Estate affairs

Welcome to Estate affairs – March 2015 edition

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International estate planning

By Neil Page, Legal Counsel, AET

With one in four Australians born overseas[1] and over one million Australians living abroad [2], it's likely that you will have clients that either hold overseas assets or own Australian assets but who are non-residents of Australia.

Clients in these situations present significant estate planning challenges.

What should you do? A simple solution is to refer these clients to an experienced estate planning lawyer for advice, however, it's useful to have some background knowledge of international estate planning issues as outlined below.

Australian residents with overseas assets
Is your client's Australian Will recognised in another country? Does your client need an overseas Will prepared?

Are there specific estate planning or succession laws that apply in a foreign country that prevent a gift from being applied according to your client's wishes, should they pass away?

The advice we often give to clients is that they should consult with an overseas lawyer to determine if their Australian Will binds the direction of their overseas assets. This is because we often limit their Australian Will to a disposition of Australian assets only.

Assets held in the UK
UK and Australian succession laws are similar. This is one jurisdiction where we're confident that an Australian Will can deal with assets held in the UK. However, assets being held in the UK present their own problems in the context of UK inheritance tax (IT) legislation. Subject to certain asset threshold limits, UK IT is assessed at 40 per cent of assets within the jurisdiction. That's right, your client could pay up to 40 per cent tax on their UK assets!!

Did you also know that your client may be 'deemed domicile' in the UK if they die in Australia within three years of moving here, or if they spend more than 183 days in the UK each year? And, if your client is deemed domiciled in the UK, the UK IT division is entitled to charge 40 per cent IT on your client's world-wide assets - irrespective of their actual domicile at the time of death. So, if your client holds $1 million in Australian assets and only $100,000 in UK assets – they would be taxed over $400,000!

It's a complicated issue to resolve and when trying to retrieve UK assets, it can be an estate administration and tax nightmare for the executors and their advisers.

Moveable and immovable assets
If your client were to die intestate (without a Will) then it is likely that 'moveable' assets, such as shares, money and jewellery, will be distributed according to the law of your client's domicile at the time of their death. Whereas 'immovable' assets, such as real estate, will be distributed in accordance with the law of the country where the property exists. Understandably, these results may not necessarily be in accordance with your client's wishes.

Inheritance
Certain countries, including Malaysia, Greece and Italy, prescribe a fixed testamentary disposition (or a 'forced heirship rights' to the next of kin), unlike our common law system which provides testamentary freedom albeit with some family provision controls via the Courts. This is certainly an issue that clients need to be aware of and hence our common position is to ensure clients receive appropriate estate planning advice relating to the relevant jurisdiction. There is no point having an Australian Will that intends to deal with overseas assets, but cannot legally do so in that jurisdiction.

Non-resident beneficiaries
Clients with non-Australian resident beneficiaries need to be aware that death will create a deemed disposal of assets going to a non-resident beneficiary and will create a capital gains tax (CGT) event in respect of those assets. This is contrary to the usual position that a transfer of assets pursuant to a Will is a CGT-free event.

The use of a testamentary trust in these situations may be a tax-effective solution as long as the trustee of the trust is controlled within Australia. Again, this is a complicated issue and specialist estate planning advice should be sought when establishing a client's estate plan.

International Wills
Most Australian States have amended their Wills or Succession Act to accommodate 'international Wills'. The effect of this is to recognise a Will, no matter where it is made, if it is done so in the form of an international Will.

International Wills however have two significant features: they must have three witnesses, one of whom must be an authorised witness being a solicitor or a notary public and the Will must have an authorised witness certificate attached, confirming certain requirements have been met.

For more information on international estate planning issues, and to ensure your clients assets are distributed in line with their wishes, we recommend you and your client speak to an experienced estate planning lawyer.

[1] 'Australian Census of Population and Housing' ABS, 2011.
[2] www.smarttraveller.gov.au, Department of Foreign Affairs and Trade.

