

ESTATE AND TAX PLANNING COUNCIL PRESENTATION

15 March 2017

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Emerging Issues in Estate Planning

There is a general need to raise awareness of issues, opportunities, and challenges. How prepared are the next generation? There is a need to consider changes which affect the purpose for which a trust has been established and to understand how the next generation sees things. Question whether they are equipped to deal with inheritances.

A study by Williams and Preisser examined 2,500 families with wealth of between \$US15-70m. There was a 70% failure rate with wealth transfer. Of that 60% was because of poor trust and communication in the family; 25% because of the lack of preparation of the next generation; and 15% because of the poor quality of plans and structures. More broadly, planning of life needs, as well as inheritance impacts is needed. Determine what amount of capital/income is required to live on.

Advisers should consider the specific needs of woman in their planning (for example, often females will outlive their male partners).

The emphasis in traditional planning is often on the “how”, but the “why” (or purpose) is not always clear. The value of compliance is not perceived to be high.

Thought needs to be given to setting up succession with the right intent. A legacy is not just a cheque but what people want to be remembered for, mementos, and the stories. Family capital is more than just money and includes educating and growing the family, family decision making, and understanding what the family stands for (without having to live someone else’s life). Financial capital provides a means to an end. Consider appointing a family champion who understands the larger family capital picture.

Trustees should foster productive relationships with beneficiaries, help beneficiaries become good beneficiaries, and explain the role of a trustee. A Letter of Wishes is a good reference point for trustees for recording the hopes and dreams the settlor has for enhancing the lives of the beneficiaries through a trust.

Some larger US trusts are using distribution committees to guide trustee distributions (just as they have investment committees). There is an opportunity for advisers to consider an advisory trustee appointment as an alternative to a full trustee role.

Good planning involves preparing heirs, actually sitting down with the next generation, collaborating, recording and facilitating those conversations. Family elders have an important role to play and can assist in guiding family members and intercepting potential issues. Modern challenges in high wealth families for the next generation may include entitlement, 'trust fund families', and addiction.

Enduring Power of Attorney forms have changed. Current forms executed some time ago may no longer work. People are often confused as to why trusts are settled and the relationships between the people who administer trusts, wills and EPOA's. As individuals those people may look like they are qualified but do they actually get on with each other when left with that responsibility and the need to collaborate?

An EPOA cannot sign transfer documents for real estate on behalf of a trustee who has lost capacity. An EPOA cannot retire a trustee. But an EPOA can use a Power of Appointment to remove a trustee. There is a need to document why a decision was made, why one person was selected rather than another. Where there is uncertainty it is worth getting a psych-geriatrician involved to determine what capacity the client needs for different things. The case of McLaren vs. McLaren is an example of a power being created for the wrong use.

The draft Trusts Bill requires trustees to be better prepared to communicate with beneficiaries. The way trust deeds describe how beneficiaries are named may affect the expectations of beneficiaries (Erceg vs. Erceg).

It is safer to share the Power of Appointment rather hold it personally (Clayton vs. Clayton), although that could also create a bigger problem as the trust could be regarded as a nuptial settlement attributable to a relationship.

It is important for trustees to document resolutions and ratify actions or decisions where a resolution has been missed.

These are general comments in an area of potentially significant unintended consequences. Specialist advice should be obtained in each case.