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# Let's chat

The second most important estate planning document (after your Will) – July 2022

With:

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



# Scenario

- A loved one is deceased
- You somehow managed to find their Will
- The Will appoints you (whether alone or with someone else) as executor
- The Will clearly sets out who gets what under the Will
- There are some minor children who are to receive an inheritance and you've been asked to look after such assets
- What now?



# The Will – What it does

- Provides certainty as to your intentions
  - Confirms legal appointments of executor/trustee and testamentary guardians for minor children
  - Confirms who is entitled to what under the Will
- Provides the legal powers and terms to those person/s above
- Formal document that other persons/bodies can rely on (which can be certified by the Court)

# The Will – What it could do but doesn't due to inflexibility



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- Funeral and burial wishes
- Instructions on how minor children are to live – e.g. Children must live in PPR and go to this school
- Specify who receives each minor item – e.g.
  - Jewellery
  - Pets
  - 'Personal Items'
- Specify who receives each substantive asset – e.g.
  - PPR to Child 1 (valued at time of Will - \$1,000,000)
  - QLD IP plus shares to Child 2 (valued at time of Will - \$1,000,000)
  - WA IP 1 and WA IP 2 plus shares to Child 3 (valued at time of Will - \$1,000,000)
  - Everything else equally between Child 1, Child 2 and Child 3



# The Will – What it does not do

- Tell people where to find the important documents
- Tell people how to access important documents
- Tell people how you would like minor children to be raised
- Tell people how any assets should be dealt with
- Does not automatically deal with superannuation and jointly held assets
- Deal with trusts and companies
- Deal with business assets and joint investment assets



# Problem with Will doing it all

- Snapshot at a point at time
- Lack of flexibility and easy to be outdated
  - Changes in value of assets
  - Changes in relationships
  - Changes in assets owned
- Costly to update
  - Worth spending money updating changes to gifts of jewellery
  - May be worth spending money to update change of asset balance, but was it necessary if all the relevant parties could have easily agreed
- Need to be precise due to legal nature of the Will



# Memo of directions

- Not a legal document and not legally binding (no lawyer required to draft)
  - IMPORTANT – must not be considered legally binding
- Intended to provide guidance
  - Where your personal assets are located, to ensure for a smoother administration of your estate.
  - Where relevant documentation relating to your personal assets and entities you control or have an interest in, are held to assist in the administration process.
  - How you intend some assets (such as household items) to pass.
  - If there are certain investment tips or caring tips you may wish to leave for people to follow at their discretion
- Useful in ensuring your Will does not contain extra pages of specific gifts that may be deemed redundant in a few years' time, and allows you to convey wishes and directions that are not ordinarily enforceable under a Will or may be too restrictive to put in your Will



# Memo of directions

- Not strictly required but how often do you talk about post-death life to others?
- Even if discussed verbally, how good are our memories?
- Is something written down better than nothing?
- Chance for spouses to consider such issues.





# Funeral arrangements

- Note: People are not rushing to review Wills immediately on death
- Any agreements with funeral homes
- Buried or cremated
- Specific location
- Special arrangements
- Organ donation

# Location of important documents



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- Note: People who are not you do not know where to find your important documents
- Leaving a note where to find documents (whether physical or online is of use)
- Important documents can include:
  - Will and variation documents **\*\*Important that this is not lost\*\***
  - Enduring power of attorney documents and other estate planning documents
  - Important bank documents
  - Important superannuation/life insurance documents
  - Trust deeds/company constitutions
  - Digital assets and passwords (further below)
- Leaving a note on who to contact (key advisors) such as accountants, financial planners and lawyers



