

Intergenerational Wealth Transfer Strategies

Webinar Presentation

THIS WEBINAR WILL COMMENCE SOON

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Testamentary Discretionary Trusts

Testamentary discretionary trusts can provide a range of benefits including:

- asset protection;
- family asset retention (so-called ‘bloodline trusts’);
- protection of vulnerable beneficiaries;
- providing for the spouse from the second marriage while ensuring the deceased’s children from their first marriage ultimately get estate capital;
- ensuring the deceased’s children ultimately receive estate capital and preventing the surviving spouse’s later husband or wife getting access to that capital via that later marriage; and of course
- tax benefits for minor beneficiaries.

How much asset protection do Testamentary Discretionary Trusts really provide?

Re: creditors – *The Richstar Case (2006)*, *Smith's case (2008)*, *Fordyce v Quinn (2016)*

Re: estranged spouse – *Kennon v Spry (2008)*, *Morton v Morton (2012)*, *Bernard v Bernard (2019)*

How much asset protection do testamentary discretionary trusts really provide?

As much as you can arrange for them to provide by:

- a) having all or at least some independent trustees or trustee directors
- b) having all or at least some independent appointors
- c) administering the trust at arms length
- d) having a binding financial agreement in respect of inheritance
- e) evidencing 'due consideration' in decision-making

Two other points about Testamentary Discretionary Trusts

- Testamentary Discretionary Trusts add complexity
- Combined or separate trusts

Bequests to an existing family trust (pros and cons)

Pros

- Only one trust ultimately
- The set up has been completed already
- Trust terms not in Will and therefore more separate and private
- The trustee is in place
- The same basic protections as a TDT

Bequests to an existing family trust (pros and cons)

Cons

- Only partially a testamentary trust
- Need to segregate testamentary and non-testamentary assets
- Need to ensure non-testamentary assets not included in testamentary benefits
- Makes inheritance available to creditors of current trust
- Ensuring control of existing trust shared by all beneficiaries

How to safely transfer a discretionary trust

- The key is transferring control
- Control is exercised by
 - Directors
 - Shareholders
 - Appointor

Directors

- Directorship is an office and is not property
- Directors' resolutions not irrevocable
- The constitution may be set in stone
- Still dependent on directorship eligibility

Shareholders

- Can shareholders' resolutions be irrevocable?
- Gifting the shares
- Separate parcels of shares to each beneficiary

Appointor

- The role of 'appointor' is not property
- Is there an appointor?
- How is a new appointor appointed?
- Is any third party consent required?
- Can the deed itself be amended?
- Appointing the replacement appointor in the Will
- Change the trust deed now to lock in the new appointment
- Still dependent on eligibility of successor appointor

The use of loan strategies to protect assets

Common transfer strategies

- Secured long term loan to child as an estate preference over other children
- Secured long term loan to child to protect from child's creditors
- Secured loan to child and their relationship partner to protect asset from family law claim
- Loan from family trust to beneficiary secured over beneficiary's residence rather than capital distribution from trust
- Secured loan from testamentary discretionary trust to willmaker's beneficiary
- Asset protection for family home

What do these loan strategies have in common?

- They secure the loan over the client's property
- May involve the family trust as a way of shifting control rather than legal ownership
- They don't involve any transfer duty or CGT liability
- They **MUST** be arms-length, fully documented and security registered
- A parent should never give a loan to their child without all the arms length documents
- Forgive the loan or assign to trust

The role of Superannuation

- Loan strategies in respect of superannuation restricted to LRBA
- Fund liquidity on member's death
- Four strategies using life insurance
- Two previously-used strategies no longer accepted by the ATO

Intergenerational transfers out of superannuation

- Gifting (nominating) the client's superannuation death benefit to the client's children
- Making the kids financial dependants
- Gifting (nominating) the estate
- The Superannuation Proceeds Trust (SPT)

Using superannuation for asset protection

- Bankruptcy Act says super unavailable to member's creditors
- Bankrupt member may even be able to withdraw and use super benefits (subject to the SIS regulations)
- Assets acquired with protected super benefit are also protected
- Exception - large, 'out of character' contributions to their super funds with money that could be paid to creditors could be clawed back
- Protection afforded by the Bankruptcy Act only commences when the person becomes bankrupt

Buy/sell arrangements and business succession

- Setting the ground rules on death/TPD of co-owner
- Different models with different tax consequences
- Pre-existing buy/sell arrangements binding on the estate
- If nothing in place surviving co-owners now in business with deceased's family
- Surviving family may want business sold
- Co-owners should always have a buy/sell arrangement
- Informal business succession plans fraught with danger
- Families must agree the succession plan in advance

Whether family provisions claims can undo the estate plan

Can a family provision claim undo all the good planning?

- “Challenging the will” involves either
 - claiming that the Will is defective, or
 - claiming a larger share of the deceased’s estate
- Every state and territory has their own legislation
- NSW has ‘notional estate’ – meaning
- NSW eligible claimants
- No other jurisdiction has notional estate (despite threats to do so)

What can the willmaker do to avoid a challenge to their will?

The Willmaker needs to consider:

- who in their sphere is eligible to make a claim – spouse? children? dependents?
- are there particular problems such as second marriages or estranged children?
- are any of those people eligible for a gift based on the relevant state's criteria?
- have those people been catered for in the will?
- is the level of their inheritance of an amount the courts consider appropriate?
- does the willmaker have a valid reason for omitting them or limiting their entitlement?
- would providing them with some gift be better than nothing at all?
- what could the willmaker do now to decrease the prospects of a successful claim?

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