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Personal & Professional Legal Service – delivered expeditiously

Blackman Legal operates on values of personal service and reliable and cost effective representation. We are proud to offer sound legal expertise and a dedication to the long-term legal, financial and personal satisfaction of our clients. We aim to deliver value to our clients and to meet their needs with common-sense advice and friendly service. Our relaxed office and handy location in Lindfield makes a visit to us a pleasant experience.

At Blackman Legal we will work with you to obtain optimum results, taking the time to explain legal procedures clearly and frankly. We realise the importance of keeping you well-informed at all stages of the process and understand your need for sensitivity and discretion.

May your Easter be blessed with health, longevity, love and a lot of happiness!

Thanks to your support we have been very busy since the beginning of the year and have had a lot of success in assisting clients in many areas including buying and selling properties and businesses; executing up to date wills, powers of attorney and appointments of enduring guardian; entering leases, resolving commercial disputes, collecting monies owned and progressing family law matters involving arrangements for property settlements, children and binding financial agreements.

Our paralegal Suzanne Fitzpatrick is returning to Ireland and we are very pleased that Victoria Hailey will be joining us after Easter to replace her. We will let you know more about Victoria in our next newsletter.

Two interesting articles in the Sydney Morning Herald this week caught our attention and we have included them on the following pages in case you missed them. One is about the dangers of not doing a will properly; the other about the good and bad sides of trusts.

Alan continues to deliver a free monthly Family Law Seminar at our offices in Lindfield. Alan provides information and advice in regard to what options are available to someone going through a relationship breakdown particularly in respect of separation, divorce, finances and children. No one should burden themselves alone with the stress and anxiety which they may be subject to should they find themselves in such a difficult situation. Alan's experience in these matters enables him to guide someone through the stormy seas ahead.

Numbers are strictly limited, so if you or any of your friends or colleagues are interested to attend please call us to reserve a place ASAP.

Kind regards

Amanda and Alan

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Amanda Blackman is the principal of Blackman Legal and was admitted to practice law in 1987. Amanda has extensive experience in property and commercial law and possesses a common-sense, efficient yet personal approach to the resolution of client's problems. She is skilled at demystifying the legal process with advice that is easy to understand. She is a fierce protector of her client's interests and anticipates in advance issues of concern that may arise. Amanda is also Notary Public which is an international legal recognition which enables her to assist clients in overseas jurisdictions.

Self-preparation kits are becoming more popular but beware the hidden dangers of going it alone.

The growing use of DIY will kits, now more readily available online, is causing concern at a time when the relatively wealthy baby boomer generation start to pass on their assets, or what's left of them.

"We are ... seeing a rise in the work to unravel the issues with DIY wills following the increase of will kits and forms available online and through various outlets," the chief executive of the NSW Trustee & Guardian (NSWTG), Imelda Dodds, wrote in a recent newsletter. "Unfortunately this has meant NSWTG is required to sort out wills that are ambiguous, can be misinterpreted and therefore challenged, or are not valid and able to be executed.

"We actively encourage all adults to make provision for their future ... we also say it is very important to take professional advice," Dodds says.

LEGAL ADVICE

Consumer group Choice concluded in a study two years ago that will kits could be a useful research tool but that legal advice should usually be obtained, particularly if you have small children, complex financial affairs or a complicated family situation.

One of the will kits examined could "confuse rather than clarify", the group found, while some others didn't give sufficient warning about when to seek detailed advice.

An estate-planning specialist with Equity Trustees, Stephen Hardy, says roughly half of all adult Australians don't have a valid will and even those who do often make basic mistakes that mean their wishes won't be properly carried out.

COMMON MISTAKES

Hardy says one common mistake is to appoint a friend as an executor even though they may not have the financial competence required and, being a similar age, may die before you. If your will isn't changed after their death, their executor may become your executor, he says.

Also avoid appointing anyone who may have a conflict of interest - such as a business partner or a family member if there's any chance of family discord over the estate, he says.

If you have debt against particular assets, such as a mortgage over a property, recognise the effect of this in your will and specify that all debt must be repaid before distributions are made, he says.

"For example, someone may have two investment properties of equal value and leave one each to their children. "If one carries a mortgage, care needs to be taken that this debt isn't inherited with the property, making the inheritance unequal."

