Brien Leibinger LAWYERS

Estate Planning Advice

Information Sheet

WHY DO I NEED ESTATE PLANNING ADVICE?

Imagine spending your entire working life accumulating assets, building an estate for your children only to have part or all of it go to someone you did not intend to benefit because you did not have a valid Will. Your children could then spend months and thousands of dollars trying to reclaim your estate or defend it against a claim that could have been avoided.

Imagine you have a young family, you and your spouse are tragically killed in an accident. Who will raise your children? Will your wishes be met? How will your children be cared for?

Estate Planning is not just about what happens with your assets when you die. Thorough Estate Planning will help to protect your assets from risks like bankruptcy and marriage breakdown.

WHAT IS ESTATE PLANNING?

Estate Planning is about facilitating the protection of your assets while you are alive and, on your death, the distribution of your assets to ensure your beneficiaries receive them in the most efficient and protected form.

Estate Planning is about peace of mind through control.

The tools of Estate Planning include the Will, Powers of Attorney, beneficiary nominations for superannuation and life insurance and business structures and asset ownership structures e.g. Superannuation Funds, Trusts and Companies.

A good Estate Plan should provide for flexibility, control, access to capital, asset protection and tax effectiveness. It should also seek to minimise the risk of possible challenges to the success of the plan.

The extent to which beneficiaries will or may benefit from other (non-estate) sources, e.g. joint tenancies, superannuation and life insurance proceeds, annuities and family trusts could mean the arrangements around these assets may be more important than a Will!

DO YOU HAVE YOUR OWN BUSINESS OR FAMILY TRUST?

For people with Businesses or Family Trusts, there are further issues to consider such as:

- Property that has been transferred to a business or family (i.e. discretionary) trust;
- Future control of family trusts - will one proposed beneficiary be able to exclude the others, e.g. sisters and brothers, from any further benefit;
- The establishment of a family trust or new business venture;
- The retention of capital and profits in a company;
- Retention of trust distributions allocated to beneficiaries, e.g. children;
- Sacrifices made by beneficiaries, e.g. wages foregone when working on the family farm;
- The need to implement a plan for business succession.

ESTATE PLANNING TO PROTECT YOUR FAMILY NOW AND IN THE FUTURE

Making provision to protect your family and/or the proper distribution of your assets in the event of death or disability is an important part of wealth management and Estate Planning.

Although there are currently no death duties in Australia, tax and social security efficiency can be greatly enhanced through proper planning. It is well worth spending a little time and taking professional advice to ensure that your family is taken care of and your wishes respected.

THE TOOLS OF COMPREHENSIVE ESTATE PLANNING INCLUDE…

The Will

The first essential is to have a properly signed Will. This is a legal document which sets out the wishes of the Willmaker (i.e. the person making the Will), the Beneficiaries who are nominated to receive an inheritance and the appointment of an Executor to make sure the Willmaker's wishes are carried out.

A Will does not have to be in a particular format but professional advice is strongly recommended so that the Will is properly drawn up and valid.

The Will must be witnessed by two people who are NOT beneficiaries.

A Will should always be reviewed if there is a change in family circumstances such as a death, a birth, a marriage or a divorce. The sale or purchase of investments, receipt of an inheritance or a change of residence may also involve changing a Will.

In fact, it is wise to review a Will every 2 or 3 years and then consult a solicitor if you want to make any changes to the Will.

Testamentary Trusts

A Testamentary Trust is simply a Trust established under your Will. The main advantages of a Testamentary Trust are:

- It provides excellent tax planning opportunities as distributions can be made to children as beneficiaries and taxed at the normal adult marginal rates of tax.
- It can provide protection for an inheritance from a Beneficiary's creditors provided it is correctly structured and can also be suitable to provide for beneficiaries with a disability.
- It can also provide a level of protection for an inheritance in the case of a Beneficiary's marriage or relationship breakdown provided it is correctly structured.

Grandparents may be able to help their children more effectively by leaving gifts for the grandchildren's education through a Testamentary Trust.

If a family member is regarded as not being capable of managing or retaining money – a gambler or a spendthrift perhaps – monies can be protected through a trust.

DISCRETIONARY TRUSTS

Establishing a Family Trust may have several estate planning advantages, especially if substantial assets are involved.

Assets can be transferred into a trust without the former owner losing effective control, as he or she can become a trustee as well as a beneficiary of the trust.

The trust does not pay tax as long as all income is distributed to beneficiaries and there is no CGT issue on death as there is no change of ownership – the trust remains the owner or the assets.

This also means the assets in the trust are not part of the estate of a deceased Willmaker and, with correct structuring, can put assets beyond the reach of someone wishing to make a claim against the estate.

POWER OF ATTORNEY AND ENDURING POWER OF ATTORNEY

Not all estate planning issues are concerned with death. Adequate arrangements need to be made in the event of a person losing capacity.

A Power of Attorney allows a person to act on your behalf, including making financial transactions. Such a power may be given for a specific length of time, such as when someone is travelling, but a more general power can be given allowing someone to act on your behalf in a variety of ways.

An ordinary Power of Attorney lapses in the event of incapacity, which is ironically when it would be most needed but an Enduring Power of Attorney continues to operate until death.

While a spouse may seem the most appropriate person to appoint as an attorney, it should be recognised that there is the possibility of a joint accident, such as a car or plane crash. It is usually preferable to also appoint another trusted family member or friend as an attorney, perhaps as a reserve or back up attorney.

The Power of Attorney can be revoked at any time, unless the person giving the Power of Attorney becomes incapacitated.

RISK MANAGEMENT

Insurance can play an important role in estate planning. People with dependants such as a spouse and young children and relatively few assets can best provide for their dependants in the event of their untimely demise or disablement through life, trauma and income protection insurance.

Trauma insurance pays a lump sum in cases of specified life threatening illnesses such as cancer, stroke and heart attack, not only helping to cover family expenses but also funding rehabilitation.

After life itself, the ability to earn an income is, arguably, the most important asset we have. Income protection insurance premiums are tax deductible and the policy can provide up to 75% of normal income during a period of prolonged illness or following an accident.

As time goes by, as dependants become more self-reliant and more investment assets are built up, there will be less need for insurance.

All insurances should be reviewed each year to make sure:

- The cover is adequate; and
- Valuable policies are being kept up; but
- No unnecessary premium costs are being incurred.

WHY YOU NEED ESTATE PLANNING

At all times, it is important to ensure that your family and dependants will have adequate resources to maintain their standard of living should there be a catastrophe. The amount of money needed will vary according to age, family circumstances, health and employment. The mix of assets available to meet these needs will change over time.

Addressing these needs in the context of a comprehensive long-term estate and financial plan will provide the best means of tailoring your needs to your life stage, family responsibilities and savings capacity.

It is important to think about estate planning as soon as possible as no one knows when disaster may strike.

The steps you need to take include:

- Thinking through the future outcomes for your family;
- Making a valid Will;
- Establishing an Enduring Power of Attorney;
- Reviewing your Will regularly;
- Building up assets as quickly as you are able;
- Using insurance policies appropriately in the interim;
- Having appropriate and valid death benefit nominations in place for your superannuation;
- Making the appropriate agreements with spouses and business partners; and
- Assessing whether a trust (or trusts) would help for the reasons outlined earlier.