

# Estate Planning in Real Life



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**P**icture this: Members of a large family comprising nine children continue to be embroiled in legal tussles, aggressively asserting inheritance rights in bids to carve out a piece of the sizeable fortune left behind by their father, who died intestate over six years ago.

Here is another scenario. With the intelligent use of a trust and a will that pours everything into the trust, another family and several beneficiaries outside the family now enjoy in quiet comfort the assets bequeathed to them by a widow, knowing that their inheritance would not be exposed to the public eye.

Don't these situations sound familiar? You might expect them to come right out of television dramas, but they are actually unfolding in the real world. Mere words cannot begin to describe the stark difference between the absence of estate planning and thoughtful estate planning.

The first family is that of the Taiwanese tycoon Wang Yung Ching. Touted as the "god of management", Wang built his businesses and assets to the tune of billions of dollars, and left them all behind for his nine children (none begotten from his widow) to fight over.

The second family is that of the late comedienne Joan Rivers, who apart from having lived a remarkable life, set up a brilliant interlocking trust and will mechanism that was not only legally executable, but also made things easy for her beneficiaries.

## RELEVANCE TO ALL MALAYSIANS

As Malaysians accumulate unprecedented levels of wealth and grapple with its orderly and timely distribution, estate planning is fast becoming a necessity. Traditional Asian emphasis on family ties is being tested, if not strained or broken, by spreading affluence and more aggressive assertions of inheritance rights.

Estate planning is not just for the wealthy. It is for anyone who has any level of wealth and wishes to bequeath convenience, comfort and privacy to their loved ones instead of putting them through an agonising ordeal which might become very nasty and very public.

The opening examples are given only because they relate to well-known people and are therefore widely reported, not because of their wealth levels.

Malaysia does not impose inheritance taxes. That spares us from one element, but estate planning on the whole remains relevant. Estate planning requires one to take complete stock of one's assets, beneficiaries and the person(s) one entrusts the execution of one's wishes to.

Wills and trusts are the more popular estate planning tools, and they are quickly gaining awareness and popularity. As with any tool, they can give you the mileage you want if used properly, but things can go wrong if it is used improperly. To illustrate, a power drill could save you time and effort, but it can also cause damage and injury if it is used carelessly or in unsuitable situations.

## WHEN NO ESTATE PLANNING IS DONE

Much has been said about the agonising delays, heartbreaking disputes and anxiety one's beneficiaries may face should one pass on without a valid will. Pablo Picasso, Sonny Bono, Howard Hughes, and yes, Wang Yung Ching, were but only a few famous people who did just that. Every one of these instances led to prolonged court wrangling, intrigue and complications.

Indeed, the woes of the beneficiaries do pile up non-stop. In Malaysia, delays in the estate distribution of one who died intestate could arise from the beneficiaries' disagreement over whom to appoint as the executor.

In addition, ascertaining the values and locations of the deceased's assets and liabilities would take up further time, labour and costs. On top of that, the Distribution Act 1958 (applicable to West Malaysia and Sarawak) and the Intestate Succession Ordinance 1960 (applicable to Sabah) only indicate the percentages for distribution, so it remains open as to who gets which assets. This could very well lead to further disputes and unhappiness.

On a separate note, Muslims are subject to Islamic Laws, in which up to one third of one's estate can be distributed via one's will, and the remainder via a *Sijil Faraid* (a certificate issued by the Shariah court regarding the distribution of a Muslim estate and entitlement of beneficiaries under Islamic Laws of Inheritance).

## PITFALLS TO AVOID

If one organised one's estate planning to the level that Joan Rivers did hers, much of the agony of inheritance distribution we see around us could have been avoided.

Having said that, however, I understand things might still go wrong in one's estate planning efforts. The deceptive downside of inadequate planning quality is the false sense of security that everything that should be taken care of has been effectively taken care of.

It would be a shame to painstakingly ascertain one's assets, decide who the beneficiaries should be and think through how the assets are to be split among the beneficiaries, only for disputes to arise despite the testator's best intentions, or for assets to end up distributed against the spirit of the testator's wishes. Unfortunately, it happens in real life. Some key stumbling blocks could negate the effectiveness of estate planning efforts. Let's see where things can go wrong, so you know what to look out for in your estate planning endeavours.

