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# Let's chat

30 June learnings and estate planning refresher – June 2025

With:

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

# Some learnings

- Last minute trust deed reviews
- Example 1:
  - The individual trustee
  - The clause excluding an individual trustee beneficiary
  - Prior distributions to individual trustee
- Example 2:
  - A relatively standard discretionary trust deed
  - The wild deed of amendment replacing the entire original terms
  - The removal of all beneficiaries of the trust
  - The lack of consent to the variation
  - The lack of clarity in confirming the beneficiaries of the trust post amendment
- Sanitised trust deeds for review

# Caveat Emptor

- Trust deed
  - Circular definitions (Child and Grandchild)
  - Conflicting provisions (clause 8.2)
- Provisions complying with relevant foreign surcharge provisions
  - Recent NSW Tribunal decision
- Other trust deed considerations
  - Notional settlor provisions (NZ decision)

# Practical considerations

- Accounting for small business CGT concessions
- Considerations where Distributable Income (i.e. Trust Income) is equal to section 95 income
- What if you need to stream
- Use of 'reserves'

# To rectify or not to rectify

- Going to Court as best case
- Self-serving rectification document with Settlor executing next best
- Note case law confirming a document between certain parties purporting to correct historical discrepancies will not necessarily be binding on third parties (such as taxation/revenue authorities)
- Cost-benefit-risk analysis
- Rectification document better than nothing

# Tax reform – family trusts?

- Would you trade trust tax flexibility/complexity for simpler taxation?
- Interesting short read
- AFR article from prominent tax lawyer
- Flat 25%/30% tax rate v income-splitting benefits
  - Not an original idea
  - Goes back to 1998 under Howard
- Out goes a host of other complex trust specific tax provisions (Division 7A, section 100A etc)

# Estate planning – the refresher

- ‘Best of’ slides of things to appreciate (taken directly from estate planning slide deck)
- Then the debate to ‘rule beyond the grave’ or to ‘have a little faith’

# Family and key persons

Please provide me with the following information in relation to your immediate family, people you want to benefit from your Will and key persons for your 'Will' as well as people who may be unhappy with your Will:

- Full names and other names they go by
- Relation to you (including if 'step' or 'adopted')
- Your relationship with that person (great, good, alright, estranged)
- Details of age and place of residence
- Other details to be aware of including their health, bankruptcy, their occupation or past history

The information provided here will outline if there are estate planning issues to be aware of including but not limited to: estate challenges, if 'special' strategies should be employed and if your intentions need amending.



# Assets and liabilities

Please provide me with the following information in relation to significant **assets** or **debts** that you own (whether directly or indirectly):

- Specific details about asset including who legally owns
- Market value, debt linked to assets and approximate equity
- Who to benefit from the asset including if there are particular 'directions'
- Where is the asset located (if held interstate or overseas)

Depending on how your asset is held and who you would like to benefit, it may either be easily done, or potentially complicate your affairs (because it cannot be easily achieved).

Any persons assisted with contributing to acquisition of assets?

# Considerations for minors

- Should the same people:
  - Manage the finances; and
  - Care for such minors?
- Should a representative from each side of the family be involved at a decision-making level of:
  - Managing the finances for minors; and/or
  - Caring for minors?
- The persons caring for such minors have all the rights and responsibilities for making decisions about the long-term care, welfare and development of the child (such as education or religion)
- Consider practical implications if guardians of minors are not living with such minors

# Prior Will

- Prior estate planning documents?
- Reason for updating?
- Does it make sense?

# More than a Will

Various ways you can 'own' an asset.

It is important to appreciate that having assets held in different manners – such as jointly with other people, through trusts and through companies – will impact what needs to be done. A Will *might* not be enough!

