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Modern Estate Planning Issues

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Estate Planning

1. Common objectives

2. Estate Asset Protection – are we protecting the beneficiaries or the estate?

3. Strategies

Estate Planning Objectives

- Objectives → age and family structure
- Blended families
- Personal Guarantees, Creditors, Bankruptcy

Asset Protection means different things to different clients

What is the risk that we are protecting?

- Is it protecting the estate from:

  (i) claims by creditors

  (i) claims by spouses, estranged children, step children, others.

- Is it protecting the inheritance for the beneficiaries?

Testamentary Trust misnomer

- Testamentary trusts do not provide estate asset protection
- Testamentary trusts provide beneficiary asset protection

Protecting the Estate v Protecting the Legacy

Beneficiary Asset Protection by Testamentary Trust

- immaturity
- addictions
- creditor claims upon beneficiary
- spouse remarriage
- family law claims upon beneficiary

Risks to the estate?

- Creditors
- Estate bankruptcy (nb s.116(2)(i)-(iv))
- Disgruntled “beneficiaries”

Claims against the estate – three steps

1. who can challenge?

2. what can be challenged? (consider the wealth held in family discretionary trusts and superannuation)

3. how much (if at all) is the claimant entitled to?

Who can challenge an estate?

- Spouse/person in domestic relationship
- Child
- Dependent (wholly/partly) and household member
- Grandchild and household member
- Person who was in a “close personal relationship” with the deceased at the time of their death

  (2 adults whether family or not, not being a marriage or defacto, living together, one or each provides the other with domestic support and care)

s.57 Succession Act 2006

What are the risks

1. blended families

2. fallout with children

3. unequal estate distributions (typically due to partial early inheritance or family business)

4. son-in-law / daughter-in-law (housing crisis!)

Assets at risk

- Estate; plus (Succession Law Uniformity)
- Prescribed transactions
  - Three years
  - One year
  - Date of death

s.75 Succession Act 2006

A relevant property transaction occurs if a person does in/directly or does not do any act (immediately or some future time) which results in property being held by another person or subject to a trust and full valuable consideration is not provided.

s.76 Succession Act 2006

1) The circumstances set out in subsection (2), subject to full valuable consideration not being given, constitute the basis of a relevant property transaction for the purposes of section 75.

2) The circumstances are as follows:
   a) If a person is entitled to exercise a power to appoint, or dispose of, property that is not in the person's estate and does not exercise that power before ceasing (because of death or the occurrence of any other event) to be entitled to do so, with the result that the property becomes held by another person (whether or not as trustee) becomes, or continues to be, entitled to exercise the power.

76(c) if a person holds an interest in property in which another interest is held by another person (whether or not as trustee) or is subject to a trust, and the person is entitled to exercise a power to extinguish the other interest in the property and the power is not exercised before the person ceases (because of death or the occurrence of any other event) to be so entitled with the result that the other interest in the property continues to be so held or subject to the trust.

Superannuation and Estate Challenges

- Are BDBN’s secure?

Superannuation Pope v Christie (1998) NSW SC

- Dealt with predecessor rules in FPA (s.23(4)).

(more on superannuation to follow)

Discretionary Family Trusts

Wardy v Salier [2013] NSWSC473

Strategies

- s.100 Statements
- Restructures
- Amending Structures
- Executor directions

Blended Families

- Testamentary Trust
  - income annuity
  - capital entitlements

- Life estate or for a period

Estate Planning & DFT's

- Assets held in DFT's not part of estate
- BLA's often hidden asset (consider when passing control)
- Passing control and ownership
  - Appointor
  - Trustee

Succession of Trust Issues

- Equalisation if DFT doesn't "pass" to all kids
- What happens if a sibling wants to "cash" their asset
- If 3 cardholders → risk of majority control
- Future generations being excluded
- Potential limited FL asset protection
- Vesting period
- Exclusion if beneficiaries dispute

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