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Newsletter

Estate Planning

The information provided in this newsletter is merely a guide and is not meant to be a detailed explanation of the law on each subject. Please contact us for legal advice. © Colin Fleming. Colin Fleming & Company.

Introduction

Estate planning involves the creation of an ordered, secure, yet simple and flexible overall regime for our affairs, for the present and future. It should provide scope for building up your assets during life and should provide for your comfortable and secure retirement. It should provide a suitable balance between enjoyment of property and income during life and the preservation and/or creation of capital for your family or other beneficiaries on your death. It should be "tax friendly" for you during your life and for your family and others after your death. It should be flexible enough to be able to cope with unforeseen changes in circumstances, domicile and in the law.

Estate Planning is:

- ✓ **Taking control** so that you, not the Queensland Government, your superannuation trustees or someone who doesn't know your family, are making critical decisions about your

assets.

- ✓ **Avoiding uncertainty** - People who rely on you can make their own plans for their futures.
- ✓ **Taking responsibility** for the orderly transfer of assets to your family and loved ones.
- ✓ **Paying no more tax than is necessary** on what you leave behind.
- ✓ **Saving your loved one's expenses** by avoiding unnecessary court applications.
- ✓ **Keeping your plan effective.** Superannuation and tax laws are extremely complex and change rapidly. So may your personal and family circumstances.
- ✓ **Peace of mind** for you and your dependants.

Estate Planning consists of three phases:-

1. Estate Growth;
2. Estate Protection; and
3. Estate Succession.

Estate Growth

Estate Growth consists of creating wealth. More can be achieved in this time if it can be done in a tax effective way. In particular, income tax and capital gains tax liabilities may be delayed, if possible. *To maximise the effectiveness of Estate Growth, you will need to involve your Financial Planner and your Accountant.*

Estate Protection

No one questions that to protect your assets you have to make and implement a plan. Too often this is postponed because it's "too hard". *(For further information, ask for our newsletter - 7 Steps to Peace of Mind - implementing estate planning.)*

Did you know that Robert Holmes a Court died without a valid Will, although he

reportedly had one in his brief case that he was going to sign later...?

Your assets are at risk to the following circumstances:-

- X Debt
- X Disability
- X Divorce
- X Dementia
- X Death

In the financial year ending June 2001, over 25,000 bankruptcy and debt agreements occurred, with this rate still increasing.

Accidents and unexpected illness happen without warning.

The failure rate of marriages is approaching 50%, despite large shifts to non-married relationships.

At least 28% of us will suffer from some form of incapacity, most notably dementia, in later life.

We will all die, often without notice. For example, the first symptom in nearly one half of heart attack cases is sudden death. This is a fact of life. It is not smart to ignore this as your valuable assets are placed at risk.

One of the critical asset protection mechanisms is to have suitable Attorneys, Executors and Trustees. They are often critical to the effective performance of the Estate Plan. Have you taken this simple step?

Often, the single largest asset and most significant feature of the Estate Plan is superannuation which is often boosted by additional life cover. With the maximum pension amount for tax protection (Reasonable Benefit Limit) for superannuation being approximately \$1,000,000.00, we are talking serious assets worthy of protection. You should note that any funds paid in excess of this limit are taxed at the top tax rate of 48.5%.

A superannuation death benefit paid to a dependant as a lump sum is generally tax free provided the amount does not exceed your pension Reasonable Benefit Limit (RBL). Unfortunately, the definition of "dependant" for tax purposes is not as wide as the "dependant" for superannuation purposes. Probably your children over eighteen (18) are not dependants and payments to them will count as an eligible termination payment in their hands. This payment will be taxed accordingly - generally, at either approximately 15% or 30% (Plus Medicare) so long as the amount does not exceed your pension RBL.

Debt

It surprises us that while the family home is religiously insured against the improbable risk of being destroyed by fire, persons at risk, (especially anybody who conducts their own business) risk the same family home, and all other assets, needlessly, to the far greater risk of business failure. Bankruptcy need not destroy all wealth created.

Disability

Income and Trauma Insurance are available to cover such risk. Please note that you should read these policies carefully or seek legal advice to ensure that what you regard, for example, as "disability" is the insurance company's definition too. It almost certainly is not. The Queensland Powers of Attorney Act 1998, while giving an enormous increase in opportunity for people to arrange their affairs as they wish, makes them more vulnerable to exploitation and subsequent abuse. Is the person you have appointed to look after you, if you are incapable of doing that yourself (if you have, at least done that), also a beneficiary under your Will? Be sure that you can trust them not to preserve your estate at the expense of your care! ie. You won't get the care you require, and can afford, because your carer realises that every cent not spent on your medical or general care leaves more for them on your death.

Divorce

Unmarried or same sex relationship partners now have comparable rights to Family Law property settlements. That gives your partner the power to take much of what you regard as yours, if your relationship fails. If your relationship has terminated, have you done all the paperwork to ensure that all the property transfers have occurred, and that your former partner is not still a beneficiary under your superannuation / insurance plan or Family Trust?