Advance care directives

By Elizabeth Ferguson, Senior Estate Planning Lawyer, AET

A good estate plan outlines what would happen should a client no longer be able to make decisions for themselves. It is important that clients think about who would make lifestyle and medical decisions on their behalf should they lose mental competence or become so ill that they no longer able to make informed choices.

Incapacity is not necessarily something which comes upon us slowly; nor is it age related. A client does not need to be over 80 years old to suffer a stroke or heart attack, be involved in a motor vehicle accident or suffer some other trauma that impairs capacity.

In July 2014, the 'Advance Care Directives Act 2013' came into effect in South Australia. This Act essentially replaced previous legislation relating to the appointment of guardians (relating to medical and lifestyle decisions), medical powers of attorney (relating to specific medical treatment), and making anticipatory directions.

If your client completed an enduring power of guardianship, a medical power of attorney or an anticipatory direction before 30 June 2014, these are still legally effective and valid. Effective 1 July 2014, anyone wishing to create such a document will need to prepare an advance care directive.

What is an advance care directive?
This new Act allows clients to put into place an advance care directive, a legal document that sets out future medical treatment and lifestyle decisions. This document not only provides relief and comfort for your clients' loved ones at an already difficult time but is a useful and legally binding resource for health care practitioners when making treatment decisions.

It can include treatments that clients do or do not wish to have such as life-support or whether or not they wish to live in a nursing home. Our experience is that some clients tend to be very specific about their wishes for future care and include directions such as 'no chemotherapy', 'I wish to die at home, rather than in care' or 'no resuscitation'. Others are happy to leave the decisions to their substitute decision makers.

Using this document, a client can appoint a 'substitute decision maker' (formerly referred to as a guardian) to make medical, lifestyle and other decisions on their behalf. Once it becomes effective the 'substitute decision maker' can make decisions based on what they believe are in the best interests of the client and must follow any requirements that the client has set out in the document.

How do clients prepare an advance care directive?
A specialist estate planning lawyer will be able to ensure that this important document is properly explained, correctly completed and witnessed.

Although your client can obtain and complete an advance care directive themselves, there are some difficulties in doing so.

- Accessing an advance care directive form may be problematic for some people. For those who are comfortable using the internet, the form can be accessed via the advance care directive website (www.advancecaredirectives.sa.gov.au) and either be completed online or printed off and completed. Alternatively, the form can be purchased online or in person from Services SA.
- Although under the legislation there is no limit to the number of substitute decision makers who may be appointed, the online forms or printed versions only allow for three. Therefore, a client who wishes to appoint their spouse and three children as substitute decision makers cannot do this easily using the current versions available from Services SA.
- Witnessing of the document may not be done correctly. The range of people who can witness a document has expanded but this broader range may include people who we suspect will not be familiar with the overall process. Incorrect witnessing of a document may invalidate it.

What happens if a client does not have an advance care directive in place?
If clients do not have an advance care directive in place and they lose capacity in the future, then a family member will need to apply to the Guardianship Board to be appointed before they can make decisions on behalf of the client. This process can be time-consuming and stressful especially if there is conflict within the family. In addition, the Guardianship Board may decide to appoint the Public Advocate in cases where it is not appropriate to appoint family members.

Putting in place an advance care directive will give clients peace of mind that their wishes are known and respected should others need to make decisions for them.

For more information on advance care directives, please visit the advance care directives website (www.advancecaredirectives.sa.gov.au) or contact one of our South Australia estate planning specialists on 1800 882 218.

Super fund beneficiaries – why clients should think carefully when nominating adult children

By Benjamin Martin, Technical Services Manager

Have your clients nominated their children as beneficiaries on their super fund account? They might have inadvertently exposed the child's super inheritance to future legal proceedings.

