Succession Planning | Much more than a Will!

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1. What is in a Succession Plan?

1.1 Commonly people think a succession plan is just a Will. Some are aware of the fact that it involves much more than just a Will, but even then in our experience there is a lack of full appreciation of just how many aspects of life and business need to be considered when properly designing a succession plan. The following diagram truly represents all that is involved in a comprehensive success plan:

1.2 Before progressing with a discussion on the most common options available for a succession plan, it is important to consider the final instrument through which assets owned by the individual business owners will be handed on to future generations - the Will.

1.3 The Will

(a) Whether or not a document is the last Will of a deceased, and whether or not it covers all of the assets of the deceased, is becoming increasingly vexed.

(b) There are certain requirements for a valid Will[1]. In broad terms:

(i) a Will must be in writing;

(ii) it must be signed by the testator making the Will (preferably at the end of the Will and on every page if the Will runs over more than one page);

(iii) it must be dated to verify that it is the testator's last Will;

(iv) the signature of the testator should be witnessed by two witnesses, after the will maker signed, and in each others presence[2].

(c) If there are problems with formality a Court may, upon application, declare any document or any part of a document (even something not in traditional written form - including a voice or video

[1] *Succession Act* (Qld) s10

[2] Witnessing a Will is known as *attestation*.

recording, text messages on a phone[3]) to be a valid Will, an alteration of a Will or a revocation of a Will. In order to make such an order the Court must be satisfied that the testator intended the document to form the person's Will[4]. These types of Wills are known as **Informal Wills**.

(d) If there is some ambiguity around the meaning of some words used in the Will, or the absence of some words, a **construction** or **rectification** application to the Court may be necessary[5].

(e) Beyond establishing those requirements have been met, there are some other possibilities available to complicate matters, including:

(i) **Invalid Wills**: A party wishing to challenge a Will might do so on the following grounds:

I. a lack of testamentary capacity of the testator. In order to satisfy a Court as to testamentary capacity *Banks v Goodfellow*[6] and many other decisions offer clear guidance. A testator must:

(i) understand the nature and effect of their Will;

(ii) understand the nature and extent of their estate (in general terms);

(iii) understand the claims to which they should give effect, being able to identify such object, the basis and type of any claim they have and evaluate the respective strengths of those claims; and

(iv) not be affected by:

- any disorder of the mind that might poison their affections or prevent the use of their faculties; or
- any insane delusion, being a fixed and incorrigible belief that no reasonable person would believe, which has brought about the Will (or parts of it) which the testator would not have made had they not been so affected.

II. the exercise of **undue influence** by a party on the testator. This undue influence must be proved by the party asserting the undue influence[7] and cannot be presumed. In *Wingrove v Wingrove*[8] Sir James Hannen said:

> *… it is not sufficient to establish that a person has the power unduly to overbear the will of the testator. It is necessary also to prove that in the particular case that power was exercised, and that it was by means of the exercise of that power, that the will such as it is, has been produced.*

III. the existence of **suspicious circumstances** in relation to the Will. If there is a reasonable suspicion that a Will is prepared under circumstances which raise a well-grounded suspicion that the document does not express the mind of the testator a Will may be found to be invalid. In this case the party propounding the Will as the last Will and testament needs to remove that suspicion before the Court will uphold the Will: *Tyrell v Painton*[9].

[3] see *Mahlo v Hehir* [2011] QSC 243; *Re Carrigan* [2018] QSC 206
[4] *Succession Act* (Qld) s18
[5] *Succession Act* (Qld) ss33 & 33C
[6] (1924) 34 CLR 558
[7] *Nicholson v Knaggs* [2009] VSC 64
[8] [1885] 10 ER 1192
[9] [1894] P 151

IV. the **lack of knowledge and approval** of the testator - Importantly the suspicion involved here is not of the behaviour of the relevant parties, but the suspicion that the testator did not know and approve the contents of the Will: *Fuller v Strum*[10].

V. the existence of **fraud** around the circumstances of the Will.

VI. the lack of any **due execution** of the Will.

(f) Beyond the matter of formal and informal wills consideration needs to be given to the following matters

(i) Conflict of Laws (Domicile, Moveable and Immoveable Assets)

I. Where a will maker has assets which might form part of their estate in different jurisdictions, caution should be exercised.

II. The legal systems of those different jurisdictions cannot be ignored[11].

III. The consequence for the estate and its administration will also be heavily impacted by whether or not the will maker is found to domicile in the place of origin, place of dependence or place of choice, and findings as to which is their State, Territory or Country of domicile[12]. Interesting changes to outcome can occur, particularly where intestacy (no Will) occurs, depending on the domicile[13].

IV. Whether or not assets are able to be moved, or not, makes a big difference practically. There is a difference between real property and immoveable property, and personalty and moveable property[14].