# Minor gifts of personal items

- **Personal Property** means, my clothes, furniture, curtains, drapes, carpets, linen, china, glassware, ornaments, domestic appliances and utensils, garden appliances, utensils and effects and other chattels of ordinary household use or decoration, liquors, wines, consumable stores and domestic animals owned by me immediately before my death and other articles and effects of personal, domestic, household or garden use not specifically given by this Will which includes Digital Assets.
- **Digital Assets** includes any right or interest in data held in a digital format (including intangible form by electronic, magnetic or optical means), such as audio, codes, images, information, videos or text in technology that exists now or may exist in the future, including:
  - Online data held in an online account such as an address book, calendar, collaborative platforms (e.g. Uber and AirBNB), communication services (e.g. WhatsApp and Skype), content distributor (e.g. Youtube, Instagram, Soundcloud and blogs), dating, email, entertainment, gambling, gaming, health records, lottery, loyal programs, marketplaces, online shopping platforms, news, payment facilitator, social media, storage, web domain and other online data held in a similar online account;
  - Offline data and credit held on a digital storage device (e.g. CD, computer, DVD, mobile phone, tablet, USB flash drive); items stored electronically and any online accounts including but not limited to social media and email accounts,

but excluding accounts relating to currency and financial instruments such as bank, share trading and cryptocurrency accounts



# Minor gifts of personal items

- Your Will can gift your assets to chosen persons
  - Is it practical for gifts of personal items to be split in a proportion or to make multiple specific gifts (that are legally binding)?
  - Will persons fight over personal items?
- Is it better to:
  - Leave a general provision in your Will stating recipients can agree to split personal items in whatever manner they agree providing if they don't agree, a valuer comes in, values and such items must be split equally
  - Leave your 'thoughts and wishes' on who receives what personal items in your Will but not binding
    - Allows you to put tags with people's names
    - Allows you to give all personal items to a particular person who can then on gift based on the memo of directions
- Consider dollar value of items
- Contrast:
  - Tags v drawing lots (1,2,3,2,3,1,3,1,2,1,2,3 etc)
  - In memo of directions v in Will



# Minor children

- Important to pick right guardian for minor children
  - Not the siblings who are 'over having kids'
  - One family member as guardian
  - Multiple family members as guardian
- Testamentary guardian has all the powers, rights and responsibilities, for making decisions about the long-term care, welfare and development of the child, that are ordinarily vested in a guardian (taken from QLD Succession Act)
  - Includes child's education and religious upbringing
- Helpful to give guidance on thoughts on how children should be raised
- Ensuring appropriate funds are available to assist guardian



# Who gets what asset

- Where Will does not specify who gets what assets (for example, where it is proportionate)
- Allows executors to determine appropriate distribution (for example, a Child would prefer a different asset from the one thought by a Parent under a Will)
  - Works with close family group
  - Works with smaller family groups
  - May not work if there is a power dynamic
- Can be extended to address assets held in trust/company structures



# Control over structures

- Where trusts and companies are involved and minors are intended to be the ultimate beneficiary
  - Consider when is it appropriate to pass control to minors
  - Who is right to control such structures until that age
  - Does such control need to be legally embedded into documents to guarantee children receive control
    - We prefer flexibility and trust
    - This is because standard discretionary trusts provide sufficient power for a controller to empty a trust anyways before a child turns a certain age
    - Therefore, additional steps would need to be taken to guarantee the assets are still in the trust
    - While possible to do so by Will (bespoke drafting), would require amendments to *inter vivos* trusts
  - Examples to be discussed: 'Indonesian couple', 'Malaysian couple', 'ex-CFO who loved to dive', 'Hedge fund manager' and 'Financial planner'



# Investment ideas

- Outline preference but accept not bound to follow
- Trustee has certain obligations to the trust estate but appreciate broadness of a modern discretionary trust allows trustee to make any investment they wish (consider the modern trust deeds now including a specific power to invest in cryptocurrencies)



# Legal standing of memo of directions



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- A trustee has an obligation to give real and genuine consideration to the interest of the beneficiaries prior to exercising its discretion
- Real and genuine consideration includes the trustee informing themselves of the relevant matters to exercise the discretion
- It has been accepted that a 'memorandum of wishes' may be taken into consideration in exercising its discretion conferred under the trust deed.
- Although not binding, it will form part of the matters the trustee must give consideration to when exercising their discretions.
- See *Callus v KB Investments* [2020] VCC 135; *Monaghan v Monaghan* [2016] NSW 1316

# Specific comments to family and friends



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- Personal comments
- Anything you want
- Example: Father's written note to family prior to a large family trust dispute:

*These are my last instructions to my children, grand-children and their descendants and it is my sincere wish that they will be faithfully carried out.*

...