### 1. Failing to tell your loved ones where your original documents are

A will that cannot be found is as good as no will. This happened to Olympic sprinter Florence "Flo Jo" Griffith Joyner, which led to disputes between her husband and mother.

In Malaysia, the court requires the executor to produce the original copy of the will before they will issue a Grant of Probate.

### 2. Failing to update estate documents to include new beneficiaries or new assets. Estate documents include wills, trust deeds, insurance policies and retirement accounts

This is a common oversight among those who managed to get some estate planning done. Taking estate planning as a one-time exercise could lead to unintended consequences as the circumstances upon one's demise could be very different from those when the estate planning exercise was conducted.

Actor Heath Ledger had a will when he died at the age of 28, but he had written it three years before, and had left his entire estate to his sister and parents. In the ensuing three years, he had a daughter, whom he did not get down to revising his will to include.

Felicitously, it all turned out well despite his "oversight" as his family subsequently donated the estate bequeathed to them to his daughter. I would caution one not to count on one's original beneficiaries to act with largesse as the actor's family did.

In case you are wondering, assets that are left out of a will are treated as intestate assets, since the testator's wishes for these assets are never made known. However, inserting a properly worded residuary clause in your will should take care of all other assets not specifically named in a will and thus avoid the situation of partial intestacy.

### 3. Failing to take into account events that revoke a will

Certain events – such as making a later will, marriage and conversion to Islam – would render a will made prior to them invalid, even if the will was otherwise valid. It would therefore be advisable to take note of such events.

In addition, intentional destruction of a will by the testator or a duly executed declaration of revocation by the testator will revoke the will.

Unlike a marriage, divorce does not revoke a will.

### 4. Failing to consider the implications of "tenancy in common" and "joint tenancy" when purchasing a property

Both types of joint ownership – "tenancy in common" and "joint tenancy" – have their pros and cons.

A tenant-in-common owner is able to will away to others his/her interest in the property without the consent of the other owners. Should a tenant-in-common die intestate, intestacy laws will apply to his/her share of the property. In Malaysia, jointly held properties tend to be in the "tenancy in common" form.

In contrast, a joint-tenancy owner is unable to will away to others his/her interest in the property. Hence, upon his/her demise, the surviving joint tenant or tenants would automatically get his/her interest in the property. Malaysians have to be aware of this type of joint ownership, especially if they jointly hold properties in other countries, where joint tenancy is as widespread as tenancy in common. If a testator subsequently wills away his/her share of a joint tenancy property, it is likely to be disregarded for being void.

### 5. Failing to include back-up nominees

To be prudent, "what if" possibilities ought to be carefully considered and addressed in your estate plan. Back-up nominees for executors and trustees should be written into the estate documents in the event one's original choices pre-decease one or cease to be up to the job in the testator's opinion.

Incorporating back-up nominees helps to reduce hassle and delays when the estate documents are called upon for execution.

#### **6. Failing to fulfil family obligations**

Disputes might arise from challenges to the testator's choice of beneficiaries. This is likely to happen if a testator bequeaths her entire estate to, say her hairdresser, rather than to her immediate family members. In the spirit of fulfilling family obligations, Malaysia's Inheritance (Family Provision) Act 1971 contains provisions that protect the interests of certain classes of immediate family dependents in the event they have not been provided for, or reasonably provided for.

#### **NOT A ONE-TIME EXERCISE**

It is to Joan River's credit that she revisited her estate documents several times during her life. According to her will, the trust was the eleventh amendment of the original document. Her commitment to estate planning is central to the ease and comfort enjoyed by those who stand to gain from her estate.

Generally, occasions when you should review your estate plan include:

- your marriage or divorce;
- the birth of your child;
- the adoption of a child;
- the death of a beneficiary;
- the inclusion or exclusion of a living beneficiary;
- the death or incapacity of your named executor, trustee, or guardian; and
- the selection of a replacement, additional or back-up executor, trustee, or guardian.

The legal framework has evolved to enable one to keep one's asset distribution under a reasonable level of control after one's passing. You can see for yourself that real life examples exist to attest to the advantages of estate planning. As you have worked hard to accumulate your assets, it would be a life well-lived if you would show your loved ones how much you care for them by making legacy plans according to your situation now. ■