# Summary table

Ownership	What governs	What to look for	How asset can pass
Personal	Will If no Will – the law	N/A	Can pass asset directly Can pass control over asset
Superannuation	Superannuation documents and beneficiary nominations	Has a 'beneficiary nomination' been made and is it binding?	Can pass superannuation directly (to a limited number of people) If held in a 'SMSF', you can pass control over SMSF
Jointly	Either the law or your Will (depending how joint interest owned)	Joint tenants or tenants in common	Depends on how joint interest owned
Company	Company constitution Legal owner of share	Who is the director or shareholder	Cannot pass company asset directly Can pass control over company
Trust	Trust document If unsure, trust law	Who is the trustee or appointor (controller)	Cannot pass trust asset directly Can pass control over trust
Partnership	Depends on how owned and third party agreements	Depends on how owned	Depends on how owned

# Estate challenges

## Family provision application

- Eligible person able to challenge – generally includes spouse, children and people dependent on you which can include parents, ex-spouses and people who you provide maintenance to)
- Prove not adequately provided for – based on various factors
- Appreciate persons with special disabilities with greater claim
- Only affects assets going into your Will – except if assets held in NSW

# Estate challenges

Factors a Court considers in determining if an eligible person is adequately provided for:

- Financial position of eligible person and needs now and into the future
- Ability for eligible person to meet financial obligations
- 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

# Estate challenges

Other ways to challenge

- Will leaving markings suggesting ‘tampering’ or ‘missing pages’
- Invalid Will (not executed properly)
- No capacity to make Will (unable to properly understand what is being signed)
- Promises made to a person not kept in Will



# Estate challenges

- Making provision
- Bypassing your Will
- Joint tenancies
- Direct superannuation nominations
- Separate successor control documents
- Restructuring
- Gift and loan back arrangements
- Call options
- Declarations (formal or informal)
- Roll the dice and let the Court decide

# Superannuation

- Not automatically part of your Will
- Power to nominate recipients – ‘legal personal representative’, spouse, children or dependents
- Nominations can be binding or non-binding
- Retail or industry funds – you can do it yourself
- To estate or directly to individual – best depends on
  - Tax (we cannot give financial advice)
  - Timing to receive payment/need to receive payment (estate pay out longer)
  - Estate planning intentions
- Pension over \$1.9 million?

# Superannuation

- Superannuation broken into tax free and taxable components
- Spouse, minor children, dependents – receives both components tax free
- Everyone else (including adult independent children) –
  - tax free component tax free and
  - tax on taxable component:
    - 15% plus Medicare if received directly
    - 15% if paid via estate
    - 30% in certain circumstances
- If paid to estate, then whether taxed will depend on who benefits from death benefits paid into Will (look through approach)

# Self-managed superannuation

- SMSF – a lawyer should do it for you to review any governing documents and follow the procedure and consider the control mechanisms
- If SMSF – story time

To avoid all doubt, you should consider preparing a nomination to confirm what happens to your superannuation benefits. If you make this nomination binding, there is no room for ambiguity or dispute.

# Jointly held assets

Joint tenants (think ‘joined by the hips’)

- Rule of survivorship – each person owns 100% (from succession perspective)
- Death of co-owner means surviving co-owner automatically receives asset

Tenants in common

- Each co-owner owns a specific percentage in an asset (e.g. 50%, 99%)
- All percentages add up to 100%
- Death of co-owner means that deceased’s share goes into their Will

It is important to appreciate that assets can be held jointly in different ways. It also needs to be considered if it is better for any assets you hold jointly with another, to be held in one manner over another.

# Trust assets

- Assets in a trust is not yours
- There is a document (trust deed) governing the rules of the ‘trust’
- Those rules dictate who can benefit – it is not for your Will to override those rules by default
- Question becomes who controls the trust
- As there is already a set rule book, if your intentions are contrary to the rule book, complicated changes need to be made
- The rule book needs to be reviewed

Assets held in trusts normally pass through the ‘gifting’ of control. By giving control to the relevant person(s), that person(s) can decide how to deal with the assets in the trust.

# Company assets

- Assets in a company is not yours, a company does not pass away with you
- There is a document (constitution) governing the rules of the company
- The directors enforce the rules and makes the decisions
- Shareholders ultimately benefit from any retained assets in the company and can dictate who the directors are
- The rule book for the company, however, needs to be reviewed to see if it states what happens
- If there are multiple shareholders, then any 'shareholders agreement' also needs to be considered

Assets in a company stays in the company if you pass away. The question, however, is who becomes the shareholder for the company.

