Estate Planning and Will Disputes

By Robert C. Minter*

Estate planning is all the more important in current times in view of increased rates of relationship breakdown and because more people live in a variety of personal relationships which are less likely to be considered "for life".

While the blended family is becoming the norm the level of concern by parents for the wellbeing for their children appears to be as strong as ever, but given the frailty of relationships, the desire to protect assets from "non-blood" relationships is becoming dominant.

Conversely, while children do not wish their now long living parents to be denied companionship and happiness in their older age, they often see such "companions" as a threat to their inheritance.

For numerous reasons such as these a parents' death can leave a family riven with jealousy and discord.

The estate planning process aims to ensure that a person's assets and affairs pass as seamlessly as possible through life into death in accordance with their wishes with little or no family disruption. This process looks at a variety of issues including:

(a) protection of assets against creditors, marriage breakdown and will disputes;
(b) dealing with inequalities arising from family loans and gifts;
(c) tax benefits;
(d) ensuring ongoing control of investments and businesses; and
(e) providing flexibility in distributing estate assets.

There is a wide variety of "tools" to achieve these ends, often in combination with each other. Despite the best laid plans, will disputes can still arise because, at law, spouses, children and dependants all have the right at law to make a claim and this right cannot be taken away from them no matter what is said in the will or what family agreements might be made.

A brief overview of will disputes (family provisions claims) - Will makes are deemed to have a duty to every person who is eligible at law to claim against an estate (spouse, child, dependant). This duty is described in terms of whether the deceased has made "adequate" and "proper" provision for the claimant. If a court considers that adequate and proper provision has not been made then it has the power to re-write the will in their favour.

The word "adequate" relates in relatively simple dollar terms to what is adequate for a person's needs. The word "proper" on the other hand is more complex as it focuses more broadly on what is appropriate under all the circumstances.

This could mean that despite finding that inadequate provision has been made for a needy claimant a court may still hold that it is not "proper" that they be given anything because

they may have been, for example, given plenty during their lifetime or are gainfully employed or ought to be.

It is not easy to determine in advance how much an eligible person might be given by a court, if anything. There is no straightforward formula, indeed there is no ready formula at all. Family Provisions is a discretionary jurisdiction.

Despite this, or perhaps because of it, people with even marginal claims are not discouraged from commencing proceedings because, if they are eligible, they have a reasonable chance of recovering at least their legal costs from the estate even if they can expect little extra from the court.

Such a situation provides little financial disincentive not to make a claim with the expectancy that the executors will find it more expedient to pay them off in order to avoid the cost, uncertainty and delays of ongoing litigation.

What is involved in Estate Planning - Estate planning is not limited to avoiding family provisions claims. It also involves dealing with asset protection, tax issues and minimising business disruption. Some of the more common strategies include:

(a) Family meetings and agreements, combined with
(b) business structures,
(c) life insurance and key man business insurance,
(d) rights of residence,
(e) creation of joint tenancies,
(f) gifts during life,
(g) binding financial agreements under the Family Law Act,
(h) powers of attorney and guardianship,
(i) funds management arrangements,
(j) applications under the Succession Act preventing any particular person claiming,
(k) superannuation, and
(l) trusts.

While trusts are listed last they play a significant role in any estate plan, both trusts created during life and in a will.

Trusts – Put simplistically, trusts allow assets to be transferred out of a person's estate without actually denying that person the benefit of those assets. While trusts take numerous forms and must be specially drafted to deal with each client's particular circumstances. A trust in a will can offer certain tax advantages that a trust made during a lifetime cannot. There is little point in attempting to create a trust if the will is challenged and the trust consequently never comes into existence. This means that close attention to every clients particular requirements must be given.

Discretionary trusts are an valuable tool in estate planning as they give the trustee the discretion to determine each year to whom the income is to be distributed for the best advantage overall.

Discretionary trusts are created to provide flexibility in distributing income and capital for both tax and asset protection purposes. Protection is a broad term referring to protection not only from creditors or in bankruptcy, but also in relation to marriage and will disputes.

The Will Making Process – You will appreciate from the above that creating a will is often only a part of a broader estate planning process. Indeed, when a will is made separate arrangements must be made in relation to superannuation, insurance and jointly held assets as these will pass separately to the will.

At a more basic level, the making of a will raises the question of whether enduring powers of attorney or enduring powers of guardian must be created, and whether an advanced care directive (sometimes called a living will) is deserved to inform carers, doctors and hospitals of a person's wishes regarding care, particularly for when there is no chance of them recovering from any medical condition.

These are not issues that can be covered by off the shelf documents or handled by accountants or fund managers. The starting point is to an assessment of your assets and a discussion of your wishes and concerns. With this information, a detailed estate plan can be drawn up and then implemented.

* Robert Minter is a senior consultant with the law firm Garland Hawthorne Brahe. He practices in the fields of estate planning and will disputes. He was a partner of a major law firm for many years. He holds BA LLB degrees from the University of Sydney, has carried out post graduate studies at Duquesne University in Pittsburgh Pennsylvania USA and holds a graduate diploma in Business from the Australian Institute of Management subsequently lecturing at Bond University School of Management on Business and the law in China and the College of Law in Wills and Estates.