WILLS & ESTATES BULLETIN – ISSUE #12

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Trump and the IRS are out to get you - Terrifying tales of US tax law

1. Most of us would be comfortable with the idea that a person would be subject to US taxation laws if they are US citizens or Green Card holders or, in respect of a company, it is incorporated in the US or operates in the US.

American but you don't know it

2. However, many would not be aware that there are a variety of other persons and entities that can unknowingly be caught within the ambit of US tax law. These include:

   (a) Trusts where all trustees or appointors are US citizens – even if the assets are in NSW or Australia;

   (b) Persons born outside of the US (i.e Australian born!), but both of their parents are US citizens;

   (c) Persons born outside of the US after 14 November 1986, where:

      (i) one of their parents is a US citizen, and,

      (ii) before the person was born the US citizen parent was in the US for 5 years prior to their birth; and,

      (iii) 2 of the 5 years were after the parent turned 14 years of age.

   (d) Persons born outside the US between 1941 and 1986, where:

      (i) One of their parents is a US citizen; and,

      (ii) The parent was in the US for at least 10 years prior to the birth of the person; and,

      (iii) 5 of the 10 years were after the parent was 14-16 years of age;

   (e) Persons born outside of the US between 1934 and 1941 where one of their parents is a US citizen and spent any time in the US prior to their birth.

3. Given the widespread travel of Australians and transient nature of many forms of work, it is increasingly common for clients or their children to fall within the above categories.

4. From an estate planning perspective, care must be taken in relation to the drafting of testamentary trusts, whether they be simple or complex, in respect of the selection of trustees and appointors, and executors of Wills generally.

Why does it matter?

5. I don't pretend to understand the US tax system, but any unintended or unplanned consequence of a will, trust deed or power of attorney is risky.

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6. For starters, US tax legislation runs to well over 110,000 pages, as opposed to about 3,500 in Australia. That should be enough to concern most advisors.

7. Furthermore, the Internal Revenue Service (IRS), being the US's equivalent to the ATO, has been considering its treatment of payments to US citizens from Australian private (i.e non-public) superannuation funds for a number of years and has still been unable to come to a determination. The US-Australia Tax Treaty has not resolved this issue either and there is apparent double taxation of contributions, accrued income and distributions from Australian private super funds.

8. Discretionary trusts in Australia are treated as investment trusts in the US, which equates to something like a company – which is as awkward and cumbersome as it sounds. This tax treatment can result in large tax liabilities even if dividends have not been paid.

9. For those with assets in the US, they may be subject to a death tax of 40% on their US assets if their worldwide estate exceeds $11,200,000. This could of course be a significant tax liability.

10. If an estate has more than $60,000 in US assets then the executors must file a tax return in the US.

11. Failure to lodge a return or one of the many prescribed forms can result in fines from the IRS of up to $10,000 per form.

What to take away

12. Advisors need to be alert to the risk of the IRS' reach.

13. With the ATO and IRS now sharing their data matching, it is increasingly likely that clients will be caught out by the monolithic US tax system.

14. Care should be taken in preparing estate planning documents to avoid or mitigate the risks of double taxation or unfavourable tax treatment.

15. Tailored advice from specialists in the area should be considered for significant estates that may be affected, or where there are substantial assets in the US. Please feel free to contact us if you require a referral to an appropriate specialist.

16. US citizenship can be renounced but this is not a straightforward process and must be undertaken properly to avoid the ongoing IRS reporting obligations.

Richard Morris

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Statutory wills / Court Authorised Wills

Introduction

1. The Supreme Court of NSW has the ability to **make or vary** a will for a person in three scenarios:

    (a) NIL capacity - Where a person has never had capacity to make a will;

    (b) Lost capacity – where a person has lost capacity to make a will;

    (c) Pre-emptive -where a minor is old enough to have formed relationships but will lose capacity prior to reaching 18 years of age;

2. The Court must be satisfied of a number of matters before it will exercise its power to make or vary a will:

    (1) The person lacks capacity or will lose capacity;

    (2) The will or alteration is necessary;

    (3) The proposed will or alteration is what the person would have reasonably been expected to make if they had capacity.

