



INTRODUCTION

Having recently set the process in motion of updating my will, I thought a prompt to all clients would not go astray. Estate planning and the preparation of a valid will is often overlooked or put in the too hard basket to be attended to later on (as evidenced by my tardiness in not reviewing my will for five years!)

In our view it is a very important (although hopefully not urgent!) aspect of your tax and wealth planning, particularly as you accumulate assets and debt.

The primary value is to ensure your estate is controlled by those you choose and assets are left to those who you wish to receive them and to make life easier for those you leave behind. And of course, having attended to asset protection aspects during your lifetime we want to ensure your assets are protected wherever possible when you pass on.

It is imperative that your solicitor be experienced in estate planning; we can assure you a cheap will costs heaps (and we have seen this in practice). Further the traditional one page will is (in all but the most simple of cases) ill equipped to deal with 21st Century issues.

We have arranged with solicitors with substantial expertise and experience in this area (MCP Commercial Lawyers) a fixed cost of \$3,500 plus GST for our clients. The package is for two persons and includes wills creating testamentary trusts upon death and enduring powers of attorney, both financial and medical. Clearly if it is for one person the cost is \$1,750 plus GST. The cost for a two person package for basic Wills and Powers of Attorney is \$1,430 plus GST and for one person \$715 plus GST. A combination if one party requires a will creating a testamentary trust and the other a basic will is \$2,465 plus GST.

A meeting may be arranged at our office and in some instances your business or practice premises. We will prepare a structure diagram to be sent to MCP so there is no uncertainty regarding who owns relevant assets.

Please feel free to contact Michael Poynter, the Principal Lawyer at MCP (03 9620 2001 or m.poynter@mcpgroup.com.au and indicate you are a client of ours. Alternatively let us know if you would like them to call you.

I have attached below an article written approximately two years ago for a MADA newsletter (updated where appropriate) for your information regarding estate planning.

Further I have attached a diagram of common testamentary trust wills courtesy of MCP.

Estate Planning and Testamentary Trusts – Protect Your Assets

Everyone needs to consider estate planning. Effective estate planning ensures that assets are directed to the right beneficiary at the most appropriate time. Other benefits of an effective estate plan are managing the tax implications on passing assets to beneficiaries. In estate planning it is not the will but the strategy that produces the right result.

A will is a legal document which allows you to choose who receives your belongings and assets after you die. It is the only legal way you can tell others how you want your assets to be distributed upon your death. Wills provide for clarity and may prevent future family feuds.

By having a valid will, your assets will not be managed by the State Government who in certain circumstances will deal with estates where there is no valid will.

Testamentary trust

Use of a testamentary trust may be a useful tool in managing tax implications and also achieving asset protection objectives.

A testamentary trust is a trust created by a will upon death. It may last as long as 80 years or may be terminated at any time at the direction of the trustees. It is generally a discretionary trust where the Trustee has full discretion about who benefits, and to what extent, under the trust. A discretionary trust is generally the most flexible type of trust. A testamentary trust can be established under a will to appoint a trustee to use property for the benefit of the beneficiary in the way that the will specifies. The trustees have broad powers to invest funds while under their control.

A testamentary trust has two significant advantages for the maker of the will and the nominated beneficiaries.

Income Splitting

The Tax Act provides that income and capital gains derived by children under 18 years of age received as a result of a will are not subject to penalty tax rates. As most of you would be aware, children under 18 may receive passive (unearned) income of up to \$3,000 tax free before penalty rates of 45% plus Medicare levy of 1.5% kicks in. Children who benefit under a will are taxed at the normal marginal rates. In addition:

- Each child has a tax free threshold of \$6,000. Based on rates for the 2010/11 year, taxable income between \$6,001 and \$37,000 will be taxed at the low rate of 15%.
- The main advantage of using a discretionary, testamentary trust to bequeath assets to beneficiaries is that any income gains, capital gains and franked dividends can be distributed among the beneficiaries each year in the most tax efficient way.

Note that tax concessions also apply to income and capital gains derived from assets acquired from the re-investment of monies received from the original inherited assets.

Asset Protection

A person making a will wants to make sure that the assets of the estate are protected and that they remain within the family and are used to benefit family members.

