WILLS & ESTATES BULLETIN – ISSUE #7

MOIN &
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Inside this issue:

What is an estate plan and do I have one?

1. An estate plan is a plan for what will happen if you or your partner die or lose capacity. It includes planning for your property, your family, your health.

Assets

2. When making your estate plan, the assets you need to consider are:

    a. real property assets, such as land and leases;

    b. personal property assets, such as money, motor vehicles, artworks or heirlooms.

Jointly owned assets

3. Assets which are jointly owned are not part of your estate if you die. Instead the surviving joint owner/s of the asset continue to own the property solely.

4. Most assets can be jointly owned. This includes land, bank accounts, motor vehicles. There are some assets which are difficult to register as being jointly owned.

5. The only way to be sure if you own your home with your partner jointly or as tenants in common is to do a title search or review the title deed (also known as a certificate of title).

Farming assets

6. Farming assets are just not the same as other assets when undertaking an estate plan. There are often added complexities arising from:

    a. Leases;

    b. Trusts;

    c. The farming enterprise being carried on by an entity that is different from the entity which owns the land;

    d. Relatives working on the land for little to no income

Business assets

7. Much like farming assets, business assets must be treated carefully due to the complexities that arise including corporate and trust structures, and the involvement of relatives in the operation. Self managed superannuation funds also frequently own the premises, which can also require care and attention in estate planning.

Business succession plan

8. If you are in business someone else, your estate plan should include thought as to what will happen in the event that you can no longer contribute to the business due to ill health or death. The following issues need to be considered:

    a. Will your spouse be able to continue to receive income from the business if you die? Can they become a director or partner themselves?

    b. Will your spouse be able to require the continuing business owners to buy you out? Can you do this if you suffer total and permanent disability?

    c. How will the business be valued when you are being bought out? Will an independent valuer be used, and if so, what methodology or formula should be used in that calculation?

    d. What are the timeframes for the buy-out? Can it be vendor financed?

    e. Will the partners or the business take out life and TPD insurance to fund the buyout of a deceased/ TPD business owner?

9. These issues can be dealt with in a business succession agreement.

Superannuation

10. Superannuation is not automatically part of your estate on your death. This is because superannuation funds are structured as trusts, and the trustee of the super fund holds your superannuation on your behalf. On your death the trustee must pay your superannuation in accordance with the trust deed and any binding nominations you have made.

11. There are on limited eligible beneficiaries for your superannuation. For example, you are not able to nominate a sibling, parent or grandchild to receive your superannuation directly. If you attempted to do so it would be void and unenforceable.

Family Trusts and unit trusts

12. Similar to superannuation, the assets of a family discretionary trust or a unit trust are not owned by you, even if you control the trust.

13. You also need to consider if the trust deed caters for the event that the you are incapacitated, either temporarily or permanently.

14. The appointor (sometimes called principal) is the ultimate controller of a family trust because they have the power to hire and fire the trustee. Your estate plan needs to provide for who will be the appointor in the event of your death, and also in the event of your incapacity.

15. We recommend that family trust deeds are reviewed from time to time to ensure that there are no unusual provisions which may obstruct your estate plan or cause an adverse tax event.

Taxation

16. Death and taxes are said to be the only 2 certainties in this world. However how much tax you bequeath to your family can be quite different depending who your beneficiaries are, how long you have owned the asset, whether the asset is sold after you death or transferred, and the type of asset.

Involvement of other professionals

17. If you are in business, or if you have an investment portfolio or self-managed superannuation fund, it is crucial that your accountant and/or financial advisor are closely involved in the estate planning process.

Wills

18. The major decisions to make in your wills are:

    a. who will you appoint as your executors. Your executors hold legal title to your assets during your estate administration, have a duty to collect your assets and pay your debts, and then distribute your estate;

    b. if you have children under the age of 18, who will be their legal guardians;

    c. who will receive your estate;

    d. any wishes as to organ donation, burial or cremation;

    e. any other wishes.

What is a "Simple Will", a "Mum and Dad will" or a "I love you" will?

19. These are all colloquial terms for the same type of will, being a will whereby 2 people who are spouses or partners:

    a. appoint each other as their sole executors, and give their whole estate to the other; and

    b. if their spouse or partner predeceases them, appoints one or more of their children as executors and gives the whole of their estate to their children in equal shares.

20. Most Australian wills use this structure. This type of will is appropriate for a large number of people. This type of will is generally not appropriate where (and we have to be careful about generalisations because every person and family is different):

    a. there are substantial assets;

    b. one or more of the beneficiaries have a vulnerability such as an addiction, a disability or a mental health challenge;

    c. one of the beneficiaries has contributed more than the others to your estate and you wish to recognize this in your will;

    d. the estate includes farming land which must be divided between beneficiaries;

e. you wish to provide a beneficiary with a right to reside/occupy your home or another property;

f. your family is complicated or your assets are complicated.

Testamentary trust wills

21. These wills are more complicated, but for families involving larger sums of money, or beneficiaries with addiction issues, disabilities, or who run their own businesses, there can be substantial asset protection and tax advantages.

22. Testamentary trusts come in a variety of forms, and must be tailored, like any will, to your particular circumstances to maximise the benefit for your beneficiaries.

Powers of attorney and guardianship

23. Your will deals with the event of your death, but has no effect whilst you are alive but have lost capacity.

24. You are able to:

a. appoint an enduring attorney to manage your legal/financial/property matters; and

b. appoint an enduring guardian to make health/personal decisions for you.

25. We strongly recommend that every person have an enduring power of attorney and an appointment of enduring guardian to ensure someone is able to manage your affairs and look after your health and personal matters, if ever necessary.

