



Estate Round-up

Market influences and continually evolving estate law

By Tony Crilly

Share valuations

The global financial crisis has put everything in a new perspective, including estate planning and estate claims. By virtue of the drastic changes in share prices, there is simply less of an estate to distribute. Given that the courts are much more inclined to consider the merits of a claim and make cost orders against applicants that should not have made a claim, it is even more critical to consider the net value of the estate before taking a step.

The sharp decrease in share valuations has also made adjustment clauses in wills more difficult to administer. During the administration of an estate, the parties may, if there is provision in the will, adjust different parts of the estate between them, provided the valuations are equal or in the same proportions as the will dictates. Share market volatility affects the ability of beneficiaries to adjust those values compared with property and other assets.

What does the executor do when the share market has such a high degree of volatility when making decisions?

The executor must get independent financial advice. But what if the advisers themselves have no clue as to the best short-term option?

It could be that a beneficiary, who has time on their side, accepts a direct transfer of shares based on a reduced valuation and holds them until the market recovers.

History shows us that economies run in cycles and that by the time the estate is divided, the willmaker's total wealth may have increased significantly from the date that they signed their will document.

Recent developments

- ▼ Revenue Office views on main or principal residence exemptions (i.e. selling a testamentary trust asset triggers a CGT event because it strictly does not pass to the beneficiary of the estate).
- ▼ High Land Tax rates for non-fixed trusts in New South Wales, Victoria, Queensland and ACT.
- ▼ Fixed life interest and family trust elections.
- ▼ Special disability trusts.
- ▼ Removal of exemption for *splitting* or *cloning* trusts.

These are just some of the issues that must be considered carefully when drafting wills, including testamentary trusts and the suitability for asset protection, income tax concessions, family trust elections and management of estates into the future.

Choice of trustee

One of the constant dilemmas that arise in practice is the choice of trustee of an estate trust. Really, outside the primary beneficiary children or a trusted family friend, there are very few low-cost options. Some banks and trustee companies provide an excellent service for those who do not have a suitable nominee or where there is a need for an independent trustee on a continuing basis due to:

- ▼ disability of primary beneficiary;
- ▼ financial instability;
- ▼ Family Law disputes;
- ▼ drug or alcohol dependency; or
- ▼ difficult relationships.

We have seen case law where the appointment of two siblings as joint trustees of their separate testamentary trusts may not always be the answer. Involvement by sibling in the operation and management of a testamentary trust on an on-going basis can sometimes lead to a high level of friction and Court Applications. Willmakers need to be very careful when choosing a trustee of an estate trust given the possible future relationship of the intended beneficiaries.

Trust cloning

A significant development for estate trusts has been the removal of the exemption for CGT purposes for splitting or cloning trusts.

The Government has announced a proposal to abolish CGT trust cloning exception under paragraphs 104-55(5)(b) and 104-60(5)(b) of the *Income Tax Assessment Act 1997*. On 31 October 2008, the Assistant Treasurer announced that the Government will abolish the trust cloning tax concession on the basis that CGT will arise where there is a change in “*economic ownership of an asset*”. This single decision has caused the estate planning process greater difficulty than any other single decision in recent years. This removes the ability for estate trusts to be split and assets within them divided between children to cure any disputes or enable a separate investment path to be undertaken.

Family law

It is worth mentioning the new de facto legislation that has been handed by the States to the Commonwealth. Rather than dealing with de facto property claims in the State-based property law act, the various claims will now be dealt with in the *Family Law Act*.

Binding Financial Agreements are a very useful tool for parties in a second or third marriage to dictate how their property will be split and, therefore, what property will fall inside or outside their respective estates.

Moving on

The cases continue to demonstrate that estate law is a moving target. There are a series of cases that show that the formalities of preparing and executing a will can be waived. There have been recent cases of suicide notes where sufficient intention was shown to have been expressed to constitute a testamentary act. As a result, the suicide note was found to be the will and the transfer of a property pursuant to the note as a will was upheld.

No doubt 2009 will give rise to interesting changes. Watch this space!