A significant advantage of a testamentary trust is that there is a separation of control and benefit. The assets are owned by one party (i.e. the trustee) and the benefit of the income and capital passes to another person (i.e. the beneficiaries). A testamentary trust is therefore able to address the following concerns:

- Beneficiaries becoming bankrupt;
- Beneficiaries becoming divorced and their assets being split in the divorce;
- Spendthrift children;
- Ensuring that the surviving spouse will pass on their assets to their children upon that person's death;
- Looking after handicapped children.

The terms of the testamentary trust are set out in the will. These terms can restrict the ability of any of the beneficiaries to control the activities and investments of the trust or give them total control. The person making the will therefore needs to decide whether he/she wishes to sacrifice the independence

of the beneficiary to ensure that the inherited assets are protected and used sensibly for the benefit of the family.

We recommend that the majority of our clients create a testamentary trust under their will.

Consider the following example:

Tim is a general practitioner. He is married to Jasmin and they have three young children. Concerned with protecting his assets from potential risk associated with his occupation, Tim has carefully structured his investment and asset ownership so that his wife Jasmin owns most of the marital assets including the family home.

Tim and Jasmin have both made simple Wills leaving everything to each other and then equally between their children.

Tim did not realize that the assets may still be at risk if Jasmin dies before him. Because Jasmin's Will leaves everything to Tim personally, upon her death he will inherit all the assets previously held by Jasmin. The assets will once again be exposed to the liability risks arising from his occupation.

The solution to Tim's asset protection dilemma is for Jasmin to prepare a Will that provides for all assets owned by her at death to pass into a testamentary trust for Tim's benefit. In this way the assets of Jasmin's estate are quarantined from Tim's personal name and are therefore protected from any claims made against him in his professional capacity.

Tim's parents should also consider testamentary trust wills for any provision they intend making for him at their deaths.

Do not let your assets be exposed through inadequate asset protection and estate planning

Regular reviews

It is imperative that your will be reviewed on a regular basis i.e. 3 years to ensure executors and guardians are still appropriate and your assets are being distributed according to your wishes.

Events such as marriage or divorce necessitate a review of your will (and in the case of marriage any existing will is revoked unless it is expressed to be made in contemplation of that marriage).

We prepare a detailed structure diagram for our clients so there can be no uncertainty as to relevant assets held and work closely with your nominated

solicitor to ensure your will reflects your intentions. We also assist in such matters as choosing appropriate executors and guardians or expression of wishes e.g. which school they wish their children to attend, a desire for monies to be spent on certain things for beneficiaries while still held in trust, etc.

Excluded property

There are certain kinds of property that you cannot will away as follows:

- Jointly held property (upon death the real estate automatically passes to the other person)
- Property held in trust
- Partnership property (depending on the terms of the partnership agreement)
- Superannuation (in certain circumstances)
- Life Insurance Policy proceeds (in certain circumstances)

Powers of Attorney

We further recommend our clients have appropriate Powers of Attorney. These are vital if you want someone to take care of your financial and legal affairs, or want someone to take care of you if you have an accident or sudden illness which leaves you incapable of doing it for yourself. It can also facilitate medical decisions on your behalf if you become unconscious or otherwise incapable of making those decisions for yourself.

There are two essential types:

1. Enduring Power of Attorney (Financial)

This is used in case you suffer an accident, sudden illness or disability, offering security that someone will look after your financial health and legal affairs. You must make such a Power while you are still capable of making legal and financial decisions for yourself.

2. Enduring Power of Attorney (Medical Treatment)

In this instance the attorney is required to make decisions about your physical health as opposed to your financial and legal affairs. This power authorizes your appointed person to authorize medical treatment, such as an operation, when you are not in a position to make that decision or give that consent yourself. To activate this Power, you must be either unconscious or otherwise incompetent.

Why sign an enduring power of attorney now?

Such a Power must be signed while you are still legally capable of managing your affairs. Most situations requiring such a Power happen quickly and without warning (just look what happened to my husband in Singapore earlier this year with his fractured skull). Once you lose the capacity to make your own decisions, you cannot sign a Power of Attorney, and other avenues to appoint a manager of your affairs can be time-consuming and costly.

Your attorney must be at least 18 years old and themselves capable of managing their own affairs. You must have confidence in their ability to manage financial and legal affairs and must obtain their consent to the appointment. Your appointed Attorney is obliged to always act in your best interests.

