



Précis Paper

Estate Planning and the Legal Personal Representative

This is a comprehensive presentation that covers many important issues in relation to estate planning, potential liabilities for a legal personal representative, and important taxation issues.

Discussion Includes

- Executors / Executrixes and Administrators vs Trustees
- Informal wills
- Liabilities for a legal personal representative
- What can a trustee do if they have breached their duties as trustee?
- Stamp duty liabilities for beneficiaries
- Power of appropriation
- Capital gains tax and GST considerations
- Testamentary trusts

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Estate Planning and the Legal Personal Representative

1. In this edition of BenchTV, Michael Bennett (Barrister, 13 Wentworth Selbourne Chambers, Sydney) and Justin Brown (Barrister, 13 Wentworth Selbourne Chambers, Sydney) discuss estate planning issues, including liabilities for a legal personal representative and taxation issues.

Executors / Executrixes and Administrators vs Trustees

2. The term "legal personal representative" encompasses executors/executrixes and administrators carrying out their functions up to the end of the administration of a deceased's estate. For many purposes, the legal personal representative will also be a trustee, and the term is picked up in s 5 of the *Trustee Act 1925* (NSW). However fundamentally, the legal personal representative has been given the job of administering someone's estate and the focus is on bringing in the assets, paying the debts, and dealing with the personal aspects of the estate such as burial. In contrast, a trustee has more of an ongoing role, and may hold the assets for a number of years once the estate has been administered.
3. A legal personal representatives is required to bring in the assets of the deceased, pay expenses, and distribute the residuary estate in accordance with the will (or intestacy or order of the court): see *Re Chirside* [1956] VLR 295. *Hansen v Young* [2004] 1 NZLR 37 also sets out the core roles of the legal personal representative. The legal personal representative must also deal with the payment of creditors in claims against the estate, such as a family provision claim.
4. A trustee's core responsibilities are gathering the funds from trust assets; preserving trust property; and ensuring that the terms of the trust are carried out.
5. There is no clearly enunciated time when a person will cease to be the legal personal representative of the estate and becomes the trustee of the assets, but generally a person ceases to be a legal personal representative in relation to a specific asset when that asset has been administered so far as necessary under the will. Once there is nothing in a particular asset that relates to the estate administration other than holding it for the beneficiary, a person will move from a legal personal representative to a trustee in relation to the asset. This means that a person could be the legal personal representative over some assets, but the trustee over others that have already been administered.

6. Where there are multiple trustees, trustees must act unanimously. In contrast, legal personal representatives can act independently of each other.
7. Both executors and trustees are indemnified for actions they take that are authorised in that role, and statutory indemnities may also apply. However, contrary to the position for a trustee, a legal personal representative will be held liable to the extent that they diminish the estate (by distributing to beneficiaries) and a later debt arises. This often arises in a taxation context where a tax debt is only revealed after the estate has been distributed. The legal personal representative has a right of indemnity from the estate for this liability, however this is problematic if there is nothing left in the estate.

Informal Wills

8. For a will to be valid, it must be a document, it must state a testamentary intention, and must be witnessed by two adults who will not benefit under the will.
9. An informal will otherwise records a testamentary intention of the deceased but may fall down on some of the formal requirements. Most commonly, it is not signed or it does not comply with the witness requirements.
10. Section 8 of the *Succession Act 2006* (NSW) replaced s 18A of the *Wills, Probate and Administration Act 1898* (NSW), and the cases that interpreted s 18A remain relevant to the interpretation of s 8. Section 8 considers the situations in which the court can dispense with the requirements for execution, alteration or revocation of wills. Cases such as *Ian Yazbek v Ghosn Yazbek* [2012] NSWSC 594 make clear that the court is looking to determine the intention of the testator, and whether the court would be honouring their intentions by admitting the document despite the lack of formality. Informal wills could also be an alteration or revocation of the current will.
11. Mr Bennett advised that it is incumbent on practitioners to satisfy themselves that there are no other records of testamentary intention, even if there is a will (particularly if it is made some time prior to death).
12. In *Ian Yazbek v Ghosn Yazbek* [2012] NSWSC 594, the court held that a Microsoft word document entitled "Word.doc" found on a computer could record testamentary intentions. In *Re Yu* [2013] QSC 322, iPhone notes were found to form part of a testamentary disposition. The court will ultimately consider whether the document was a planning document, or whether it was actually the final intention of the testator. In *Costa v The Public Trustee of NSW* [2008] NSWCA 223, but for the disposition that was argued for, the property would have gone to an ex-partner of the deceased. The deceased had written a suicide note in

the form of a poem that included the words "I think I'm dying and I want you to have my house", which was aimed at his parents. The Court found that the poem was a disposition because it was made very close to death and clearly contemplated his passing.

Liabilities for a Legal Personal Representative

13. The legal personal representative takes on the obligations that the estate had. The role of the legal personal representative is to finish what the testator was unable to finish him or herself. The executor should make sure that they are comfortable taking on the role, and can renounce the role should they not wish to take it on. The consequences of dealing with claims against the estate are not just financial but can also be emotional.
14. Section 91 of the *Probate and Administration Act 1898* (NSW) gives the legal personal representative an indemnity if the grant of probate is invalid. In addition, at law, a trustee (that includes a legal personal representative) is indemnified for any actions that are taken within the scope of their role: *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360. The indemnity is focused more on the situation where an executor is sued by a third party, not by a beneficiary in relation to the way that the estate was administered
15. Clauses in wills may state word to the effect "My legal personal representative shall not be liable for any act that they do in this role". Clauses of this nature are binding insofar as the estate is concerned (intra-estate) but cannot give the legal personal representative protection vis-à-vis third parties. However, the legal personal representative must still be acting within the proper confines of the role in order to receive the benefit of the indemnity, and it will not protect the representative from liability in cases of fraud, dishonesty or mala fides: *Armitage v Nurse* [1988] Ch 241. Moreover, the clause will be construed strictly and given no broader operation than what the clear terms provide.
16. If a trustee unknowingly commits a breach of their duty, they can approach the court and seek advice in certain circumstances under the *Trustee Act*. Section 85 of the *Trustee Act* gives the court power to relieve a trustee of the consequences of any breach of trust they have committed where the trustee has acted honestly and reasonably and ought fairly to be excused for the breach.

