



ESTATE PLANNING AND ASSET PROTECTION – AN OVERVIEW

Introduction

There is no estate plan, or asset protection strategy, which fits everyone. The estate planning and asset protection must be tailored to suit the individual's particular needs and circumstances.

General Approach to Asset Protection

Ensure, insofar as it is possible, that the “at risk” individual does not own assets. If somebody does and is successfully sued, the Judgment Creditor can take action to eventually seize the Judgment Debtor's assets, and to sell them to pay the Judgment Debt.

Various strategies can be employed to avoid the “at risk” individual owning assets, for example, transferring money, property etc. to an environment where a creditor cannot attack them, eg. into a superannuation fund; to someone who is unlikely to be sued, eg. wife or husband of the “at risk” individual; to a company; or to a trust.

Life interests, Binding Financial Agreements (under the *Family Law Act*), and other legal structures, can also be used.

General Approach to Estate Planning

The aim of an estate plan is, firstly, to ensure that, on your death, the assets which you have worked hard to build up, go to the beneficiary or beneficiaries you want to receive them. Secondly, insofar as it is possible, those beneficiaries should receive the assets in a way which ensures that they are preserved for the benefit of the beneficiary, rather than for someone else, eg. if you leave your estate to a bankrupt son, any monies which he inherits from you will be used to pay his creditors; if you leave your estate to your daughter, who is currently involved in Family Law property proceedings, it is possible that her estranged spouse will become entitled to part of what you have left her, or, if not, to a greater proportion of the property which they own together.

A simple form of estate planning may only involve a basic Will and, for example, altering ownership of a house from joint tenancy to tenancy in common.

A more complex form of estate planning may involve establishment of a number of trusts, self-managed superannuation funds, transferring properties between individuals, preparation of a Will containing discretionary testamentary trust provisions, and signing a Power of Attorney and a Form of Appointment of Enduring Guardian.

Most people's circumstances fall somewhere in between the above two extremes.

Financial planners are generally recommending that people sign Wills containing discretionary testamentary trust provisions. A Will containing those provisions, is one of the most commonly recommended strategies for your estate plan.

What is a Discretionary Testamentary Trust?

Basically, it is a Will which leaves the whole, or part, of your estate to a Trustee, or Trustees, who have a discretion as to who both the income and capital of your estate is to be distributed, (subject to it being distributed amongst the named possible beneficiaries).

Benefits of a Will containing discretionary testamentary trust provisions

1. Flexibility in terms of distributing both capital and income.
2. Ability to distribute income in the most tax effective manner.
3. Ability to distribute capital in the most tax effective manner.
4. Ability to distribute superannuation benefits to dependants, and equalize the distribution amongst other beneficiaries, eg. non-dependant children, by use of the discretionary provisions of the Trust.
5. Ability to ensure that "at risk" persons do not receive a large lump sum; or receive smaller amounts on a regular (or irregular) basis to assist with expenses; or estate money is used to enable the Trustee to purchase a house, or rent a house, for the use of the particular beneficiary.

Persons "at risk" include:

- 5.1 Bankrupt beneficiary
- 5.2 Beneficiary involved in Family Court, or other, litigation, where an Order or Judgment is likely to be made against them
- 5.3 Disabled child
- 5.4 Child subject to some other adverse circumstance, eg. drug use; gambling addiction; spendthrift child; liable to be taken advantage of financially, etc.

Disadvantages of a Will containing discretionary testamentary trust provisions

It gives a wide discretionary power to the Trustees. Care should therefore be taken to ensure that the "right" Trustees are appointed.

Superannuation

Need to ensure that superannuation is directed to the desired beneficiary or beneficiaries, particularly a tax dependant, on your death, if possible, to minimise income tax. Your superannuation benefits do not automatically become part of your Estate. Therefore, it may not be possible, in your Will, to specify who is to receive those benefits.

Superannuation Binding Death Benefit Nomination

Does the fund allow a Binding (as opposed to a “Non-Binding”) Death Benefit Nomination to be made? Give consideration to whether to direct that the superannuation benefits be received by the Estate, or by the spouse, particularly where there is a separation, but no divorce.

Self-Managed Superannuation Fund Will

Generally, the self-managed superannuation fund trust deed will specify who is to receive the superannuation funds on the death of the member, though it may set out a number of possible beneficiaries. Care should be taken to ensure that the superannuation funds are, on death, received by the desired beneficiary, thus the need to consider a self-managed superannuation fund “will”.

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2 December 2009

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