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YOUR WILL AND ASSET PROTECTION

A number of people who read our recent Estate Planning Health Checklist have asked me to explain what I meant by “asset protection”, and how this works in the context of your Will.

The Old – Unprotected Way

In an “old fashioned” Will, you would simply provide for your assets to go to your wife/husband/partner and/or your children. Whilst such an arrangement may be emotionally satisfying, it leaves the inheritance of your loved ones unprotected, and therefore exposed to the risks and uncertainties of modern life.

Types of Assets and How They Are Held

In most situations your assets fall into the following categories (although there are many varied combinations and permutations) –

- Assets which you own personally, alone or with someone else (such as your partner). Typically your home and other personal assets fall into this category;
- Assets which you don't own personally but which are held in a family discretionary trust. Typically business and investment assets fall into this category. The Trustee may be a Company, controlled by you, or it could be you personally;
- Superannuation assets (which are becoming increasingly important as a result of recent changes in the law to encourage superannuation). These may be held in a self-managed superfund controlled by you or you may hold your superfund assets in a public superannuation fund;
- Life insurance, particularly where your estate is the beneficiary.

The Risks

The kind of risks to which these inheritances are potentially exposed, in the absence of an asset protection structure, include, for example:

family breakdowns and divorce;

the challenges of “blended families”;

The Risks

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insolvency;

professional negligence;

drug and alcohol abuse and dependency;

getting sued by vicious creditors;

an inability to manage one's own affairs. (Don't we all have or know wonderful adult kids who have no idea about how to manage or look after money).

The Solution

The asset protection solution, which can be extremely effective in protecting your loved ones, both from themselves and from others, should be an integral part of a properly structured modern Will. What happens is that legal ownership and control of your assets is separated, through a testamentary trust structure, from the people who will enjoy and benefit from these assets, but without exposing them to the above risks.

Controlled Assets

In the case of assets which are already held in a discretionary trust, you cannot directly bequeath these assets because they are not owned by you. However what you can and should do through your Will, is to ensure that the control of these trust assets ends up in the right hands, and also that the ultimate controllers whom you appoint have a clear indication from you as to how you expect them to exercise that control.

Packaging

It is not just a matter of leaving your assets to your chosen beneficiaries, but rather a question of "packaging" these assets in such a way that you create an ownership and control structure to ensure that your assets remain in the family, are properly looked after, and are not exposed to the kind of disasters that can befall any one of us.

Mike Lyons

VPro Lawyers & Corporate Consultants