

*And To the Tax Man I leave...*

Every year, Australian tax payers voluntarily pay the Tax Office millions of dollars in “Death Taxes”. Are you going to be one of them?

Proper Estate Planning ensures that your estate goes to those you care about, and not the Tax Man.

### **Does the “Simple Will” protect your family?**

Many people believe that their affairs are simple. You may wish to leave everything to your spouse, and if they die before you, then to your children. Simple. Right? Unfortunately this is rarely the case.

This Manual has been prepared to alert you to some of the pitfalls of preparing a “Simple Will”. A “Simple Will” may seem to fulfil your needs on the surface, but there are often many other issues that you may not have considered.

Ask your accountant, adviser and tax lawyer how you can be certain that your estate goes to the family – and not the tax man.

### ***Will the Tax Man smile when I die?***

Imagine \$1.5 trillion of deceased estate assets up for grabs! That is the projected total value of estates from Australians who die in the next 20 years. The question is, **who gets that money**: the Tax Man, Trustee Companies or your family?

It all depends on your **accountant, adviser, and tax lawyer** coming together to carry out Estate Planning before you die.

Careful planning can reduce Capital Gains Tax, Stamp Duty and other death taxes. The most basic protection is to include a Testamentary Trust in your Will. Most Wills made before 1998 don’t have even this protection. A 3-Generation Testamentary Trust and

Superannuation Testamentary Trust provides the best protection for your family.

### ***The Government has already made a Will for you?***

*Unfortunately, you are never consulted over your Government default Wills.*

Does it coincide with your wishes? Who benefits from your property when you die? A Government imposed Will rarely corresponds with your wishes as to how much you leave the Tax Man!

### **Children under 18?**

If you die leaving orphans then you can recommend Guardians to the Family Court in your Will.

- Does your Trustee conserve your estate for your children’s education?
- At what ages do your children receive the trust capital and in what amounts?
- If a child dies before you, who then receives the property? Your grandchildren, your other children or charities?
- What happens if one of your children is bankrupt or of unsound mind when you die?

### **How much of your Family Home goes to the Tax Man?**

Death and Probate Duties were abolished by 1981. However, in 1985 the Federal Government introduced *Capital Gains Tax*. Capital Gains Tax now earns the Australian Federal Government more money on deceased estates in a single year than in the cumulative history of death duties.

Contrary to what Treasurer Paul Keating told us back in 1985 when he introduced CGT, Capital Gains Tax and Stamp Duty are applying more often to your family home. Even your pre-1985 family home can be subject to Capital Gains Tax.

A 3-Generation Testamentary Trust is the most effective safeguard to put into your Will to dampen the effects of Capital Gains Tax and Stamp Duty.

This is an example of a Will without a 3-Generation Testamentary Trust:

*Tom's Will made the Tax Man rich*

*Tom always wanted to build his retirement home on the canals where he had purchased a block a few years ago. Unfortunately, Tom died before realising his dream to build on the block.*

*As a dutiful husband, Tom left everything to his much loved wife Jenny.*

*Little did Tom know, but Jenny never shared Tom's vision to live by the canals. However, their 2 children did share Dad's vision. Jenny decided to give the children the block of land. After all, it was now interfering with her aged pension and pharmaceutical entitlements.*

*The gift made the children excited. The block had increased in value to \$175,000. However, the children were less excited when they got a Stamp Duty bill of over \$4,200.*

*Later, Jenny gets a notice from the Tax Office to pay Capital Gains Tax of \$28,000.00 on the "disposal" of the block. ("But I just gave it away!" she lamented)*

*The nightmare continues when Centrelink advises Jenny that the gift reduces her entitlements because of the Non-Abandonment rule.*

*All this seems very unfair to Jenny. They had paid tax throughout their life. Jenny gave the*

*block away yet Capital Gains Tax, Stamp Duty and Centrelink all became problems.*

*But there is a way that Tom and Jenny could have fought back...*

Tom could have put 3-Generation Testamentary Trusts into his Will. Tom's Will then leaves everything to his wife, children and extended family. Tom also makes his wife Trustee of the 3-Generation Testamentary Trust. Jenny controls the assets but does not own the assets for tax purposes.

*Does that mean that Tom's estate goes to Tom's mother-in-law and Uncle Harry? Do the children have control over what Jenny does with her husband's estate?*

No to both questions.

Jenny has full **control** of who gets what from the estate. With a Testamentary Trust, Jenny can give everything to herself or give some things to the children, grandchildren or any of the extended family **as she so wishes**. With her accountant's help, Jenny can take advantage of the lower income tax rates paid by some members of her family. Now that is flexibility.