3. Each of the matters must be sufficiently address in any application. The Court's power to make a Will for a person arising out of its protective jurisdiction and as such the court's primary aim to the protection of the person who lacks capacity (or will lose capacity).

4. Evidence of a lack of capacity is usually in the form of medical evidence from appropriate specialists.

5. Examples of circumstances where a statutory will should be considered are:

    (1) Where a person has lost capacity and their spouse has subsequently left them or divorced them;

    (2) Where a child no longer has capacity as a result of their parent's actions (i.e abuse) and the rules of intestacy would lead to that parent(s) receiving the child's estate;

    (3) Where a child has received significant personal injury compensation but it is inappropriate for their parents to receive their estate of their death;

    (4) Where a person has lost capacity and the circumstances of their children or beneficiaries have changed so as to require an amendment, for example to include testamentary trusts.

6. Statutory will applications must be approached with care. The Court will not automatically provide for the costs of the application to be paid from the person's estate, even where the application is successful.

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7. The Court will not entertain premature submissions in the nature of pre-emptive family provision litigation.

8. If you have a client whose has lost capacity and their will is no longer fit for purpose then please feel free to contact our estate planning team to discuss your available options.

Richard Morris

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Estate planning – whose job is it anyway?

You will be familiar with the saying “it takes a village to raise a child”. This approach should, in a coordinated and managed way, be applied to estate planning. Where a client has a financial advisor and/or accountant and/or risk advisor, those professionals need to be part of the estate planning process.

I admit that lawyers do not always have a good record of coordinating their clients’ estate planning with the clients’ other professional advisors. As an industry, lawyers can do better.

Whilst every firm and each professional takes a unique approach (and generalisations are therefore always incorrect for many cases!), we find that financial advisors often have a much closer relationship to the client than their lawyer. The advisor sees the clients more regularly, keeps up with important family milestones and has a close understanding of the financial success or challenges of the client. As sad as this may seem, some clients do not see their lawyer for many years!

It is arrogance and ignorance for a lawyer to blindly mess about with the financial plan carefully instituted by a financial advisor.

We find that accountants have the best understanding of why trusts and companies were put in place, what the function of those entities is, how they relate to each other, what the plan for them is moving forward. Accountants provide crucial guidance on the tax position of our clients and what impact particular strategies may have on their taxation.

The tax planning done by accountants and financial advisors needs to be considered.

The Moin Morris Schaefer estate planning team takes a multi-disciplinary approach to our clients’ estate planning. We engage early with our clients’ financial advisors and accountants to ensure that:

- we have up to date information about our client’s assets and entities,
- we understand the purpose of particular investments and structures, and
- our planning can dovetail precisely with existing plans.

We are sometimes called to implement an estate plan designed by another professional. We are most happy to do this, provided that we will of course consider the plan through the eyes of our skillset and knowledge in case there is something we can add to the plan. Our experience with a wide array of estate planning tools allows us to suggest solutions that may not be apparent to other professionals.

Other times we are approached with the client’s objectives and outcomes, and we work with the client’s existing advisors to design an estate plan to achieve those outcomes in a way which works with the client’s particular circumstances.

There are even times when we need to work with other lawyers! Complex issues require specialised lawyers, and from time to time we undertake estate planning aspects of a client’s work and other lawyers continue to represent the client for the legal work they have done for many years with that client.

We look forward to working with you and your clients.

Cameron Cowley

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Our Estate Planning Team

Cameron Cowley

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- Trusts
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- SMSF nominations
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- Deeds of family arrangement
- Corporate succession

Greg Moin

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Richard Morris

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- Probate/ Administration

We stand by all of the legal information in this bulletin. However it is important to understand that it is not legal advice for you. Advice must be tailored to your circumstances, and every client's circumstances are unique. If you try to apply the above information to your circumstances it may not lead to the outcome you seek. We would be most happy to provide tailored advice for you suited to your circumstances.

Moin Morris Schaefer Wills & Estates Team