family trusts that Melinda has on the side
 - Hard to guarantee how income to be split in those family trusts as there is the potential for abuse by appointors/trustees
 - Secondary fear that family members will not give control to children on the children turning a certain age
 - Possible to tailor testamentary trust to reduce this risk
 - Increases the potential branches that may occur if children pass away before that age
 - Same issue with existing family trusts



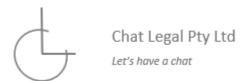
Example 7 – Phil and Ellie

- It's easy:
 - To my partner, otherwise to our family members to look after for our two children
- What's not so easy:
 - One side of the family based overseas
 - Emotional attachment to family home does not want executors to be able to sell the family home unless children consent to it
 - Usual fears about control
 - Curious because they had a 'Public Trustee Will' that gave all control to a single sibling if both deceased



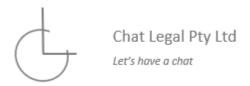
Example 8 – Dylan

- It's easy:
 - Give my superannuation to my wife
- What's not so easy:
 - NB I was called in to help another law firm here
 - Wife was a second partner and there was a daughter from an earlier marriage
 - · Man was on his 'deathbed'
 - Man was a trustee for 3 SMSFs:
 - Turns out, 1 for himself
 - 1 for his daughter
 - 1 for his second wife
 - Nomination only required for his SMSF
 - Aftermath daughter is disputing things
 - Law firm only found out of SMSF after talking to accountant, as well as various trusts (as client had appeared not to feel they were of importance)



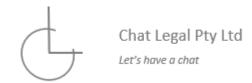
Example 9 – Linda and Ben

- It's easy:
 - Give to my partner and then to my children
 - PPR, share investment and superannuation
- What's not so easy:
 - Son is divorced with two minor children
 - Daughter lives overseas
 - 2 investment properties as well as overseas properties
 - Want to give 50% to Son, 30% to grandchildren and 20% to Daughter



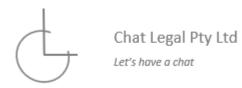
Picking the right people

- Single v multiple
- Related parties v independent
- Family members from 1 side v 2 sides



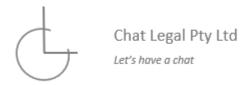
'Younger' clients

- Still not cookie-cutter
 - Recently married but only giving 80% to wife, with other 20% going to mother also had a family trust
 - Living together but not married and only giving house and life insurance to partner, with rest going to family members
 - Married with two very young children but does not want husband to be sole executor
 - Married with two very young children, but has an ancillary issue being they gave \$120,000 to a friend to invest; the friend has since lost 90% value of the investment whether a loan exists or not



Simple clients (if they exist)

- No ex-spouses
- Happy family
- No trusts or companies or business interests
- Give 100% to spouse and then to children (and no concerns that family members would 'steal the money from the children') whether directly or in a testamentary trust (depending on value of estate)
- Superannuation distributed either directly to spouse/children (subject to tax advice) or for distribution under Will (and no concerns as no estate challenges)
- Family home owned as joint tenants and there are joint bank accounts, so no need for testamentary trust on one person dying, but existing if both pass away



Other complications

- Loans (whether to related party or not)
- Funeral arrangements
- Intellectual property and cryptocurrencies (the unknowns)
- Other agreements (including binding financial agreements and life interests)
- Business interests
- Memo of direction as a useful 'dictionary'

Contact details

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