*It is my deepest and dearest wishes that my children and descendants will continue to love and help each other when I am gone. Take heed of the old saying "Harmony within the Family promotes prosperity". The way to achieve such harmony as taught by ancient sages is to cultivate the virtues of filial piety and brotherly love.*



# Ideas for completing

- Think about all the 'substantive' things in your life
- Think about whether guidance needs to be provided to family/friends to understand how to deal with such assets (in addition to any minor children):
  - Cash
  - Shares
  - Property
  - Cars
  - Life interests/time-shares
  - Agreements for income entitlements/IP
  - Business
- Overseas assets? The interest in the Malaysian golf course, the interest to a Canadian pension etc.



# Joint investments

- Shareholder/unitholder agreements
- Partnership deeds
- Joint venture agreements
- Buy sell deeds
- Etc.



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# Business interests

- Insurers to notify
- What happens to suppliers/clients
- Someone can step in to take over
- Guidance to assist people to keep the business going



# Digital assets - Australians

- 2022 statistics
- 99% internet users
- 98% have email accounts
- 79.8% have smart phones
- 79.9% use social media
- 66% use Facebook specifically
- >600,000 have invested in cryptographic tokens



# Digital assets

- More than just online account details
- Financial value assets – Crypto-currencies, accounts with loyalty points, art, domain name, online businesses etc.
- Business assets – Particularly where deceased was sole trader
- Sentimental value
- Private information – Private exchanges, WhatsApp messages
- Security risks – Location tracking apps



# Digital assets – access/ownership

- Online account – review terms of service but usually a licence to use and website contains what rights post-death
- Digital device asset – owned by you
- Other assets which may be accessed electronically but are not digital due to it reflecting bank account/superannuation etc





# Digital assets – example

- During his life domain investor, Igal Lichtman, acquired a vast portfolio of investment domains, many worth tens of thousands of dollars.
- Died from cancer complications in February of 2013.
- No clear way to manage domain names.
- Domain names expired, and were auctioned off by their registrars:
  - Vodka.net sold for \$20,000;
  - Penis.net was auctioned for \$5,015; and
  - Vegans.com sold for \$48,000.



# Digital assets – example

- Stefan Thomas, a programmer in San Francisco, is reported to have lost the paper where he wrote down the password for his IronKey, which gives users 10 guesses before it seizes up and encrypts its contents forever.
- IronKey contains the private keys to a digital wallet that holds 7,002 Bitcoin.



# Digital assets – example

- James Howells, a Welsh I.T. worker, began mining Bitcoin on a personal computer in 2009.
- By 2013, he had mined 7,500 Bitcoin before stopping and selling the computer he was using for parts on eBay. He kept the hard drive with the hope that Bitcoin would rise in value.
- In 2013, when cleaning his house he accidentally threw the drive away.



# Digital assets – example

- Matthew Mellon was a prolific crypto investor in Ripple and XRF.
- Died unexpectedly at age 54 in 2018.
- Private keys were stored at various banks and did not tell others which banks.



# Digital assets – example

- Facebook – account can be memorialised or permanently deleted (pre-planning options)
- Google – pre-planning options to delete or have data transferred to a contact
- AppleID – ability to nominate a Legacy Contact (required to provide death certificate and obtain approval)
- Consider what's important and 'google it mate'
  - Leave instructions in memo of directions?



# Digital assets - accessing

- Seed phrases
- Passwords (even digital hardware)
- Multi-factor authentication (linked to phone or other things)
- Password managers
- Hardware wallets
- Tips:
  - Don't put it all in an electronic copy of the memo of directions (for security)
  - Retain only physical copies and outline where can be found
  - Keys/passwords needed to access physical copies (chicken and egg)

# Contact details

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