(g) Jurisdiction

Where a will maker holds assets in different jurisdictions, thought needs to be given to:

(i) International Wills[15] where there are three witnesses, one of which is specially qualified[16];

(ii) One Will with multiple applications or grant of probate resealing across multiple jurisdictions[17];

(iii) More than one Will in each jurisdiction where assets may be held with same or different executors, more or less complexity around estate administration, and more or less costs associated with advice and administration[18];

(iv) taxation on a jurisdiction by jurisdiction basis.

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[10] [2012] 1 WLR 1097

[11] The best example of this is Sharia Law, the religious law forming part of the Islamic tradition and derived from the Koran, Islam's central text, and fatwah - the rulings of Islamic scholars. But also consider the French system which claims to apply to all French residents regardless of nationality and which is a version of forced heirship.

[12] See *Domicile Act* (Qld) 1981 s9 - legislation is uniform across Australia and the Commonwealth

[13] *Application of perpetual Trustee Company Limited ; Re: Estate of the late Evelyn Mary Dempsey* [2016] NSWSC 159.

[14] *Haque v Haque* (No 2) (1965) 114 CLR 98

[15] *Haig Convention providing a Uniform Law on the Form of an International Will 1973* : http://www.unidroit.org/status-successions : *Succession Act* (Qld) 1981 Division 6A, Schedule 3

[16] Notary Public, Solicitor or other person authorised to act in connection with an International Will under the law of a Convention Country: see s33YC of the *Succession Act* (Qld) 1981. The authorised person must complete a certificate which is attached to the Will, and in the precise for set out in Article 10.

[17] *Arnot v Chapman* (1884) 5 LR (NSW) Eq 66; *Re Dalglish* (1889) 10 LR (NSW) L 256; *Re Ricketson* (1917) 17 SR (NSW) 233

[18] RG Mortensen, Private International Law in Australia, LexisNexis Butterworths, 2006 at pages 480 and 481

1.4 What assets form part of an estate?

(a) Increasingly businesses involve multiple entities: self managed superannuation funds; trading companies; asset holding entities; family discretionary trusts for income streaming; joint ventures or partnerships; landlord property owning entities; leases between super funds or landlord entities; distribution or licensing agreements; and soon.

(b) These complexities around the legal and operating structure of a business or organization makes it more challenging than ever to ensure an estate plan adequately covers everything.

(c) Working as a collaborative advisor where lawyer, accountant, financial planner, human resources advisor, insurance broker and banker are singing from the same song sheet is more critical now than ever.

(d) In terms of what assets may form part of an estate, consider the following:

(i) Real property held by the will maker on their own, or with others as tenants in common, will generally form part of the estate.

(ii) Debentures, bonds, shares in companies or units in trusts which the will maker owns solely in their own name will typically form part of the estate.

(iii) Personal property (often called personalty) also held by the will maker in their own name will also generally form part of the estate. These personalty assets may include:

I. cash at bank;
II. superannuation benefits or life insurances where there is a binding death benefit nomination directing the trustee to pay the funds to the legal personal representative;
III. motor vehicles, plant and equipment and machinery;
IV. intellectual property rights;

V. leases in the will maker's own name;
VI. licenses or royalty agreements;
VII. mortgages or loan agreements for the benefit of the deceased.

1.5 What assets do not form part of an estate?

(a) Joint bank accounts won't generally form part of an estate.

(b) The provision of a certified copy of the Death Certificate will generally be enough for any bank, credit union or building society to allow the surviving joint account holder/s to access and continue to use the account.

(c) Real property held as joint tenants won't form part of an estate. Upon registration of a certified copy of the death certificate and a Request to Record Death with the Registrar of Titles, a property will be transferred into the name of the surviving joint property owner/s.

(d) Generally superannuation benefits and life insurances won't form won't form part of the estate. The wishes of the deceased in making a binding death benefit nomination or nominating a beneficiary can confirm or change that position, subject to validity[19], confusion or dispute.

(e) Assets owned by discretionary trusts, unit trusts or companies controlled by the will maker through directorships without shareholding in the deceased' own name generally won't form part of the estate.

(f) Trusteeships of the will maker also won't bring assets to the estate, but control issues may be dealt with as part of the estate administration.

(g) Similarly, assets contractually promised or gifted to third parties during the will maker's lifetime are unlikely to form part of the estate of the deceased.

1.6 What else must be considered?

(a) Clearly there is a lot which may not become part of an estate and so won't be dealt with as part of an estate administration process.

(b) A well-designed succession plan will facilitate the succeeding of the business to others beyond a death event (or incapacity event) with minimum fuss and complication - bearing in mind there is always a lot of fuss around any death or incapacity event. Importantly, business continuity can be preserved.

(c) Typically, and increasingly, various business and accommodation arrangements are causing complications around succession planning.

(d) Businesses which have begun the process of succeeding to future generations might have taken on debt with old personal guarantees in place and yet the parents or grandparents aren't aware of the changing circumstances of the debt levels or financial and trading circumstances of the business.

