ESTATE PLANNING AND FAMILY TRUSTS

Your Will can only do so much, as company or trust assets are not part of your estate. Read this technical article to learn more.

Family discretionary trusts (simply referred to as "family trusts"), in particular, bear a close look when using them as part of your estate planning. Family trusts can be important asset protection vehicles should you be concerned about the potential of a challenge against your Will, or the prospect of bankruptcy. Proper maintenance of your trust records is essential.

If you have a corporate trustee of your family trust, retain the last annual return or your ASIC records detailing the current company directors and shareholders. It is also important to retain a record of any special rights attaching to the company shares (for instance, whether additional voting rights have been conferred).

This is because the control of the corporate trustee is maintained through the shareholders who appoint the company directors. Company constitutions often contain a clause acknowledging that the deceased shareholder's legal personal representative is the only person authorised to deal with the shares. As a result, the Executor or Executors appointed under your Will can potentially control the corporate trustee (subject to the office of Appointor of the trust, discussed below).

You also need to retain an up-to-date, stamped trust deed. Any variations must also be retained to provide a complete document. It is vital to read and understand the trust deed, as it is the source for the powers and responsibilities of the trustee and for the tax-effective distribution of trust assets.

The trust's records must include the balance sheet setting out the trust assets (remember, these are not assets that you personally own, and therefore your Will cannot direct how they will be distributed).

However, the balance sheet may also show undistributed beneficial entitlements or beneficiary loan accounts that have arisen due to the exercise of the trustee's discretion to distribute capital and/or income from the trust. If so, then such items are no longer trust assets and have now become assets belonging to the appointed beneficiary of the trust. If you, as the WIllmaker, are one of the beneficiaries, then your trust entitlement will form part of your estate and can be dealt with through your Will.

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Family trust deeds often have an Appointor and/or Guardian as officers of the trust. The Appointor (and the Appointor's successors) will retain ultimate control over the trust as it is the Appointor who has the power to appoint, remove and replace the trustee of the trust (even a corporate trustee). If the trust deed does not name specific successors to an Appointor who dies or who loses capacity, then the deed often contains a provision to allow the Appointor's legal personal representative to take over upon the death or incapacity of the Appointor. This means that the Executor or Executors appointed under your Will would ultimately control the trust.

A Guardian's role is to oversee the exercise of the trustee's discretion. A trust deed can also provide that the Guardian's legal personal representative take over upon the Guardian's death or incapacity.

Remember also that generally a trust has a limited lifespan (known as the Rule Against Perpetuities). In all states but South Australia, the maximum life of a trust is 80 years. This would impose a limit upon the effective use of the family trust as a vehicle for estate planning.

However, it is worth noting that, although South Australia has abolished the Rule Against Perpetuities, s 62 of the Law of Property Act 1936 (SA) provides that 80 years after the date of a disposition, parties may apply to the court for orders to vary the disposition so that any remaining unvested interests will immediately vest. Alternatively, if interests under a disposition are unable to vest or are unlikely to vest within 80 years, then s 62 allows the parties to apply to the court to vary the terms of a disposition to ensure that those interests will vest within 80 years anyway. Therefore, the application of s 62 of the Law of Property Act 1936 (SA) achieves a similar final result as the Rule Against Perpetuities.

As one final point, you may want to arrange for a Deed of Vesting of the family trust that to wind up the trust upon your death to ensure that the trust assets will form part of your estate (and therefore be controlled through your Will). However, this is a particularly complex area, and consideration must be given to potential CGT, stamp duty and even GST liabilities upon winding up the trust.

More information

Should you have any queries or require more information, please contact the team at Topdocs on 1300 659 242.

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