Not recognising the effect of tax, particularly capital gains tax, is another common mistake that can lead to unintended unfairness.



Alan Blumberg assists clients going through the breakdown of a personal relationship with discretion, understanding and empathy. He has an interest in estate planning and the creation of strategies to ensure client's assets are protected into the future. He brings his extensive real-world experience in business to the resolution of commercial disputes. Alan understands that a trip to a lawyer can be a daunting experience for many people but his calm and confident manner reassures clients in distress. Alan works hard to resolve disputes and achieves outstanding results for clients by providing advice that is practical and by only recommending solutions that are achievable.

COSTLY CHALLENGES

"If one child receives the family home and the other a holiday home of equal value, the second child will receive less because CGT will be payable," he says.

Hardy says some people prepare a will but later write notes about new estate-planning considerations, which can then be interpreted as being a new will.

"This can result in costly challenges to the will and cause unnecessary family stress," he says.

If you decide not to leave anything to a family member, obtain professional advice about whether a statement giving your reasons should be included in the will or in an accompanying document, he says.

"It may not prevent them challenging but with proper advice a useful defence may be established. If there is a good financial reason they have been left out, such as giving them various financial gifts over the years, details in the will itself might well be helpful."

Another mistake is to leave assets that you don't actually own. This problem can occur when assets are held jointly, perhaps in a family trust, business or superannuation fund.

Finally, not being able to find the will is a fairly common occurrence, Hardy says. "Make sure the executor knows where it is and, ideally, talk through the contents so he or she knows what you intend and why."

Key points

- DIY will kits should be used only in the simplest of circumstances.
- Choose an executor carefully.
- Consider the impact of debt and tax on fairness.
- Don't bequeath assets you don't own.
- Don't hide your will.

Trusts are designed to protect assets but it can be a bit rich when the kids want out

Family trusts are a time-honoured way for successful individuals to put a fence around their wealth and protect it from outside threats and prying eyes. But it seems that such a trust can't protect a family from itself.

In recent months some of Australia's wealthiest families have been displaying their dirty laundry in full view of the neighbours. The mining magnate, Gina Rinehart, is resisting an attempt by her children to have her removed as trustee of the multibillion dollar family trust. And the billionaire retailer, Solomon Lew, is fighting legal attempts by the estranged spouses of two of his children to get a share of the \$621 million family trust.

These fights over the hereditary silver are proof that the trusts are assailable (more on that later) but that does not mean they are not a valuable wealth-management tool.

In fact, Australians with far less wealth than Rinehart or Lew are embracing them in ever greater numbers. In 2009, 660,000 trusts lodged tax returns with the Australian Tax Office, a 50 per cent increase in less than a decade.

The main advantages of family trusts (see box) are to protect family and business assets, not just during a lifetime but beyond the grave, and to reduce tax, in that order.

A family trust specialist, Bernie O'Sullivan of Bernie O'Sullivan Lawyers, says many of his clients are professionals who set up family trusts to protect themselves from future litigation.

"In the event they are sued, money transferred into a family trust no longer belongs to them. Rather, it belongs to the trust so it is out of reach of potential creditors," he says.

But let's not forget the tax benefits.

One of the key ones is that the trustee can distribute income earned on assets inside the trust to other family members, taking full advantage of each member's tax status and \$6000 tax-free threshold.

Capital gains generated by the trust are distributed to the beneficiaries as income. This might be from the sale of assets or distributions from managed investments inside the trust.

The beneficiaries pay tax on the income and can claim the normal 50 per cent discount if the asset was held for more than 12 months.

"Provided the trust deed allows, you can stream different types of income to different beneficiaries," O'Sullivan says.

For instance, you can distribute capital gains to a beneficiary who can offset them against existing capital losses, distribute income to beneficiaries on low marginal tax rates, or distribute income with franking credits to the family member who can benefit most from them.

"The trustee has full discretion whether to distribute income and capital, to whom and in what proportion," O'Sullivan says. "If they choose not to distribute income, it will be taxed to the trustee [inside the trust] at the top marginal tax rate."

This is rarely ideal, O'Sullivan says, as trusts would usually be better off distributing "excess" income to a corporate beneficiary, which pays tax at the company rate of 30 per cent.