1.7 Complications around estate planning these days can include:

(a) Alternative accommodation arrangements for the elderly including moving in with the kids - **granny flats** - with a lack of clarity around funding the lifestyle arrangements or the actual granny flat;

(i) Mum and/or Dad want to see their child own their own home and so gift or loan money for the purchase or transfer ownership of their own home on the basis Mum and Dad can continue to live there. Or

[19] Munro v Munro [2015] QSC 61

(ii) Mum and/or Dad contribute capital (loan or gift) to a child to enable them to extend / modify their property to enable Mum and/or Dad to live in the property.

(iii) Financial circumstances can change. Health status can change. The child's relationship circumstance could change (marriage, divorce, remarriage, grandchildren, step-grandchildren and so on).

(iv) A well drawn granny flat / family agreement can minimize the risk posed by the changed circumstances.

(v) Advisors all play a critical role in identifying the need for such an agreement to be drawn, because depending on the types of relationships clients have with their advisors can dictate where conversations about these arrangements may unfold.

(vi) Special granny flat rules within section 1147 of the *Social Security Act* (Cth) 1991 need careful consideration to ensure the exemption to the gifting deprivation rules are accessed[20].

(b) Blended **families** where children from prior marriages are also dependents;

(i) The child's relationship circumstance could change (marriage, divorce, remarriage, grandchildren, step-grandchildren and so on).

(ii) A well drawn granny flat / family agreement can minimize the risk posed by the changed circumstances.

(iii) Advisors all play a critical role in identifying the need for such an agreement to be drawn, because depending on the types of relationships clients have with their advisors can dictate where conversations about these arrangements may unfold.

(c) De facto relationships, including on occasion multiple **de facto partners**;

The *Property Law Act* (Qld) 1974 contains clear rights for de facto partners[21] to apply to a court for an order adjusting interests in the property of either or both of the de facto partners[22].

(d) Independent living in a **retirement village**;

The *Retirement Villages Act* (Qld) 1999 was amended in 2017 and 2018 and there are implications for an elderly person's estate if they are a retirement village resident including a value of investment impact as a result of the exit fee[23] and exit entitlement[24], and the risk of retirement village operator insolvency. Additional concerns arise should a move to higher levels of care be required earlier than anticipated.

(e) Care in a **nursing home**;

(i) Funding aged care can pose challenges for most families. Often the timing of entry into aged care is varied between married couples or de facto partners.

(ii) Coming up with the refundable accommodation deposit (RAD) with any implications on pension entitlements and principal place of residence sale is an issue.

(iii) If a resident's means tested amount exceeds the relevant threshold a daily accommodation payment plus accommodation supplement may also need to be funded.

[20] see http://www.humanservices.gov.au/customer/enablers/assets/granny-flats for details

[21] as that term is defined in the *Acts Interpretation Act* (Qld) 1954 s 32DA - *either 1 of 2 persons who are living together as a couple on a genuine domestic basis but who are not married to each other or related by family.*

[22] see *Property Law Act* (Qld) 1974 s283

[23] see *Retirement Villages Act* (Qld) 1999 s15

[24] see *Retirement Villages Act* (Qld) 1999 s16

(iv) Advisors would do well to consider these funding complexities for their clients and think about any suitable alternate arrangements which might be available including any necessary loan agreements to preserve assets of an estate from the clutches of the outlaws who may become the in-laws over time.

(f) Considerations around **age pension entitlements** and the gifting deprivation rules;

(i) We have all had clients who strongly believe it is their entitlement to access the aged pension and associated assessments.

(ii) The *Social Security Act* (Cth) 1991 governs the entitlement to these benefits. Part 3.12 sets out the asset test rules when individuals are being assessed for the aged pension. Gifting away assets to qualify for these benefits can have adverse impacts because the gifted assets are **deemed** to be included in the asset test for a period of time after the gift is made.

(g) **Ademption**;

The principle of ademption operates as a rule of construction of wills[25] where property described in a Will has substantially changed over time or has been disposed of either through inter vivos (during ones lifetime) gifting, sale, theft or loss[26] so that it is no longer within the contemplation of the giving, falling foul of the ademption rules and not being available to the beneficiary.

(h) **Incapacity** issues; and

Advisors should exercise grave caution when there is any hint of incapacity. It may start to show up as problems with memory and recall, a client quickening to anger, more frequent requests for contact and communication to aide recall, and advisors should (subject to privacy laws) liaise with fellow advisors supporting clients displaying these behaviours to ensure advantage isn't taken of a deteriorating health position.

(i) **Elder abuse**.

Advisors need to be careful to ensure they are able to identify signs of elder abuse. Any increased reliance on others is not, of itself, a cause for concern, but in combination with other departures from ordinary routines and historical decision making behaviours (such as being unwilling to maintain eye contact with the advisor but glancing at another, or continually deferring to the opinion of another before decisions are made) should place advisors on notice of a possible risk.