### **Flexibility: 3-Generation Testamentary Trust?**

In the above case, Jenny could have merely distributed the block to her children through Tom's Will. Even if the transfer took place years after Tom's death, the transfer is direct from Tom to his children. Therefore:

1. No stamp duty is payable because Jenny did not own the land - she merely controlled the land in the Testamentary Trust.
2. There is no "disposal" of the land. Therefore, Jenny does not have a Capital Gains Tax bill – CGT Generation Skipping.
3. Alternatively, the asset could have been kept out of Jenny's hands to protect her Centrelink entitlements.

### **Do children benefit from the 3-Generation Testamentary Trust?**

The Tax Man penalises your children and grandchildren under 18 years of age who receive unearned income over \$416 per year. Above this amount, children pay tax at the highest marginal tax rate (66% in some instances).

This is not the case with a 3-Generation Testamentary Trust. A Testamentary Trust operates through your Will only at your death. A Testamentary Trust offers the benefits of tax effective income splitting without attracting the penalty tax. Minors deriving income under a Testamentary Trust get benefit of the same tax free threshold as adults.

### **Rich enough for a 3-Generation Trust?**

Of all the people who paid Capital Gains Tax in 2013/14, 80% earned income of less than \$80,000.

Capital Gains Tax is a tax on the middle class.

The only people who don't need a Testamentary Trust in their Wills are people who feel guilty for not paying enough tax during their life! Even if your only major asset is your family home, you can gain tax advantages from a Testamentary Trust.

Estate Planning is not for the rich. It is for people who don't like paying taxes.

### **Pay CGT on my family home?**

When the press was alerted to them the ATO withdrew its two booklets:

- *Capital Gains Tax and the Assets of a Deceased Estate;* and
- *Capital Gains Tax and the Family Home.*

For updated copies of these books ring the ATO on 13 2861.

Unfortunately the books don't tell you how to reduce Capital Gains Tax on your home or

your deceased estate; they just give you advice on how the Government collects its money when you die.

*Paul Keating told me in 1985 that my home was exempt from Capital Gains Tax*

A lot has happened since then. Within one generation, every asset in Australia falls within the CGT regime. Even the family home is not automatically exempt.

You can own property with another person either as **Joint Tenants** or **Tenants in Common**. When a joint tenant dies, his or her interest goes automatically to the survivor(s) - not via the Will.

In the past, it was popular for married couples to buy assets, such as the family and investment homes, together as Joint Tenants. Capital Gains Tax legislation does not recognise Joint Tenancy in its calculation of Capital Gains Tax. Generally, holding assets as Joint Tenants is now considered **dangerous**.

By owning property as Tenants in Common and including a 3-Generation Testamentary Trust in your Will, you can provide your accountant with the flexibility to significantly reduce any Capital Gains Tax that may be payable on your home.

### **Tax Man takes my Superannuation when I die?**

Some of your nominated beneficiaries may have to pay tax on your Superannuation when you die. Others in your family may pay no tax on the same Superannuation.

The laws are continually changing and your family members' income and status can change. You may be able to protect your Super by seeking to have it paid to your Estate (and into a 1 or 3-Generation Testamentary Trust). After your death, your accountant can advise your family on who is best to receive the Super and the income from the Super for tax purposes after you die. How is this achieved? Instruct your tax lawyer to include

a **Superannuation Testamentary Trust** in your Will. This is to satisfy the Tax Office that only "Dependants" benefit from the capital.

Unless you decide otherwise, Super goes to who your Trustee decides. Unless you have "binding nominations" (very rare), your Super Trustee will make the decision upon your death. However, your Super Trustee often complies with your request to direct your Superannuation into your Will if this is in the best interests of the "Dependants".

### **Do Estate Planning after I die?**

If there is no Testamentary Trusts in your Will then your family may be able to set up a Post Testamentary Trust after you die. A Post Testamentary Trust has limits that do not exist for a Testamentary Trust. It is a poor second best option.

### **How come my Partner loses the Aged Pension when I die?**

Your gift may partially or fully reduce Centrelink and other pensions.

"I'll just renounce the gift because I really want to keep my pension for the medicines subsidy. Even better, I'll just keep the gift & give it to my children".

Even abandoning a gift under a Will presents complications for pensioners. It leaves that pensioner open to the so called "deprivation" rules of Centrelink. Centrelink considers the gift an "asset".

### **'Gifts' reduce pensions?**

*Why is Centrelink so tough on Pensioners?* The philosophy is that those who can provide for themselves should. Give careful thought on how to leave assets to pensioners. Your well intentioned wishes may result in an Aged Pensioner losing all or part of their entitlements. Estate Planning can help.