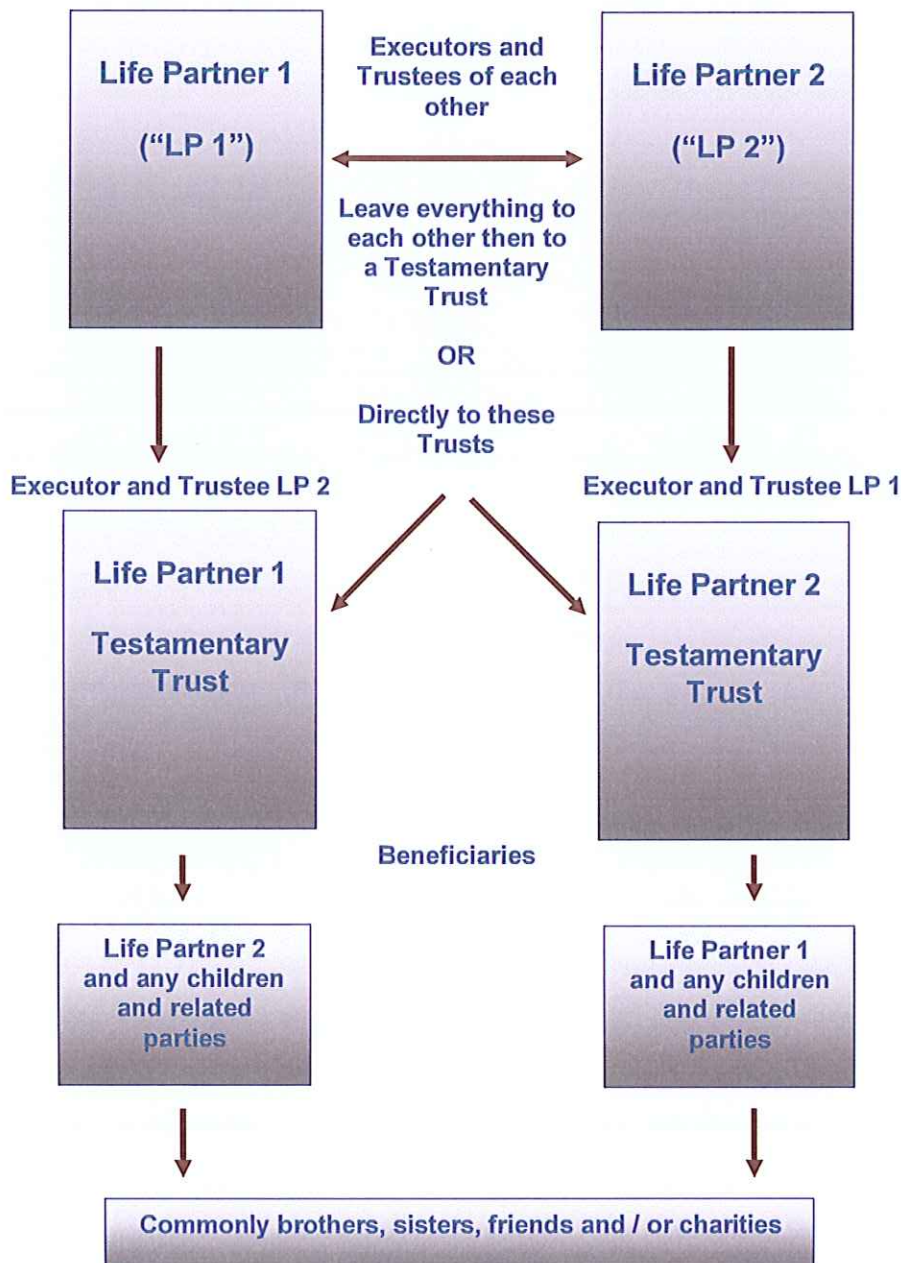
The contents of this article are general in nature and are not advice that applies to any particular client situation. Whilst every care has been taken in preparing the article, specific advice should be obtained before proceeding with any suggestion or recommendation made

By Caroline Poon, Director, Medical and Dental Accounting Pty Ltd. Note Caroline Poon is a Chartered Accountant with a Masters of Taxation degree from Melbourne University.



A DIAGRAM OF COMMON TESTAMENTARY TRUST WILLS

"Husband and Wife Crossovers"



Notes

Specific gifts can be nominated. Guardians of infant children can be nominated.

Backup Executor and Trustee required if LP 1 and LP 2 both deceased.

Testamentary Trusts require an ABN and TFN.

Backup Beneficiaries if LP 1, LP2 and all remaining descendants deceased.