[25] see *Brown v Heffer* (1937) 116 CLR 344

[26] see *Trustees Executors and Agency Co Ltd v Scott* (1898) 24 VLR 522 where the item or gift destroyed or lost, the beneficiary of that specific property under the Will was found not to be entitled to the proceeds of any insurance pay out that may have covered the item

2. Options for a Business Succession Plan

2.1 Increasingly business owners are looking for creative ways to extract value for their years of blood, sweat and tears.

2.2 Critical to unlocking that value is a viable business with either positive income streams, or a growing balance sheet, if not both.

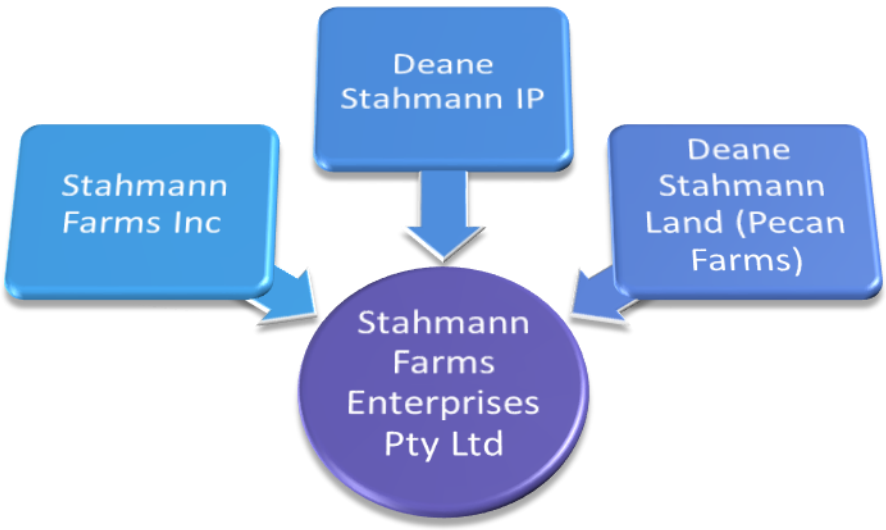
2.3 Our experience in advising clients on and implementing their options suggests the options set out below as being worthy of discussion in this paper. The options canvassed in this paper are by no means exhaustive and are offered in conjunction with structuring and estate planning advice.

2.4 Management Buy Out

A management buyout (MBO) is a form of acquisition in which a company's existing management team purchases the assets and operations of the business they manage. A publicly reported example of such a transaction locally is Stahmann Farms where Matthew Durack and Jeff Dodd, existing Managers in the business, bought out the Australian operations from the Stahmann family. Deane Stahmann Junior came to Australia in 1965, established pecan plantations in Gatton, Queensland and Trawalla near Moree, NSW, built a nut processing plant here in Toowoomba and grew the business in Australia until his decision to succeed the business to long term employees Matthew and Jeff in 2006, which was implemented in 2008.

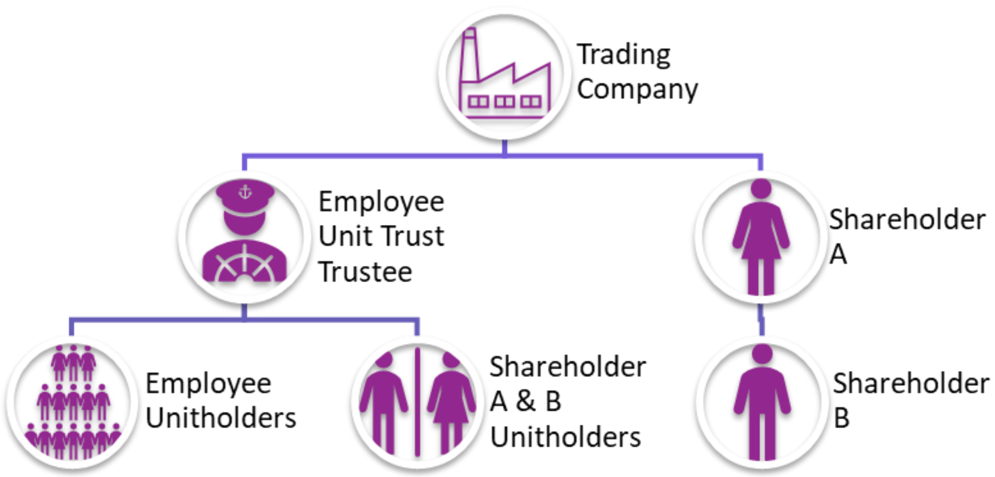
Matthew became the Managing Director while Jeff continued as the Factory Manager and also became a Board Member. Over time Jeff was replaced with Richard Genest, with Marketing experience, and Ross Burling, as Chief Executive Officer, and the business performed well experiencing stellar growth. All brand and trading names were also acquired.

The funding of the transaction is confidential, but most MBO's include either a combination of vendor financing with security, or external debt financing where dividend policies are developed recognizing the debt servicing obligations take a priority to shareholder dividends in the short to medium term.