26. It can also be necessary for superannuation/taxation/compliance reasons to have an enduring attorney if you are a member of a self-managed superannuation fund. If you have an SMSF and you do not have an enduring attorney, it will likely be necessary for an application be made to the New South Wales Civil and Administrative Tribunal for the appointment of and administrator/financial manager for you if you lose capacity to avoid your SMSF becoming non-compliant.

Documents

27. The documents which record and implement your estate plan are:

a. will;

b. superannuation death benefit nomination;

c. enduring power of attorney; and

d. appointment of enduring guardian.

28. Depending on your estate plan you may also need:

a. A memorandum of wishes;

b. Updates or amendments to your family trust deed or superannuation trust deed.

Cameron Cowley

May 2018

Big Changes on the way for Powers of Attorney & Appointment of Enduring Guardians

1. Earlier this month I was fortunate to attend the Wills & Estates Specialist Legal Conference in Sydney.

2. One of the presenters was Alan Cameron AO, who is the current Chairperson of the NSW Law Reform Commission ("NSWLRC"), and someone who you might remember as the former head of ASIC for most of the 1990s.

3. A few years ago the NSW Attorney General requested that the NSWLRC review the Guardianship Act, as well as its relationship with a number of other pieces of legislation including the Powers of Attorney Act and Mental Health Act.

4. On 21 May 2018, the NSWLRC delivered its report to the Attorney General, and whilst the report is not yet publicly available, I was provided with a briefing by Mr Cameron regarding the proposed changes to the legislation, which are:

Name Change

In order to modernise the Guardianship Act, the NSWLRC considered that "Guardian" was too paternalistic and has proposed a name change to the "Assisted Decision-Making Act".

Amalgamation of Legislation and Documents

Whereas other states in Australia have combined the roles of Powers of Attorney and Enduring Guardians into the one document, NSW has traditionally separated the roles via legislation and as such the documents appointing attorneys and guardians have always been separate.

The NSWLRC has now recommended that the two roles be combined into the one piece of legislation, and that the document appointing an attorney and an enduring guardian be combined into the one document.

The roles will still be separated in their functions, but the document appointing the persons will be reduced to one instead of two.

"Enduring Representative" not Enduring Attorney and Enduring Guardian

Another change in semantics is proposed, with Attorney and Guardian to be removed and replaced with "Representative."

The NSWLRC was fond of the term "Legal Personal Representative" but to avoid confusion with superannuation legislation and Executors or Administrators, it has settled on "Representative" or "Enduring Representative" as the term that will encompass both attorneys and guardians.

Enduring Reprentativies will be able to be appointed via a document called an Enduring Representative Agreement or via an order from the NSW Civil and Administrative Tribunal (NCAT). This mirrors the current arrangements, but simply will updated terminology and streamlining of documents.

New Role

The NSWLRC has recognised that it is not always black and white when a person loses capacity to make decisions, and there will be times when they simply need support in making decisions rather than substituting someone to make all of their decisions for them.

As such, it has recommended a new role called a "Supporter". A supporter would be a person who communicates or assists a person in communicating their decisions and who can access, collect or obtain information on behalf of a person. They cannot make decisions on behalf of a person, and must promote that person's ability to make decisions for themselves.

Other Provisions to be retained

The concept of having an alternative or back up persons has been retained, and the NCAT division for handling these matters will be retained and should be comprised in a similar manner.

Capacity Test

A person's decision making ability was formerly determined by common law tests, but the NSWLRC wishes to formalise this into a statutory framework being:

a) Decision making ability is specific to the decision being made (i.e lesser threshold for minor decisions or less complex decisions)

b) Incapacity can be temporary or permanent;

c) Capacity can vary at different times (i.e morning vs night)

d) Capacity can develop or be regained;

e) Capacity can be present with support

There is also a presumption for capacity, and interestingly a person should not be presumed to lack capacity due to their age, appearance, behaviour, beliefs, physical or mental condition, drug or alcohol use, culture or sexual preference. This is interesting due to the recent comments of Justice Kunc in Ryan v Dalton, which in the case of wills, recommended solicitors essentially start in a position of doubt for anyone who is (among other things):

a) aged over 70; or

b) being carer for by someone; or

c) residing in a nursing home.

Given the speed (or lack of!) with which law reform moves, it is unlikely that these changes will be implemented any time soon. But it is useful for all practitioners and advisors in the area to see what is on the horizon.

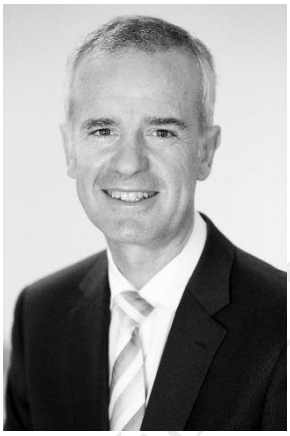
Richard Morris

May 2018

Our Estate Planning Team

Cameron Cowley

- Wills
- Testamentary trusts
- Trusts
- Superannuation including SMSFs
- SMSF nominations
- Taxation issues of estate planning
- Deeds of family arrangement
- Corporate succession



Greg Moin

- Wills
- Powers of Attorney
- Appointment of Enduring Guardians
- NCAT Reviews
- Farm succession
- Advanced Care Directives
- Corporate succession
- Aged Care Law
- SMSF nominations

Richard Morris

- Wills
- Deceased Estates
- Family Provision Claims
- Complex Estates
- Foreign Wills
- Capacity claims
- Informal Will cases
- SMSF nominations
- Special Grants
- Probate/ Administration

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