

BUSINESS BULLETIN

MAY 2010

OWEN HODGE



LAWYERS

Owen Hodge Lawyers are relaunching their website this month!
visit it at www.owenhodge.com.au

Owen Hodge Lawyers has developed a reputation for professional service, realistic advice, and commitment to providing the best outcome for clients. We send the 'Law Talk' newsletter to inform our clients and friends about the recent changes to the law we feel they should be aware of.

BE PREPARED!!

This wise old motto from the scouts continues to maintain its relevance as time goes on. There is nothing like being prepared by having your affairs in order just in case you reach a stage in your life where you can no longer make decisions for yourself.

From a legal perspective this means having an enduring Power of Attorney in place and an Enduring Guardianship appointment made. These legal documents have different functions and if in place will cover your substituted decision making if that becomes necessary.

An enduring Power of Attorney will permit your attorney or attorneys to make and carry out the financial aspects of your life which carry on regardless of your health. A person acting under Power of Attorney can deal with your bank, sign a tax return, deal with your shares and other financial matters interact with Centrelink and Medicare on your behalf. In summary, any property or financial matter affecting you.

Your Attorney cannot, however, make decisions about your health, welfare or lifestyle decisions.

Those issues are made by a person or persons you appoint to be your enduring guardian. Your guardian can decide for example where you live, arrange personal services, authorise medical treatment and the cessation of medical treatment. The power only operates if you are incapable of making those decisions for yourself.

These appointments cease on your death.

If you have not made these appointments and you lose your ability to make the types of decisions outlined above, somebody will need to apply to the Guardianship Tribunal for these types of powers. That may result in an unexpected and expensive outcome. What better option is there than setting up these mechanisms while you are well and can appoint the people you trust to make the decisions if you are unable to do so.

Finally, you must have the required legal capacity to set these appointments in place. They cannot be done after some event has occurred that impacts on your capacity.

If you have any questions or require assistance please contact
James Kelly | Partner of Owen Hodge Lawyers | 9570 7844.

The Partners and professionals at Owen Hodge Lawyers invite you to join them



Free information seminar;

Topic - Managing Divorce

When - Tuesday 25th May 2010

Where - Level 2, 12-14 Ormonde Parade Hurstville

RSVP - 20th May 2010 to tnt@owenhodge.com.au

Protect the wealth you have built over your lifetime!

TESTAMENTARY TRUSTS

How you transfer your assets to your beneficiaries under your Will can have consequences which may greatly erode the wealth you have accumulated during your lifetime. Estate planning can help you to protect your wealth by transferring your assets to your beneficiaries under your Will in a way which provides considerable taxation and asset protection advantages. A widely recommended structure used in modern Wills is known as a testamentary trust.

What is a testamentary trust?

A testamentary trust is a trust established by a Will. Instead of giving your assets directly to your beneficiaries (as is done under most standard wills), your assets are placed into a trust which is created at the time of your death and held for the benefit of your chosen beneficiaries.

What assets can be put into a testamentary trust?

Any assets belonging to you can be left to your beneficiaries on your death via a testamentary trust. Additionally, any payments made to your estate as a result of your death (eg. superannuation benefits or the proceeds of life insurance) can also be directed to be held within a testamentary trust.

Why use a testamentary trust?

The use of a testamentary trust can provide your beneficiaries with maximum flexibility in dealing with their inheritance. Depending on their specific needs and circumstances, the use of a testamentary trust may provide the following benefits:

1. Asset protection

Assets in a discretionary testamentary trust are held on trust for the beneficiaries, and are not owned personally by the beneficiaries until the trustee distributes the assets to the beneficiary. Accordingly, the assets may be protected from their creditors (in the case of bankruptcy) or their spouse (in the case of a marital breakdown). In the case of child beneficiaries, a testamentary trust can also be used to protect the assets until the child reaches a sufficient age to manage the assets themselves.

2. Income tax minimisation

Because the trustee of a discretionary testamentary trust can decide when and to whom distributions of assets are made, the use of a testamentary trust may allow for significant income tax savings. As trust income is only taxed at the beneficiary-level (that is, the beneficiary will be taxed at their marginal tax rate on any trust income that they receive), taxation liability can be minimized by distributing income from the testamentary trust to beneficiaries on low marginal tax rates at that time. Additionally, a trustee can also choose to distribute to beneficiaries under 18 to take advantage of special tax concessions, or to charitable or religious beneficiaries who enjoy a tax deductibility status or are tax exempt.

3. Capital gains tax (CGT) savings

Capital gains tax is not triggered when an asset belonging to you passes via your Will into a testamentary trust. Similarly, there is also no CGT payable when your assets are transferred from the trustee to a beneficiary.

The trustee of a discretionary testamentary trust can select which of your beneficiaries will incur a capital gain. By choosing to distribute to someone with a lower marginal tax rate, the capital gains tax liability can be significantly reduced. The trustee may also defer the sale of assets and therefore the CGT event until a more advantageous time (eg. when more beneficiaries come into existence).

In addition, there is a CGT exemption for the principal place of residence of the deceased which can also be preserved if the terms of the testamentary trust allow the trustee to grant a right to occupy the relevant dwelling to a beneficiary.

Who should use a Testamentary Trust?

You might consider using a testamentary trust if you have substantial assets, if your beneficiaries require asset protection or if your beneficiaries would benefit from the tax advantages described above.

How can Owen Hodge Lawyers help you?