2.5 Employee Share Scheme

(a) An employee share scheme is often used to encourage staff retention and performance. By unlocking shares and any dividends (distributions of profits from the company) to employees they may stay longer, strive to improve their and others performance, and generally contribute to the overall success of the organisation. An example structure is:



(b) Schemes may offer shares or rights (including options) to buy shares. Special tax considerations apply, particularly if share interests granted to employees are at a discount to the actual share price. Collaboration between advisors is critical at this juncture. Capital gains and income tax complications will arise on both sides and so all parties must take independent legal, accounting and financial planning advice before venturing down a path involving employee share schemes, or shareholdings more generally.

(c) Changes to the legislation governing employee share schemes took effect on 1 July 2015[27] (and include concessions for start-up companies) which are worth paying particular attention to during the 2020 COVID-19 pandemic because this may represent an opportunity for existing (or startup) businesses to leverage additional worker effort without additional cost in the short to medium term.

[27] ESS Legislation*

(d) Whilst beyond the scope of this paper, CGLaw has experience with the following alternative ways in which key employees may participate in accessing shares in or profits of the company trading the business:

(i) **Ghost shares** - where shares are promised at a later date upon certain milestones (often individual and/or company based) being achieved;

(ii) **Share transfer** - where shares are gifted or sold at a discount or for market value in order to retain key employees and unlock an increased level of commitment and dedication to the company;

(iii) **Share issue** - where shares of a certain class (perhaps without important voting or dividend rights) are issued to the key employees;

(iv) **Share Vesting Agreements** - common in startups, where shares are issued to founders, co-founders, key employees or board members and advisors but don’t vest (meaning the rights to voting control and dividends aren’t unlocked) until key vesting milestones (individual and/or business performance) or vesting dates are achieved, and often only after a cliff is reached (12 months or longer).

(v) **Profit sharing** - where part of the profits are made available for key employees - in such cases defining how the profit figure is calculated (what forms a part of the income and which expense items are deducted) is worth critical and detailed consideration and analysis.

(e) Beyond this paper, any share issue thought needs to be given to reviewing the company’s Constitution, ensuring a Shareholders Agreement exists and contains appropriate considerations including Drag Along and Tag Along rights which allow a shareholder to proportionately participate in subsequent share issues or disposals.

2.6 Sale

(a) Taking our Stahmann Farms example one step further, since the Management group bought out Deane Stahmann Junior back in 2008 they have realized additional value through selling shares in their company to Canada’s Public Sector Pension Investment Board (PSP Investments) which became a majority shareholder in the business along with existing shareholders in 2017. PSP Investments added a member to the Board or Directors and encouraged a move which saw the Stahmann Farms Enterprises Pty Ltd Chief Financial Officer also become a company director.

(b) For many businesses the opportunity to sell the business through a sale of part or all of the shares of the company trading the business is desirable.

(c) Alternatively, a straight sale of the entire business, rather than disposing through sale of shares in the company trading the business, is a common alternative. Buyers frequently don’t want to be saddled with any liabilities of the trading company and so prefer a clean business sale agreement.

2.7 Intergenerational Transfers / Family Succession Agreements

It is perfectly legitimate to document in a contractual and enforceable way an agreement which binds all relevant parties to a family succession agreement.

Perhaps the best way to sharpen focus on family succession planning is to consider a case where things didn’t go well.

The Vlahov Case:

Philip Chamberlain was an accountant in Geraldton, Western Australia. Phillip was the long term family accountant for an intergenerational farming family the Vlahovs. The Vlahovs were Tom (Dad) and three sons in their 40’s and their families. Mum had passed some years earlier.

The farm had been established in the 1930's and had run very successfully while Tom was alive. They had substantial land holdings acquired over time and ran a well-respected business with good practices and high levels of business wealth.

Tom had on a number of occasions visited Phillip's office to discuss family succession planning but ultimately died without taking any active steps or discussing the issue with his three sons.

Tom had a standard Will which equally divided his estate between the three sons.

All good you would think? This is what transpired:

(a) Dad passed away and the three sons started the process of his estate administration. As part of that process they were seeking assistance from Phillip. On the day in question the three sons were in Phillip's office to discuss the farm and business succession planning for the sons and their families. The land was still held by the three sons as executors pending discussions about how best to divide it along with the rest of the business interests. They were also discussing the separate contributions each had made to the business over time. That was where things became heated with a perception by one of the sons, Rodney, that he wasn't getting his fair share taking into account his greater contributions.

(b) An argument arose and Rodney stormed out of the meeting. He returned a short time later with a gun. It is not clear from available reports if Rodney intended to shoot Phillip or if Phillip was trying to defuse the situation and was shot in the process. Phillip was shot and killed. Rodney then fled the office and returned to the family farm where he took his own life.

(c) Phillip was survived by his wife, Heather, who was a GP in the local community and two small children, Mathew and Nicole.

(d) Rodney was survived by his wife and young son.

(e) Without being too dramatic Geraldton, a small town, was shaken to its core.

(f) It was particularly challenging period, especially during the time when police were trying to locate Rodney after Philip's was shot, but prior to Rodney's death.