Dementia

Unexpected accidents can place your assets at risk. Who has the power to help you in the event of a personal crisis? *(For further information, ask for our newsletter - Powers of Attorney.)*

Death

Many issues arise here. What steps have been taken to ensure that the surviving family have sufficient income to live, and primary

assets, particularly a family business, are protected? *(For further information, ask for our newsletter - Business Protection in Estate Planning.)* You must also consider:

- X Are the right beneficiaries going to receive the assets?
- X What business succession plan is in place?
- X Is your business the only source of your/your family's income?
- X Is any business income protected?
- X What pension aspirations do you have for yourself or your partner?
- X Do you have vulnerable loved ones? (Loved ones who are immature, intellectually challenged, drug or alcohol dependent, spendthrift,

bankrupt or likely to be, or simply prone to lose assets via Family Court claims by a series of inappropriate relationships.) *(For further information, ask for our newsletter - Vulnerable Beneficiaries.)*

- X Is any tax liability postponed or minimised?
- X Can your Executor adjust the share that beneficiaries get if one beneficiary has to pay more tax than another, so that the beneficiaries get the same amount net, not gross?
- X Does your existing Will have provisions to meet these events?

Your Estate Protection Plan is at risk of failure if your Insurance Advisor, Accountant and Solicitor are not advising you in this phase.

Estate Succession

Modern families contain ex-nuptial, adopted and step-children. They, together with ex-spouses in receipt of maintenance, can all bring applications to a Court for an Order that better provision be made for them from your estate. In the case of a surviving homosexual partner, they are not so protected and are particularly vulnerable. Options do exist to protect particular beneficiaries and reduce prospects of significant parts of your estate being wasted in expensive court proceedings.

Wills

A Will achieves two things. It ensures that the people that you propose to benefit, definitely receive the share intended, as opposed to relying on a distribution of your estate as determined by the Queensland Government. (It is not the law that the Government will take your property, but you may end up with the Public Trustee administering your assets, for a fee where you would prefer family members to do this. They probably won't charge as much as the Public Trustee either.) Secondly, you create something in writing for your Executor to show the people who hold your assets that your Executor has the authority to deal with those assets without the necessity of applying to a Court to be appointed as the person to look after your estate and assets.

You can avoid the need to make a Will if you do two things:

1. Use Will substitutes that achieve your desired result of asset transfer; or
2. Die first. The effect of Will substitutes is that the last to die has all of the assets, so the problems are compounded unless there is also a Will.

Will Substitutes

There are a number of ways in which property can be held during life to ensure that it does not form part of your estate, and therefore will not pass according to your Will on your death. These are Will Substitutes and work in a circumstance where the person who holds the assets is the first to die of a couple or family.

1. Jointly held assets. Jointly held assets, eg. bank accounts or land, will pass to the survivor, regardless of what you say in your Will, except in the case of land held "as tenants in common".
2. Assets held in trust pass on death to the person who controls the trust. This person is often in the position to acquire all of these assets. The person with the power to appoint and

dismiss the trustee controls everything in the trust. You can't give trust assets away in your Will.

3. Superannuation and Life Insurance Benefits may be paid to a nominated beneficiary, not the Estate. Who is your nominated beneficiary?

Binding Nominations

80% of insurance and superannuation companies claim discretion to pay the death benefit or superannuation funds to whoever the company thinks should get the proceeds, even though they have a nominated beneficiary. Ensure that your insurance and superannuation company permits you to make binding nominations of beneficiaries, or roll over the proceeds to a company that does.

Binding nominations are a lethal weapon to protect assets from expressions of bad faith by the trustees of your superannuation or insurance company. Binding nominations:

- X avoid the possibility of expensive and very protracted disputes before the unpredictable Administrative Appeals Tribunal and the long queues of the Superannuation Complaints Tribunal,
- X provide certainty for you, and
- X are very tax effective in the appropriate circumstances.
- X Please note that there are formal requirements on how to make such a nomination and that it will lose its binding nature if not renewed in writing every 3 years. These rules may not apply to self managed superannuation funds! *(For further information, ask for our newsletter - Insurance / superannuation.)*

Even with Will Substitutes, the last to die definitely requires a Will to minimise the expense and time to finalise the transfer of the assets. A well drafted will offers the flexibility to adopt the most tax effective ways of dealing with the estate assets to ensure that the correct beneficiaries receive the intended distribution. For example, allowing the executors to equalise the share to children if one has more tax to pay on a distribution than others. Does your Will enable this?

Mutual Wills

Wills should protect vulnerable beneficiaries. In many relationships (second relationships in particular) there is a strong desire to protect children of that or a previous relationship from the step mother / stepfather who may follow on your death or disability. A mutual Will may be appropriate here. Mutual Wills are based on agreements between parties to give property by their Wills to agreed beneficiaries. Once the first person dies, leaving the property, as agreed, the law will enforce the agreement even if the second person changes their mind and their Will after the death of the first and attempts to leave their property to another.

For example, spouses A and B agree to leave in their Wills particular property to which ever of them succeeds the other and then to their children C and D. After A dies B re-partners with X and has children Y and Z. B also changes B's will leaving the property that was to go to C and D to X, Y and Z. If a mutual will existed, the law makes X, Y and Z give the property to C and D on the death of B, just as B agreed with A, because A kept to the agreement. *(For further information, ask for our newsletter - Mutual Wills.)*

Estate Succession is a complex and rapidly changing area of practice because of taxation, pension and social security changes. Its effectiveness is dependant upon you dealing with a solicitor who has kept up to date with these changes and has the skills to draft documents appropriate to your needs.

We have covered very briefly here the general aspects of estate planning. It is important to note that they are your assets and the responsibility to protect them is yours. Do not hesitate to contact us for further information should you require it.