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Estate planning, ‘it’s simple” ? – September 2021

With:
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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

Summarising issues

- 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

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Summarising issues

- 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?

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Summarising issues

- 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?

Summarising issues

- 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?

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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

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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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