(g) Hopefully your clients and any business owners are not going to go to such extremes, but if Tom had better dealt with his succession planning during his lifetime would this whole incident have been avoided? If the sons had each had a better understanding prior to Tom's death of how to move forward or even if Tom had handed over the reins prior to his death - things may have been different.

2.8 Lifetime Giving

(a) People like to control their own affairs - both in their life, and in death!

(b) A person's ability to dispose of their assets as he or she thinks fit after death is always subject to intervention by the family provision legislation which exists throughout Australia - in Queensland by Part 4 of the *Succession Act* (Qld) 1981.

(c) In the exercise of that jurisdiction, being the award of provision out of a deceased's person's estate, often in circumstances contrary to express wishes contained in a Will, Courts are to interfere to the least extent required to provide '*adequate provision for the proper maintenance and support of an applicant*'.

(d) Such an award is limited to being made out of property that is in the deceased person's estate - being property beneficially owned by the person as at the date of death.

(e) Against this reality, the clearest and most certain way to minimize the risk of disputes and challenges to a Will is to deal with your own assets during your lifetime. It is not uncommon for a person, having been advised on the potential for a family provision application to be made, to seek advice as to strategies that are available to ameliorate against that risk.[28]

(f) One available option is to reduce, by transactions entered into during life, the assets available to meet a claim.

(g) As noted by Chief Justice Gleeson in *Barns v Barns* (2003) 214 CLR 169 at [18] … *Provision under the Act can only be made out of the assets of which a person dies possessed. If property is not beneficially owned by a deceased, then (subject to later legislative amendments in some jurisdictions [excluding Queensland except as to donation mortis causa] it does not form part of the deceased's estate, and cannot be made a source of provision for a claimant under the Act…*

(h) That being said, transferring assets away during a person's lifetime comes with a promise of future difficulties. There is a loss of the benefit of the assets while living, and the fact that the assets may, in the hands of the recipient, be exposed to risk. There is also the expectation risk, where those who receive the assets relationships with the donor are irreparably changed because of the shift in the relationship which inexorably follows.

(i) There are a couple of topics worth considering in relation to Lifetime Giving:

(i) **Transferring Assets & Joint Ownership** - Transferring assets to joint tenancy ownership ensures the rules of survivorship apply on death, and assets move automatically to the remaining joint tenant owners of the assets. Those assets will not form part of the estate of the deceased.[29] A problem arises where the intended beneficiary predeceases the testator, because the strategy is ineffective. The property will come the wrong way.

(ii) **Outright Gift** - Assets gifted during a person's lifetime, whilst often motivated by avoiding a prospective family provision application, won't form part of the estate of the deceased. Pension and associated entitlements can be impacted (see above).

(iii) **Gift and Loan Back** - An option which can be useful as an alternative to an outright gift is a gift with loan back. This can facilitate access to cash during a person's lifetime whilst effectively stripping the asset from the estate of the deceased. Pension and associated entitlements can be impacted (see above).

(iv) **Superannuation** - Transferring assets into superannuation and creating a binding death benefit nomination is an option to prevent assets coming to an estate. Superannuation benefits do not automatically form part of an estate - that is so even if superannuation is mentioned by a person in their will. Death is a compulsory circumstance following which a benefit must be paid out in some form. Limits on the amounts which can be contributed to superannuation are a relevant factor. The disadvantages of using superannuation includes:

- subject to the person's age and ability to otherwise access their superannuation early, the asset may not be available to be utilized by a person during their lifetime;
- the limited persons in favour of whom a binding death benefit nomination may be made is, aside from the estate, dependents as defined in section 10 of the *Superannuation Industry (Supervision) Act* 1993 (Cth); and
- in circumstances where the nominated beneficiaries are not tax dependents, paying the death benefit directly rather than by use of testamentary discretionary trusts limits the ability to deal with the funds in the most tax advantageous manner possible.

(v) **Life Insurance** - The payment of life insurance to a nominated beneficiary directly rather than to a person's estate has the benefit of bypassing the estate. This is a contractual matter between the insured and the insurer and the policy proceeds do not, prima facie,

[28] As to the issue of the duty of care owed to a testator, see *Badenach v Calvert* (2016) 257 CLR 440.
[29] *Palmer v Bank of New South Wales* (1975) 133 CLR 150

become property of the insured. A potential disadvantage of this approach is the loss of the ability to utilize a testamentary discretionary trust in a tax effective manner.

(vi) Establishing an **inter vivos trust** - Establishing an inter vivos trust (or family trust) during a person's lifetime is designed to manage certain assets or investments and support beneficiaries such as family members. There are asset protection, tax benefits and benefits with particularly vulnerable family members through the use of an inter vivos trust. In addition, the individual who controls the trust can ensure they maintain control of the assets in the trust during their lifetime (subject to capacity issues).

3. What can go wrong?

3.1 **Control Issues** - Giving up assets while you are still alive can create some difficulties in terms of control. We have all heard about ruling from the grave, but ruling while alive takes on an entirely new meaning for those family members or close friends who receive the benefit of the lifetime giving whether morally or contractually based obligations exist, or are merely perceived to exist.

