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Newsletter

# *Vulnerable Beneficiaries*

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. Information content provided by courtesy of © Allan Swan. SJQ Services.

There is no greater concern to an estate planner than answering the question - "who is going to look after my children (or other loved ones) if I can't, either because of my own death, or disability through some unexpected crisis?" Most of us, as parents, feel this even with fully capable adult children. The question is especially critical if the loved ones can't look after themselves because they are vulnerable.

Vulnerable beneficiaries include those who:

- ☑ Have congenital or other intellectual illnesses or conditions such as Down Syndrome or autism.
- ☑ Have disabilities that develop or become apparent during their lifetime and may or may not be treatable eg. Alzheimer's disease, schizophrenia. Many of the beneficiaries in this category may have their own financial dependants, eg their own children, and it may be advantageous if the clauses included in a Will or the choice of a pension or annuity allow for income to distribute to those children.
- ☑ Suffer head injuries as a result of an accident eg road trauma, workplace injury;
- ☑ have physical disability, eg because of multiple sclerosis, paraplegia. For such beneficiaries the question of control may not be important, but issues such as their special circumstances and eligibility for tax concessions tax may still be relevant.
- ☑ have a temperament that makes them susceptible to financial difficulties. The estate and asset protection planning arrangements for a beneficiary with chronic gambling problems may be very similar to those for a person with severe intellectual disabilities.
- ☑ have drug addiction problems serious enough to prevent them making rational financial decisions for their welfare and for the welfare of their dependants.
- ☑ have financial incapacity or vulnerability. (Estate planners may also want to impose restrictions on a child or other relative who is considered to be susceptible because of undue influence or whose personal relationships are perceived to be unstable and likely to end in a Family Law Court dispute. Such beneficiaries in particular are more likely to want to contest any restrictions placed on them.)

Here is the **Ten C's for "Best Practice"** estate planning when the needs of a vulnerable beneficiary are being considered.

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| **Capacity** | a vulnerable beneficiary frequently lacks the capacity to independently make financial and other key decisions. You can't safety give them property, but when they die, what happens to property that was supporting them? Such beneficiaries may be particularly vulnerable to an estranged or neglectful parent, or the children of that parent. |
| **Cash Flow** | The funding that will be, or over time will become, available to achieve estate planning objectives. |
| **Challenge** | a Will (and in many cases, the decision of a superannuation fund trustee) can be challenged and overturned. |
| **Changes** | to both the circumstances of the estate planner and of the vulnerable beneficiary as well as to taxation and other laws |
| **Circumstances - Beneficiary** | of the beneficiary, eg own financial resources such as Government (usually means tested) pensions, ongoing needs for accommodation and support services |
| **Circumstances - Estate Planner** | of the estate planner including the ownership (eg personal, superannuation, family discretionary trust) and extent of assets as well as the presence of other beneficiaries. |
| **Concessions** | eg "generous" income tax breaks for minors with disabilities and present and future eligibility for means tested pensions. |
| **Conflict of Interest** | other family members (and even advisors) may have conflicting interests and pressures. |
| **Constraints** | legal and tax impediments can prevent an estate planner from achieving exactly what they might want. |
| **Control of Funds** | is a trusted relative or a neutral trustee the best person to administer the assets set aside for a beneficiary? |

Failure to address even one of these issues can have disastrous results for those beneficiaries who are lacking either the:

- Ability to determine their own financial future, free of undue influence; or
- Income generating capacity to adequately provide for their own quality of life

So often, estate planning offers an opportunity (not to be repeated) to provide for, or enhance the quality of life of, such a beneficiary. The estate planner in this situation often has, or has had far greater ability to make financial provision for a vulnerable beneficiary.

The summary of issues provided here is by no means a comprehensive summary of all the issues that need to be addressed by an estate planner. It does seek to address some important, but quite complex issues and readers may find the information and material in this summary helpful in explaining the practical implications of some of those issues. The significance of many of the issues addressed will often be greatly reduced if the value of the estate and non-estate assets is likely to be low.