Stamp Duty Liabilities for Beneficiaries

17. Stamp duty applies under the *Duties Act 1997* (NSW) when there is a dutiable transaction in relation to a dutiable property (which includes transfers of land). If the legal personal representative (or a trustee) transfers real property to a beneficiary, absent an exception, stamp duty is payable. Section 63 of the *Duties Act* allows for a \$50 stamp duty to be

imposed on a transfer of dutiable property by the legal personal representative to the beneficiary where:

- The transfer was made under and in conformity with the trusts contained in the will;
- The transfer of property was the subject of a trust for sale contained in the will; or
- It is an appropriation of the property of the deceased person in or towards satisfaction of the beneficiary's entitlement under the trusts contained in the will.

18. The last scenario is illustrated by the following example provided by the Chief Commissioner of State Revenue in NSW:

Two beneficiaries (A and B) are equally entitled to the residue of a deceased estate which comprises:

- *The family home value at \$500,000*
- *Shares value at \$500,000*

Each beneficiary is entitled to half of the family home and half of the shares. The trustee appropriates the family home and the shares so that the family home will be transferred 100% to A and the shares will be transferred 100% to B.

Concessional duty of \$50 will be chargeable on the transfer of the family home to A.

19. The appropriation concession is to be contrasted with a deed of family arrangement, where it is the beneficiaries who together decide how to split up the assets. In that case, the arrangement will not benefit from the \$50 concessional duty. The best outcome is therefore to get the legal personal representative to make an appropriation. There is usually a specific power within the testamentary disposition to allow for this to happen.

Capital Gains Tax and GST Considerations

20. Division 128 of the *Income Tax Assessment Act 1997* (Cth) deals with deceased estates. The beneficiary will take the property with its inherent tax characteristics that the deceased had. This means that if the property is pre-capital gains tax, the beneficiary will take the property in the CGT net but the gain from the date on which the property was acquired up until the date of death will be removed from the CGT net. Only the further increase in the value of the property after the date of death will be subject to CGT. This means that if there is no tax payable on the date of death because the main residence exemption applies or it is a pre-CGT asset, the growth in the value of the asset until the date of death is grandfathered in as tax-free, and the beneficiary will only pay tax on the growth going forward.

21. Division 260-E of Schedule 1, *Taxation Administration Act 1953* (Cth) makes the legal personal representative personally liable for the tax that was already owed by the estate. The tax that arises for the deceased before the administration of the estate is carried out is deemed to be a liability of the legal personal representative. The tax that accrues to the estate while it is being administered is also a tax liability of the legal personal representative, but not through any deeming provision. The legal personal representative would be indemnified out of the estate for this tax liability. This is similarly the case for GST.
22. The passing away of the deceased also would not affect bankruptcy of the estate. If the estate is insolvent, the legal personal representative is not personally liable for the tax debts unless they have distributed the estate assets that have made the estate unable to meet those debts.
23. On death, the registration of the deceased for GST is cancelled. An installment period of a deceased registered for GST, who was an installment GST payer, does not terminate on death but there is no obligation to make any GST installment for the period starting after the date of death: s 162-85 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

Testamentary Trusts

24. A testamentary trust is an express trust that is established under a will or codicil or some other testamentary document. The four key elements of a testamentary trusts are: (1) at least one trustee; (2) at least one beneficiary; (3) there must be trust property over which the trustee's conscience is impressed with the obligations for the beneficiary; and (4) the testamentary trust has to arise from a testamentary document.
25. There is a tax advantage to extending out a testamentary trust, as any income from a testamentary trust provided to a beneficiary who is a minor will be subject to the adult tax rates and not the penal tax rates for minors under Division 6AA of the *Income Tax Assessment Act 1936* (Cth). Other benefits for establishing a testamentary trust include protecting a beneficiary who is not yet mature enough to look after the assets, or needs protecting from themselves, as well as asset protection benefits if a beneficiary is sued in a personal capacity. A trust also provides flexibility in who will receive the income in any given year. However, it will be difficult to amend a trust to amount to a resettlement, and therefore flexibility in the trust is key.

BIOGRAPHY

Michael Bennett

Barrister, 13 Wentworth Selbourne Chambers, Sydney

Michael Bennett was admitted as a solicitor in 2005 and called to the NSW Bar in 2011. He practices in commercial and equity matters, including taxes, corporations and insolvency, and is a Chartered Tax Adviser as well as a lecturer in Tax Law at UNSW. Michael is also Lieutenant in the Australian Navy Reserve. From 2004 to 2006 he was an Associate to his Honour Judge Marien SC of the District Court.

Justin Brown

Barrister, 13 Wentworth Selbourne Chambers, Sydney

Justin Brown was admitted as a solicitor in 2006 and called to the Bar in 2013. Justin is also a lecturer in succession law at the University of Sydney and has been a guest lecturer in the courses offered by the College of Law in the Master of Applied Law (Wills and Estates).

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Legislation

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Duties Act 1997 (NSW)

Income Tax Assessment Act 1997 (Cth)

Taxation Administration Act 1953 (Cth)

A New Tax System (Goods and Services Tax) Act 1999 (Cth)

Income Tax Assessment Act 1936 (Cth)