Equally, holding onto assets longer than necessary can starve others of the motivation to continue their journeys and result in fractured relationships unnecessarily.

Planning and communication is the key.

3.2 **Access to Equity** - Giving up the assets can remove access to equity which may have adverse impacts when it comes to aged care or retirement home living.

On the other hand, holding onto assets longer than might be necessary could limit the opportunities available to further grow a business or expand opportunities for those committed to the future.

3.3 **Cash Flow** - A natural consequence of giving over assets while living is the removal of cash flow which may ordinarily have been available to the testator.

The opposite problem may arise where cash is being generated where it can least be put to its best use, which may be regrettable.

3.4 **Disputation -** Challenges to a Will as a risk has been well canvassed already. Disputes may arise in other areas. Those individuals unhappy with an asset being removed from an estate might try to set aside the transaction. Lifetime giving might result in challenges to those transactions on grounds including:

(a) **Capacity** - The applicable legal principles for determining whether a person has the requisite mental capacity in respect of a transaction include[30]:

(i) There is a presumption in favour of capacity and so a person challenging capacity bears the onus of proving there was a lack of capacity.

(ii) The law doesn't prescribe any fixed standard of mental capacity in order for a transaction to be valid, just that a person have such mental capacity as to be capable of understanding (with assistance if necessary) the nature and effect of the transaction.

(iii) The degree of mental capacity is relative to the particular transaction being effected by means of the document or instrument.

(iv) Consideration should be given to the nature of the transaction itself, regarded from the point of simplicity or complexity, or of its rational or irrational provisions, its exclusion or non-exclusion of persons who may have a moral claim upon that person.

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[30] *Borthwick v Carruthers* (1787) 1 TR 648, 99 ER 1300; *Re Cumming* (1852) 1 De GM & G 537 at 557, 42 ER 660 at 668; *Masterman-Lister v Brutton & Co* [2003] 3 All ER 162 at [17]. See also the discussion of the applicable principles in *Dalle-Molle by his Next Friend Public Trustee v Manos and Anor* [2004] SASC 102

(b) **Undue Influence** / **Unconscionable Conduct** - *Birch v Birch* [2018] QSC 289 was a recent Queensland decision of the Supreme Court which considered the applicable principles of undue influence. Justice Douglas, who considered a situation where a mother was trying to set aside a transfer of one third of her rural property to her son, reflected on the long-standing decision of *Commonwealth Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 which identified the circumstances where a weaker party might be able to set aside a transaction for unconscionable conduct, including proving:

(i) the applicant was under a special disability;

(ii) the defendant knew or ought to have known of that special disability;

(iii) the defendant took unfair advantage of the position.[31]

4. Succession plan Check List

Collaboration around a comprehensive succession plan is essential for advisors and business owners to navigate through the challenges outlined in this paper.

A ten step check list is a great place to start.

4.1 Establishing Goals & Objectives

(a) Identify the need for a succession plan. Advisors often have trouble here because clients rarely say "*I need to do some business succession planning*'. However, over time you will pick up on clues your clients might be giving. **Listen carefully**, often around comments such as '*I'm starting to think about my retirement*', '*I have been diagnosed with a serious illness*', '*I want to expand my business*', '*I want to minimise my role in the business*' or '*I am not cut out for this anymore*', '*the stress of the business is getting to me*', '*my business partner and I are having some issues*', '*my kid who lives on farm and I are starting to have issues*', '*my kids' spouses want into the business*'.

(b) There will be many subtle variations, but they are there if you pay attention.

(c) Develop the vision, goals, and objectives of the business. This is hard to do but knowing this will shape the plan and it doesn't have to be complicated. The goals of the business could be a simple as '*making enough money so I can retire and fish*'.

(d) Determine the importance of family involvement in leadership and ownership of the business. Do they plan to pass the business on or are they happy to sell if they get the right offer.

(e) Establish personal retirement goals and cash flow needs. Are we talking living on the smell of an oily rag or five star luxury travel in Qantas first class to every country or somewhere I between. Identify family members' goals. Do any family members have any interest in the business or the requisite skills. Perhaps an external sale is the only option? Also consider whether a small change in the business is required, or a major disruption?

(f) Determine the need for an outside facilitator. These can be anyone who can level headedly deal with the process and persons and need not be an independent person but a trusted advisor already known by the parties.

(g) Establish team of professional advisors (solicitor, accountant, bankers, financial planners, insurance brokers, human resource managers). I cannot stress how important each member is to a successful plan.

[31] These principles of both undue influence and unconscionable conduct were recently considered by Justice Jackson in *Campbell & Anor v T.L. CLacher No. 2 Pty Ltd & Ors* [2019] QSC 218.

4.2 Decision Making

(a) Involve family members in the decision making process, as far as possible without compromising the purpose of the sessions. However feel free to exclude those who are not committed to the process or who are actively trying to derail the process. Importantly, identify who your client is at the outset!!!