### **Public Trustee as executor?**

You need to appoint an Executor in your Will to handle your affairs after you die. Most

people appoint their spouse and then their children when both parents are dead. You can appoint alternative executors in case the executors are never born or are under 18 years of age or dead. Be careful appointing Professional Trustees and Lawyers as Executors. They charge to administer your Estate.

*My children don't get on. Should I appoint all of them?*

If your children don't get on together then you should appoint them all as executors. Contrary to popular rumour, the job of executor is one of servant - not master. The executor can't boss the beneficiaries. The beneficiaries however can boss around the executors. Therefore appoint all the children if they fight.

If the children all love each other and get on well, then appoint them all as your executors.

*What does an Executor do?*

Your Executor arranges the funeral, applies for Probate, pays debts and distributes your assets according to your Will. These are not normally difficult jobs and the **Executor can always get professional help**. When you do Estate Planning with us, when the time comes, your family get the "Peace of Mind - Check-up". One of our specialist probate lawyers take your Executors through what they need to do and helps complete the provided action sheet. Your executors also get a substantial Manual to take home.

### **Can my Will be challenged?**

*Family Law and the Family Maintenance Provision Act* affect married and defacto couples alike. Your spouse (and sometimes your ex-spouse) is entitled to make a claim on your estate. Defactos are entitled to make a claim on your estate if you are "maintaining" them.

Even your parents, children and grandchildren can make a request to the court for some of your estate - irrespective of how little or how much you leave them in your Will. Some States go even further and include people that you maintain like step-children. A small gift of say \$1 000 left to a wayward son does not stop that son from challenging your Will. It is unwise to make such gifts as it gives the person more rights over your Will.

An Estate Planning strategy can reduce the chances of these people being successful in their request to the court.

### **Stop government meddling?**

#### *Mutual Power of Attorneys and Cascading Power of Attorneys*

Sadly, your spouse gets Alzheimer's disease at 61 years of age. Your children have left home. You decide to sell the large family home. You want to buy a smaller home closer to amenities that can help your spouse.

The family home is in both your names. Your spouse no longer has the legal capacity to sell the home. Whilst there are many different types of Power of Attorney, you have none. Therefore, your only option is to apply to a government instrumentality for permission to sell the home.

During this court/tribunal procedure your children are asked to swear in court as to whether you are a "spendthrift". Other people such as friends, other family members and even nosy neighbours may be contacted by the government to see whether they support your application. At the hearing you are cross-examined as to whether you are a "good person" to look after the affairs of your partner.

Eventually this government department tells you that you are allowed to sell your home. However, it can direct that you hold your spouse's half of the proceeds in a separate bank account. If you need to buy toilet paper

for your partner then you may need to provide a receipt.

Without all the proceeds of the sale of the home you cannot afford to buy another property.

Overcome the government's meddling with both a Mutual Power of Attorney and a Cascading Power of Attorney.

### **What do I do now?**

*What steps do I need to take to protect my family and save tax?*

Speak to your adviser, accountant, and tax lawyer. Ask Questions. Gain knowledge. Estate Planning can only take place if your accountant, adviser and tax lawyer all work together.

### **How do I engage a tax lawyer?**

The tax lawyer should:

1. At no cost for the rest of your life, explain the Will to you and your Advisers.
2. Every 4 years write to you and offer a free review of your Will
3. Refund the cost of your document if you or your Adviser can't understand it.
4. Refund the cost of any of your Estate Planning documents if you don't want them, within 4 weeks of being invoiced.
5. Offer 24 hour unlimited access to answer questions regarding the operation of your Estate Planning documents
6. Explain to your family how to administer the Estate themselves after you are gone.

Legal Consolidated is proud to comply with these standards.

We are an Australia wide law firm. We service the whole of Australia from Perth. Brett Davies has been doing so since the 1980s. For clients out of WA we take instructions via the telephone and Skype.

### **How do I proceed?**

After the appointment is made (through your adviser, accountant or lawyer) we email you a questionnaire. Your accountant and adviser are welcome to provide a list of your assets and liabilities and in what names they are owned. For example, joint tenancy assets, family trust assets and Superannuation don't generally form part of the estate that goes into a Will.

Estate Planning meetings generally take up to 2 hours. The cost of the meeting is \$660 per hour. However, because you have been referred to us there is no cost for the initial meeting if you don't proceed.

At the end of the initial meeting, we give you a quote to prepare Wills that contain, as needed: 3-Generation Testamentary Trusts, Protective Trusts, Superannuation Testamentary Trusts, maintenance clause and other tax protective strategies. We also put in place Mutual Power of Attorney and Cascading Power of Attorney.