Another benefit of family trusts is that they allow assets to be passed from one generation to the next and capital gains tax to be deferred for up to 80 years. But this can cause problems for beneficiaries when the "vesting" date arrives and the trust is pregnant with unrealised capital gains.

The HLB Mann Judd Sydney tax partner, Peter Bembrick, says when the trust vests, "all assets have to be passed on to the beneficiaries". "Capital gains tax is more likely to be a problem if it has been holding assets for a very long time," he says.

Or if the trust is sitting on billions of dollars of iron ore assets. The dispute at the heart of the Rinehart family feud is Gina's unilateral decision, as trustee, to extend the life of the family trust by more than half a century from its original vesting date late last year. Three of her four children want their share of the trust's assets now but Rinehart argues the capital gains tax bill would bankrupt them.

In practice, many family trusts with more modest fortunes wind up early and by the second generation, family members will often go their own way.

"When you have three siblings, all with their own families or divorced, they often want to take their share and go their separate ways," Bembrick says. "You have to balance the costs of taking assets out of the trust structure with the benefits of each person being able to control their own affairs."

REGULATORY CHANGE

The vexed issue of the distribution of capital gains is one reason behind the federal government's planned reform of the taxation of trust income.

Bembrick says recent court decisions, including the Bamford versus Commissioner of Taxation case that went all the way to the High Court in 2010, have highlighted gaps between ancient trust law and modern tax law, especially where the distribution of capital gains is involved.

This, plus the recommendations of the Henry Tax Review, is behind the federal government's planned reform of the taxation of trust income.

A consultation paper was circulated last November with the aim of "better aligning the concepts of distributable and taxable income".

While the government stresses that it was not proposing a "crackdown" on family trusts and that trusts are still a legitimate structure to conduct personal and business affairs, Bembrick says the uncertainty has led some people to think that family trusts are not worth the risk.

"It is vital that the reforms lead to a system that is workable and provides certainty to beneficiaries and trustees of family trusts," Bembrick says.

"There's a popular perception that family trusts are just a way to rot the tax system but that does not appear to be the approach Treasury is taking.

"I don't think they are in danger of disappearing."

But tax isn't the only area where trusts have not kept up with the times.

O'Sullivan says the protection offered by family trusts from a family law perspective is not as good as it once was. He says the Family Court is increasingly willing to consider treating an individual's interest in a family trust as being part of the property of their marriage.

"In recent times there have been more cases where people get divorced and there is very little marital property. In such cases, the Family Court might be more inclined to look to the family trust, if one exists. But there are ways of structuring a trust that offer greater protection," he says.

COSTS

Family trusts are not necessarily expensive to set up but the experts agree that you need to be well off to make the most of them.

O'Sullivan says it costs in the order of \$600 to set up a family trust, plus ongoing fees associated with lodging an annual return. Additional costs kick in if you decide to have a corporate trustee. "In total, ongoing costs can amount to \$1000 a year or more," he says.

"Rarely would someone establish a trust for assets of only \$100,000 but it's not uncommon to get started with that if it is expected to grow quickly."

Regardless, O'Sullivan says anyone thinking of establishing a family trust, streaming income or distributing to corporate beneficiaries should always seek advice from their accountant or lawyer before doing so, as complex tax and succession-planning issues can arise.

A senior adviser at Donnelly Wealth Management, Russell Lees, normally only recommends a family trust where assets exceed \$400,000.

"If a client's capital is reasonably high, we would consider a family trust and self-managed super and shuffle assets from the trust into super," he says.

"If a client is in their 30s or 40s, perhaps with their own business, they can't get access to money in super so they can use a family trust as an entity to hold money outside super.

"Trusts are a complicated beast. The holdings are more long-term and it doesn't dissolve at death, as super does. Even with a testamentary trust, you have to ask, 'is it worth it to direct \$300,000 to a beneficiary?'"

The advantages of setting up any trust needs to be weighed up against the added cost and complexity of using the structure. You need to be satisfied that a trust will have real financial benefits for your family and not just provide a rich seam of fees for your advisers.

Our Services

We offer a broad range of services across a range of legal disciplines:

- Property Law, Conveyancing and Leasing
- Wills and Administration of Estates
- Powers of Attorney and Appointments of Enduring Guardian
- Family Law
- Commercial Law
- Notary Public Services
- Intellectual Property
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