(b) Establish a method for dispute resolution and get agreement. Do this early on - a written process can be invaluable to preventing emotions from stopping the plan being achieved.

(c) Document the succession plan in writing. This is essential because in five years time no one is going to remember the exact terms. It also works as the progress monitor to keep the parties on track. We honestly cannot emphasis enough the benefits of a well documented succession plan.

(d) Communicate the succession plan to family/stakeholders and get their agreement in writing.

4.3 Successors

(a) Identify the successors – both managers of the business and owners.

(b) Identify active and non-active roles for all family members. One child may never have set foot in the business but will want to be involved so set out their roles and what the expectations will be of them.

(c) Identify required training for the successor(s).

(d) Provide necessary training to the successor to ensure the future of the business.

(e) Will the retiring owner remain involved in the business? If so, define the role, very clearly!!

(f) Provide support to successors so that the transition succeeds and the business continues.

4.4 Estate Planning

(a) Develop estate and personal financial plan for owner, spouse and then succeeding generation. Provide for active and non-active family members (consider providing non business assets to non-active family members).

(b) Address taxation implications to the owner/business upon sale or transfer of ownership.

(c) Will non-active family members receive an **equal** share of assets? And is this necessary? While a good rule of thumb in an estate plan is equal shares to each beneficiary at the same level, if a particular party has contributed significantly to the growth of estate assets perhaps equal is not equitable. Consider if compensation can be provided through the Will or by the payment of wages or other support.

4.5 Consider the Transfer Methods and Corporate Structure

Various options should be generated and considered to address as many family and business needs as possible. At a minimum, one needs to consider the following and document your conclusion:

(a) The method of transfer may include outright purchase / sale (unrelated or related parties), gift, estate giving, transfer to key employee/s, transfer to another business owner or any combination. Tax strategies and implications must be considered. Legal and risk implications are essential. Control and rights and obligations must be worked out.

(b) If the business is to be purchased, financing options need to be considered, including financing from an external party or will the previous owner fund through vendor financing.

(c) If the business will be purchased, ensure the business can generate adequate after-tax cash flows to support debt and interest payments.

(d) Status of the persons and entities in the succession plan must be clarified. Inter-entity loans, Unpaid Present Entitlements (UPE's) or other concerns that effect the plan or values able to be realised. These are often great for tax but a nightmare for a business succession plan. However can a creative solution be identified - for example can they provide the source of the after business income for the exiting party - just need to consider forgiveness on death and also what might happen if business doesn't do so well in the future.

(e) Business structure options (e.g. sole trader, partnership, company / trust etc.). Consider a buy sell agreement / shareholder or unitholder agreement and other business agreements (partnership or joint venture).

(f) Insurance needs (life, disability, income, key person etc.) have been considered and how will they be funded and add in appropriate persons as they become key to the business.

4.6 Contingency Planning

(a) Identify potential problem areas: death, total and permanent disablement, matrimonial breakdown, drug or alcohol dependency, criminal or serious misconduct.

(b) Dispute / conflict resolution mechanisms have been considered and addressed in business agreements.

(c) Develop "what if" scenarios including action plans (including possible untimely death or disability of the owner, key staff and the successor). Lawyers can be really good at this process because we are seeing the worst-case scenarios on a daily basis so we can imagine a lot of scenarios.

4.7 Business valuation

Obtain appraisal to determine fair market value of business and assets. And keep it updated.

4.8 Exit Strategy

(a) Determine method of transfer chosen.

(b) Establish a timeline for implementation of the succession plan.

(c) Publish the plan so that parties are aware.

(d) Communicate regularly with all parties.

4.9 Implementation / Follow-Up

(a) A timetable has been established and is being followed. This is where you guys shine - as trusted advisors you know the client and their business. You can see if goals are being kicked and suggest solutions or revisit the plan long before the plan comes under strain.

(b) Review the plan on a regular basis and update it as necessary.

4.10 Document maintenance

At a minimum all of the following current documents should be maintained:

(a) Will and Enduring Power of attorney for the parties - lawyers should usually do this but it is important to check what they do - we write to our clients every three years but other firms will have different processes.

(b) Leases.

(c) Rental agreements.

(d) Licences.

(e) Inter-entity loans and agreements.

(f) Tax returns, financial records and financial statements for last five years.

4.11 It is important that this process be considered a living process. It is unlikely to look the same when finished as it did at the start. Issues will arise and as creative solutions are considered it may require a rework of the plan.

4.12 Finally, this should be a collaborative process. Not involving the correct advisors can be disastrous. The benefits far outweigh the challenges and as a bonus you become a trusted advisor for years to come.

4.13 Whether you are an accountant, a financial advisor, bank manager, HR consultant or insurance broker you are already entrusted with details that other participants to the development of the succession plan need to know and the regular (usually yearly at a minimum) contact you have is a significant tool in building the relationship with your client and assisting them through their business succession planning.

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September 2020