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Estate Planning: Scenarios and Strategies

Background

What do you need to consider when advising a client about their Wills? In this issue we consider some of the more common scenarios and provide advice on the estate planning strategies to deal with them.

Protecting estate assets from bankruptcy or litigation

Is the client in business? Is there a chance they could be sued or the business become insolvent? If so, if they receive an inheritance in their own name it will be available to a bankruptcy trustee or liquidator. The safest solution is to place it in a testamentary trust with the beneficiary controlling the trust but not actually owning the assets in their own name.

This is an issue people in business may also need to talk to their parents about if they are expecting to receive an inheritance in the next few years.

Opportunity for Tax Benefits

Does the client have children? Or grandchildren? Perhaps they are planning to have children in the future.

If so, there is an opportunity to help their beneficiaries save money by leaving their inheritance in a testamentary trust. Under the Tax Act it is possible to direct income to minor beneficiaries on which they will pay tax at adult rates, unlike income from a family trust. This allows each child to earn up to \$6000 per year tax-free.

On the other hand if the inheritance was received direct, the beneficiary would pay tax on any income earned at their top marginal rates.

Issues arising from second marriages

A common cause for concern among many clients is the possibility of their spouse re-marrying if they die. Once that scenario is highlighted clients are often keen to protect their hard earned assets from becoming available to a new partner. Similarly, concern about existing children being passed over in favour of "new" children can also be a key driver for people when planning their estates. So what are the options?

The new spouse...

Protecting assets from your spouse's possible next partner can be assisted by leaving the inheritance in a testamentary trust. For example, let's say Hugh and Sally were married, and when Hugh died he left everything to Sally in a standard Will. Sally re-married and opened joint bank accounts with Harry, husband no.2. Unfortunately Harry is a gambler and before Sally is even aware it is happening, the inheritance is gambled away at the casino.

If Hugh had left the inheritance to Sally in a testamentary trust which she controls rather than owns, she would

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have had more control over the assets and been in a better position to keep the assets away from Harry.

Whilst it does not necessarily protect the inheritance from a family law action, it may also help provide clarity around who owns what assets and what the different contributions were during the marriage, in the event of a divorce.

Providing for children...

Some people also prefer not to rely on their spouse to look after their children after their death. It's often no reflection on that spouse - it's the concern that if they re-marry they may be influenced by their new partner. This is often reinforced when the possibility of new children arriving is highlighted. In this instance, specific assets can be left direct to the children via their own beneficiary trust.

Depending on circumstances, life insurance is sometimes used to create an asset to provide for beneficiaries and can be especially useful in creating a separate estate asset for prior children.

Providing for the second spouse...

The client may have re-married and want to provide for their second partner whilst leaving the bulk of their estate to the children. A life interest in a property that reverts to the children on death can be a useful strategy.

It is also suggested they leave a "nest egg" to help maintain the property and lifestyle if that person was a financial dependant. Again a capital sum can be set aside with the income flow directed to them until their death and then reverting to their children.

Children at risk

Unfortunately we have also had to advise on quite a few cases where parents either knew or suspected their children had a drug problem. People are understandably concerned at leaving an inheritance direct to a vulnerable child.

One option is to set aside their inheritance in a Special Care Trust and have it controlled by another family member eg an older sibling or aunt or uncle.

This also applies where there is a disabled or ill child that needs special care.

Keeping the inheritance away from an immature child...

A standard Will only allows an inheritance to be held on trust until the beneficiary is 18yo. With a testamentary trust, the capital and income can be held on trust until any age. (The most common request is 25 years old although we have had one stipulate 60yo!).

And finally... Warn your clients that their superannuation is not automatically an estate asset.

Many people do not realise that superannuation does not form part of their estate. When they die, a Super Fund trustee may decide who receives it. We had a recent case where a 60yo had \$500K in super. In his Will he stipulated that his estate be divided equally between his 3 children from his first marriage and his current partner of 2 years ie one quarter each.

Unfortunately his children were all adults and financially independent. It is highly probable that the Super Fund Trustee will pass his \$500K in Super to his partner.

Is this what he wanted? We doubt it. Our guess is he did not realise his super was not part of the estate. An expensive mistake for his children and one that has caused much angst.

Can Irongroup help?

If you would like to provide your clients with more information on Estate Planning e-mail info@irongroup.com for a copy of our 'Comprehensive Wills and Testamentary Trusts' Insight.

Or for more information on Irongroup Lawyer's fixed price estate planning solutions please call us on 03 8621 9000.