# Business and partnership assets

- Depending on the different ways you own assets in a business or partnership, you will need to consider those relevant estate planning issues
- Also, however, given you are dealing with other persons, you should consider what happens if a key person passes away.
- To respect your partner/s, they should also be part of the discussion and all in agreeance.
- Additional documents will be required (shareholders/unitholders agreements, partnership deeds and/or buy sell deeds)

As there are multiple 'unrelated' persons involved, any discussion in relation to the succession should be discussed with all parties.



# Overseas assets/beneficiaries

- Get a Will in that Country!
- Consider tax issues if there are overseas beneficiaries (CGT event K3)
- FIRB and other surcharges for 'foreigners'

# Other issues

- Funeral arrangements (recommended in memo of directions)
- Digital assets (pass under Will or license only)
- Intellectual property (including artwork, music etc.)
- Cryptocurrencies
- Loan accounts
- Liabilities and personal guarantees
- Life interests
- Binding financial agreements
- Other agreements

# Flexibility

- How flexible do you want to leave things?
- The more 'set in stone', the more complicated it is to implement
- War stories
- Practical examples (too particular to a detriment and controlling the uncontrollable)
- Potential alternative – a guideline document?
- Trusting people
- If untrustworthy, keep things simpler, appoint more people or include independent persons?

We have discussed giving assets directly compared to passing control. There are benefits in passing control, but also disadvantages.

# Flexibility – questions to consider

- Do you want to leave some ‘guidelines’ or ‘rule beyond the grave’?
- If ruling beyond the grave, we will simplify things to remove any potential for abuse of power.
- If leaving some ‘guidelines’, do you trust those in control to **not** abuse their power?
- Think – if the persons in control *could* take all the assets for themselves, do I trust them **not** to?
- Should I appoint multiple people or an independent person(s)?
- Importantly, do I trust those in control to consider my guidelines and act in the best manner possible?

This ‘guideline’ document is called a ‘memo of directions’, and we provide you with a template to complete at your leisure.

# Memo of directions

- This document allows you to document your intentions and guidelines
- It could be a blank piece of paper, or the template that we provide you
- It allows you to outline your thought process without fear of making things too restrictive with wording able to be 'lax' and personal
- Those looking after your affairs will at least then have a document that they can refer to when looking after your affairs
- It allows you to leave some non-binding directions so those in control can administer things per your intentions or administer things in a different manner if your directions are not appropriate at the relevant juncture (we are not mind readers and do not know what the future entails)

Keep a signed copy of this document with your Will and potentially circulate it to the key persons if you wish as well for their information.

# Ruling beyond the grave – what can go wrong?

- ‘Control must be passed to my children once they turn 18/21/25’
- ‘You cannot sell any property until my child turns 21, has graduated and worked full time for a year’
- ‘You must obtain financial planning advice each year’
- ‘You cannot sell the family home until the children are in control’
- ‘You must give x amount of money to the person who cares for my dogs, and that money has to be spent on my dogs’
- ‘You must distribute my properties as follows:
  - Home to Child A
  - Investment Property 1 and 2 to Child B
  - Investment shares and superannuation to Child C’

# Ruling beyond the grave – what can go wrong?

- ‘Distributions each year as follows:
  - \$300,000 to my wife if she is living
  - If she is not living, then \$150,000 to each of my two children
  - If any of my children are not living, then \$50,000 to such of their children (provided a parent is still alive) or \$100,000 to such of their children (if there is no surviving parent)
  - Distributions varied depending on if value of trust fund exceeds 3% (100% of above distributions), 0% to 3% (reduced by 1/3), falls up to 3% (reduced by 2/3) or falls over 3% (no distribution)
- Beneficiaries cannot do a host of trust powers to enable ways to circumvent above rules (i.e. no related party loans or investments)
- No ability to vary the trust except for a particular year when the kids are in their 60s.
- Independent advisor must be included in the decision making as well’

# To trust or not to trust

- ‘Act with due care and consideration’
- Memorandum of directions as a way of conveying settlor/trust creator’s intentions on how assets of the trust should be managed
- It is a personal document and does not necessarily fall within the definition of trust documents
- Ability to protect decision making process from disgruntled beneficiaries
- There needs to be someone you trust though



# Contact details

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