

Estate Planning

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Acorn Lawyers Monthly Estate Planning Update



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Estate Planning Offers

Do you fancy a coffee? I am always interested in catching up with referrers new & old to discuss the estate planning requirements of your clients and how Acorn Lawyers can be of assistance. I will even buy the coffee!

For those wishing to learn more about estate planning I offer free in house seminars for you and your staff. Seminars can also be arranged for your clients. On request, we can also send you free copies of our estate planning booklet which contains useful information on estate planning.

Contact Hannah Swindells to arrange.



Capital Protected Trusts – Protecting vulnerable beneficiaries or simply ruling from the grave

Advance Health Care Directive

In our October Newsletter, we discussed Advance Health Care Directives (AHCDs) which allow a person to decide their future medical treatment now in the event they later lose the capacity to make this decision. Most people want to *die naturally*¹ and do not wish to live on life support with no quality of life. In fact many aged care facilities require AHCDs, although these standard forms are usually of poor quality. We attach our pro forma AHCD for your review and we encourage you to discuss this document with your clients.

Capital Protected Trusts

Over the last 12-18 months I have drafted an increasing number of Testamentary Trust Wills (TTWs) that provide for trusts with restricted rights to capital. These Capital Protected Trusts (CPTs) provide beneficiaries with access to all of the income produced by the trust, but limited or no access to capital, depending on the Willmaker's instructions.

Reasons for using a CPT

There may be good reasons for a Willmaker to leave assets under a CPT, including for:

1. vulnerable beneficiaries who are liable to be taken advantage of by others if they were to have a large sum of money;
2. Spendthrifts and addicts who are likely to waste their inheritance if they receive a lump sum payment;
3. Second marriages and de facto or other relationships where the Willmaker wishes to provide for a partner during their life, but protect children's inheritance;
4. Potential family law or contested estate claims as the court is less likely to view a trust where the beneficiary does not have access to capital as their asset;
5. Where the Willmaker wishes to rule from the grave and dictate how the beneficiary can use their inheritance.

However, we cannot always predict when such issues may arise. Our Testamentary Trust Wills normally include a flexible power for the Executor to convert a beneficiary controlled testamentary trust into a capital protected trust where required.

Access to Capital clauses

In addition, the Willmaker can include flexible clauses that provide their beneficiaries with reasonable access to capital. There are often

also good reasons to make limited capital available to beneficiaries and the Willmaker will often want to provide for contingencies. Some good examples include:

1. the Executors in their absolute discretion can distribute 2% of the capital in any year, up to a maximum of 10% during the life of the trust, where the Executors consider the income is insufficient for the beneficiary's maintenance; and
2. the Executors, acting in their reasonable discretion, can provide any reasonable sum of capital from the trust required for the beneficiaries health, education or other maintenance expenses.

CPT Scenarios

Mark and Mary had been married for 10 years, both having previously been divorced. Mark was torn with his estate planning as he wanted to provide for Mary, but ultimately wanted his two sons to benefit from his hard work. Mark left Mary a CPT of \$2.2m with discretionary powers for the Executor to advance reasonable capital. Mary suffered a moderate heart attack and was on the waiting list for a heart transplant. Even with private health insurance, costs are in excess of \$80K. With the sons' blessing, the Executor advanced this sum from the trust to ensure Mary received treatment as Mark would have wanted.

My former firm, years prior, acted for two leading Wollongong businessmen with estates of then \$10m. Standard Wills drafted by a suburban firm meant the adult beneficiary children had full access to their inheritance and spent it within a matter of years. In contrast, I have seen clients who have created CPTs for children increase dramatically, comfortably providing for the life of the children and will do so for future generations.

Brett worked hard to make the family business a success. However, he knew that his five children were terrible at managing money. A CPT Will was drafted providing each child no access to capital. The CPT would be substantial and Brett believed the income should more than suffice for each child. On each child's death, their children would be added as beneficiaries to the CPT. Brett was conscious that by ruling from the grave he would ensure his hard earned wealth would be available to provide for future generations.

- Lindsay Stoddart, Director

¹ *Hunter and New England Area Health Service v A* [2009] NSWSC 761