Consider this scenario. Jane passes away at the age of 68 leaving a remaining super balance of $1,200,000. Her two sons, Alistair and James, are listed as beneficiaries and are both in their mid-30s. In accordance with Jane's nomination, the trustee of her super fund pays a net amount (after deducting taxes) of approximately $500,000 into each son's respective bank account. Alistair marries a year later and his wife gives birth to their first child shortly after. However, the marriage breaks down after several years. During legal proceedings, the Family Court specifically orders 40 per cent of Alistair's super inheritance (which Alistair had subsequently invested into a managed fund) to be paid to his former wife.

Alistair understandably asks "that was an inheritance from my mother, how can my wife receive 40 per cent of it?"

This example highlights the importance of thinking ahead when making super fund beneficiary nominations. Here, the trustee of the super fund paid Alistair's entitlement of Jane's death benefit directly to Alistair, who in turn invested the proceeds into a managed fund in his own name. However, when his marriage broke down, the managed fund was placed into a pool of assets that the Family Court was able to divide and allocate between him and his former wife. This was despite the managed fund being invested solely in his name and from the proceeds Alistair received from his late mother's super fund.

Rather than nominating her children as beneficiaries, Jane could have nominated for her super benefit to be paid directly into her estate. The net balance of $1,000,000 could then be held in trust and invested for the benefit of her children.

Establishing a trust of this type typically affords beneficiaries a degree of protection from future legal proceedings, particularly if a child's marriage were to breakdown or a child were to become bankrupt later in life. These trusts (commonly referred to as testamentary trusts) can also be very tax-friendly as income generated by the inheritance (for example share dividends or investment property rental income) can in theory be spread out and distributed to a range of beneficiaries and indeed diverted to family members that may be in a lower tax bracket. This may be appealing from the child's perspective, particularly if their employment income already has them placed into a relatively high marginal tax rate. The trust can also be designed to restrict the ability to withdraw and sell the assets, thereby protecting the inheritance against spendthrift or vulnerable beneficiaries.

It is important to remember though that a trust of this type comes at a cost. For starters, expert legal advice needs to be obtained upfront to design and embed the terms of the trust into the person's Will. Then, once the trust comes to life (following death), annual tax returns will need to be prepared and beneficiaries may require legal advice from time to time about the trust's ongoing operations. However, many would say that these costs are a small price to pay for protecting and managing the tax position of a child's inheritance.

Trusts designed to manage inheritances are not necessarily limited to super fund proceeds and may comprise of other assets that the deceased owned at the time of passing. Term deposits, real estate, shares and cash from insurance policies may in theory find their way into such a trust and be set aside for the benefit of the children.

Don't forget, though, these trusts are not for everyone. The purpose of this article is to get you thinking more when advising clients on super fund nominations and how such a nomination fits into your client's overall estate plan.

Working in partnership with you

At AET, we are always willing to work in partnership with you to provide your clients with specialised advice on estate planning and trustee services. Our services complement your existing financial planning offering to provide outcomes that are best suited to your client's circumstances.

You continue to maintain the client relationship and investment management function. And, unlike our competitors, our offering can be 'unbundled' to suit your client's individual requirements.

Our standard fees for acting in conjunction with you are set out in our fee schedule. For high net worth clients, or for those with special circumstances, please contact us to discuss fees applicable to your client's circumstances.

Expansion of our Team
We are pleased to welcome the following experienced estate and trustee professionals to our Private Client Services Team:

- Ben Clark, Head of Philanthropy.
- Karen Robinson, Senior Estate Planning Lawyer, Victoria.
- Hugh Docker and Lyndall James, Senior New Business Managers for Victoria, both of whom are based in Melbourne.
- Ravi Malhotra, State Manager Private Client Services, NSW and QLD, based in Sydney.

For more information about working in partnership with us, please contact a member of the AET Private Client Services Team. Click here for contact details.

If you have any questions, or need more information, please call us on 1800 882 218 or visit www.aetlimited.com.au