

Estate planning and vulnerable beneficiaries

Presented by

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Tom Meagher | Director

Tom has over 25 years' legal and business experience including:

- Being an owner and director of his former firm, Murfett Legal;
- Previously working for local law and major national firms;
- Being the national operations manager for a financial advisory IT platform provider;
- Previously being the WA Legal Technology Group Manager for a National Law Firm;
- Owning and managing an IT consultancy business; and
- Being a director and in-house counsel for a public company.

He is also a regular publisher of articles and is one of Australia's leading presenters of legal seminars to and for various professional bodies, associations and government authorities on a wide range of business law and professional development-training topics including:

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INTRODUCTION

1. What is a vulnerable beneficiary?
2. Problems using “standard” trusts
3. Ways to safeguard the interests of vulnerable beneficiaries
4. Protective Trusts
5. Special Disability Trusts
6. Problems with Protective Trusts (and solutions)
7. Questions and other takeaways

WHAT IS A “VULNERABLE BENEFICIARY”?

Can include:

- persons with a physical or mental disability or illness
- those with addictions, e.g. drugs, alcohol, gambling
- bankrupts / those at risk of bankruptcy
- where there are family problems / risks, e.g. where there are relationship issues with spouses, step-children, blended families or estranged families
- irresponsible persons or spendthrifts
- emotionally vulnerable or are easily led / influenced
- minors (under 18 years) or those below the “age of entitlement”

PROBLEMS USING “STANDARD” TRUSTS

- *inter vivos* discretionary trusts and testamentary trusts
- beneficiaries (specified / primary / general) of “standard” trusts (made *inter vivos* or by Will) are typically appointed trustee / appointor / guardian and have ultimate control over their trusts (including powers to hire and fire trustees and distribute income and capital)
- such powers / offices are generally unsuitable in the case of vulnerable beneficiaries
- also *Saunders v Vautier* rule where beneficiaries have an absolute, vested and indefeasible interest in capital and income of trust

WAYS TO SAFEGUARD THE INTERESTS OF VULNERABLE BENEFICIARIES

- **Protective Trusts**
 - testamentary trust
 - *inter vivos* trust
- **Special Disability Trusts**
 - limited scope
 - severe disabilities only
 - very prescribed / restricted investment provisions
 - designed primarily for accommodation / care needs
- **Effective Will Drafting**
 - exclusions, flexible terms, equalisation provisions



PROTECTIVE TRUSTS (1)

Examples where Protective Trusts might be used:

- bank account opened by parents for a child under 18 years of age – a protective trust is formed under the account terms and conditions and parent are appointed trustees
- trust formed to hold large compensation pay out for accident victim with severe brain injury and spouse and/or parent are appointed trustees
- deceased estate money held in trust for only child with gambling addiction who is unable to manage their financial affairs effectively and, in the absence of suitable family member, a professional trustee company is appointed trustee



PROTECTIVE TRUSTS (2)

- s61 of the *Trustees Act 1962* (WA)
- made either *inter vivos* or by Will
- power vested in trustee to use income / income and capital to ensure vulnerable beneficiary is adequately provided for
- trust assets do not form part of vulnerable beneficiary's estate as beneficiary only has the right to be considered by a trustee, not a right to the income / capital of the trust



PROTECTIVE TRUSTS (3)

- if vulnerable beneficiary ceases being vulnerable, provision may be made to shift power/administration functions from original trustee to the beneficiary (and vice versa)
- there are no set conditions, e.g. a Protective Trust may provide that:
 - an income amount is provided to vulnerable beneficiary each year, or
 - trustee has absolute discretion to distribute, or
 - restrictions are imposed so trustee may use income (not capital) to pay for beneficiary's education maintenance and advancement only, or
 - time limits imposed e.g. on reaching 25 years of age the beneficiary becomes entitled to trust capital
 - vulnerable beneficiary is bypassed, and their children / greater issue are entitled to receive trust assets instead

PROTECTIVE TRUSTS (4)

TERMINATION

- maximum trust perpetuity period in WA is 80 years from establishment of trust but deed may provide for less
- Protective Trusts may terminate on death of vulnerable beneficiary (but can continue for their children and then switch to “non-protective” trust when children reach age of majority (e.g. 18, 21 or 25))
- may include provision for trustee to terminate



SPECIAL DISABILITY TRUSTS

- not covered in detail in this presentation
- only applies if severely disabled
- special limited form of trust recognised for purposes of persons receiving support payments under the *Social Security Act 1991 (C'th)* and *Veterans Entitlements Act 1986 (C'th)*
- primarily for accommodation and care needs
- created *inter vivos* or by Will
- very prescribed / restrictive, e.g.:
 - single beneficiary only
 - indexed maximum limit for funds held (house plus \$)
 - trustee must be >18 and independent (i.e. not family) or 2 or more family members
 - investment restrictions and financial statements must be audited
 - prescribed model trust deed

PROBLEMS WITH PROTECTIVE TRUSTS (1)

- Protective Trusts created by Will (testamentary trusts) do not provide absolute protection from family provision claims
- eligible applicants may succeed in arguing they have not been adequately provided for under a deceased's Will
- Solution?
 - use an *inter vivos* trust made during the life of the contributor / settlor to give advance separation between personal and trust assets
 - note that this may not be suitable where tax effectiveness is more important than asset protection

PROBLEMS WITH PROTECTIVE TRUSTS (2)

- choice of trustee when e.g. only child, limited pool of family members, single parent, etc
- Solution?
 - consider appointing the following as trustee:
 - parent / surviving parent / trusted relative or friend
 - Public Trustee *
 - professional trust company * e.g. Perpetual or Australian Executor Trustees
 - professional advisor, e.g. accountant with long term / ongoing relationship / knowledge about their clients' affairs
 - combination of the above

*** be fee aware!**

PROBLEMS WITH PROTECTIVE TRUSTS (3)

- Protective Trust provisions do not align with changing circumstances, e.g.:
 - the Will cannot be changed because the testator loses capacity, or
 - the testator dies and the Will does not adequately address the needs of a vulnerable beneficiary
- Solution?
 - ensure the Will is drafted so it has inherent flexibility to adapt to changing circumstances (see next slide)
 - Statutory Will order (*Wills Act 1970* (WA), Pt XI) if lack of capacity
 - complex area of law outside scope of this presentation
 - limited application and several hurdles to overcome
 - very little WA case law (*R v J* [2017] WASC 53)

PROBLEMS WITH PROTECTIVE TRUSTS (4)

- inequality (perceived or real) between beneficiaries of a deceased estate giving rise to family provision claims, e.g. where there is disparity between *inter vivos* transfer of assets and later distributions under a Will
 - need to determine whether *inter vivos* transfers are:
 - i) outright gifts,
 - ii) portions, or
 - iii) loans?
 - presumption of advancement
- Solution?
 - be clear as to what has occurred e.g. forgiveness of debt in Will, loan documents and evidence, portion (advance payment of inheritance), deed of gift, etc
 - equalisation provisions in Will to address different asset classes:
 - personal assets
 - superannuation assets
 - insurance policies
 - joint assets e.g. bank account or house

ANY QUESTIONS?

OTHER TAKEAWAYS / CONSIDERATIONS:

- beware trust resettlement risks
- asset protection vs tax considerations
- there is no “one size fits all” deed or Will
- always get (appropriate and qualified) legal advice first
- remember the 3 golden rules:
 - i) Read the deed,
 - ii) Read the deed,
 - iii) Read the deed!

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