If any of the above apply to you, please contact us so we can discuss the matter further with you. Depending on your particular circumstances, we can tailor a solution to help you protect your wealth.

The Cost of Child Support

Choosing between Limited and Binding Child Support Agreements:

The child support scheme as of the 1st of July 2008 allows parents to work out their own child support arrangements after separation with a degree of flexibility. The current scheme is an attempt to ensure that the appropriate balance is met between all three parties: children, parents and government.

The most significant aspect of the current system is the introduction of increased safe-guards to ensure that child support agreements now have long-term financial consequences. There are now two types of child support agreements on offer under the Child Support (Assessment) Act 1989 ("the Act"): Binding child support agreements and Limited child support agreements: But at what cost?

Binding Child Support Agreements:



As the name suggests, these agreements are binding and as such provide a high level of certainty and finality to child support arrangements. However, it must be understood that although these arrangements come with the gift of security and arguably peace of mind, they do not factor in possible undesirable, unforeseen circumstances such as; the cost of future unemployment or the possible rise in a party's income. Considering their nature, it is required that when entering and terminating such an agreement you must seek independent legal advice. This requirement is to ensure that the agreement is enforceable, as well as ensuring that you understand the consequences of entering into the child support agreement. Legal advice provides protection from deceptive and other unfavorable behavior that may be between the lines.

Further, the benefit of Binding Child Support Agreements is that under this type of arrangement it is possible for parties to decide on any amount, as long as both parties agree to it. This agreed amount may be contrary to the Child Support Agencies (CSA) formula assessment. This is an attempt to now provide for a more flexible formula that takes into account the different types of family units that exist within Australia, recognising that as children grow so does the cost of providing for them.

A relevant and recent case Daley v Daley (2009) FLC 98-039 examined the current scheme. The wife applicant and husband respondent entered into a child support agreement in early 2005 ("the agreement") concerning their two children. The agreement was set to run until 2013 when their youngest child reached the age of 18.

Neither husband nor wife sought legal advice when entering into the arrangement. Regardless of this, the Registrar of the CSA deemed the agreement to be in force and binding. This means that it could only be set aside if one of the parties can establish that there were "exceptional circumstances" under s 136(2) of the Child Support (Assessment) Act 1989, such as a change of circumstances that would cause the child or the party to suffer hardship if the agreement was not set aside.

The husband's previous and current employment arrangements were such that, under the child support agreement the wife was receiving approximately 30% of what she would receive under the current child support formula. As a result, the wife was wishing to have the agreement set aside so that the CSA could calculate her entitlements using the new formula and the husband's new salary.

The husband argued that these changes were not "exceptional circumstances" and that the wife should not be able to do so as she was aware that the agreement would be binding until 2013 when the parties agreed to enter into it.

Due to both parties failing to seek independent legal advice which is a requirement of binding child support agreements, the court found that the statement issued by the CSA was an 'administrative fiction'. The court found that the Registrar had deemed the agreement binding largely because it did not provide for any terminating event besides when the youngest child turned 18 years old in 2013. The court also held that under the current child support scheme it is to take into account a broader range of factors and allow more flexibility. Thus, this ensures a more equitable outcome can be achieved between the parties and their affected children.

With regard to this specific arrangement between Daley and Daley, the court found that this did not reflect the parties' individual capacity to financially support their children or the legislative standards established by the current child support scheme. Further, it was found that the current arrangement caused detriment to the child and should be set aside.

The case Daley v Daley highlights the importance and necessity of legal advice. Notably, the flexibility available for those who enter in such arrangements as well as the security in maintaining or terminating the agreement unless "exceptional circumstances" arise as entailed within the Act.

Limited Child Support Agreements:

Unlike binding agreements, limited child support agreements give parents the ability to make arrangements without the long term commitment. In some circumstances this may sound favorable, however, it should be understood that with a lack of finality comes a lack of security. There is also relative ease associated in terminating limited child support agreements and should be intended for parties that are not looking to form part of a longer term settlement. Limited binding child support agreements do not require independent legal advice before parties sign, but of course it is recommended. Payments must be at least equivalent to the amount set by the terms of the existing child support formula assessment.

For more information regarding Child Support Agreements and what better suits your circumstances please contact:

The New Personal Property Securities Act

This new legislation has been passed by the Commonwealth and will replace current State laws, to create a national system for the registration of mortgages and charges over personal property, such as equipment, vehicles and personal goods. The new system is expected to commence in May 2011. Details of registration procedures are yet to be released. It is expected that new company charges will also be registered under the same system, instead of through ASIC which is currently the case.

All "security interests" such as mortgages, charges, and equipment leases will be required to be registered under the new regime. While having a national system for registration of interests over personal property will be a big improvement in many ways, the Act is quite complex and also creates some new concepts in this area of law.

For instance, an equipment hire contract which lasts for over 12 months normally would never have been considered in the past to be a "security interest", but it will be made a security interest for the purposes of the Act and will need to be registered. This would mean that, even though a hire company owns a piece of equipment, if it does not register its interest as the owner, any purchaser of that equipment from a fraudulent customer who decides to "sell" it, will potentially obtain good title to the equipment. Whilst this appears unfair, it is a consumer protection measure for the benefit of buyers of goods which has been included in the Act.

Further information regarding the registration procedures will be released throughout this year. For further information on the Act and its impact, please contact Roger Harkin on 02 9549 0770.



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