PERSONAL FINANCIAL
STRATEGIES
YOUR PERSONAL GUIDE TO WEALTH CREATION

A DIFFERENT PERSPECTIVE

Enduring power of attorney or guardianship?

As people get older, they need to make decisions about how to handle their estate and their personal interests in the event of sickness or death.

There are a number of options to think about when making these choices:

- Enduring power of attorney (financial)
- Enduring power of attorney (medical treatment)
- Enduring power of guardianship

Enduring power of attorney (financial)

A financial 'enduring power of attorney' is a legal document that remains valid if the nominator become mentally incompetent. The agent appointed can make any legal and financial decision that the nominator would have been able to make. Their powers can be plenary or limited, but it is important to consider whether any limitations imposed would interfere with the agent's ability to act properly on the nominator's behalf.

Agents can be appointed in a variety of ways. If more than one agent is appointed, the document can stipulate that they may act jointly or severally. If they must act jointly, the agents must agree on any decision they make. If they may act jointly and severally, an agent can make a decision by themselves. An alternative agent should also be chosen, one who will act should the first agent be incapacitated.

Once an agent is appointed, the power will last until the nominator chooses to end it, they die, a specified terminating event occurs, or the power is cancelled by the court.

Enduring power of attorney (medical treatment)

An 'enduring power of attorney' for medical treatment authorises the agent to make decisions about medical care

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RICHARDS & CO

2/73 HAY STREET
SUBIACO, WA 6008

TEL (08) 9381 6225
FAX (08) 9388 8078

E-MAIL
cpa@richardsandco.com.au

WEBSITE
www.richardsandco.com.au

PRINCIPAL
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Taxation
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and treatment. The power takes effect if and when the nominator becomes incapacitated, whether temporarily or permanently.

The agent holds all the power over treatment that the nominator would have held. They are meant to take into account all personal views and wishes when making such decisions. The agent can refuse all medical treatment except emergency treatment and palliative care.

Enduring power of guardianship

In the case of mental and physical disability, a guardian can be appointed by the courts. In general, a guardian is granted powers only as is necessary to accomplish what the ward cannot accomplish independently. Unlike the 'power of attorney', each state has a guardianship board or tribunal which supervises the guardian.

A legal document can also be created called an 'enduring power of guardianship', that authorises a person to make personal, lifestyle or treatment decisions on the behalf of the ward. One enduring guardian or joint enduring guardians can be appointed. Joint guardians must act together and reach agreement on any decisions they make. It is advisable to choose no more than two guardians.

When creating the guardianship document, consider whether the guardian is allowed plenary decision making power, or whether it should be limited. For example, they may be instructed that they can only make choices regarding treatment, or that they can only act if they are in the same state as the ward at the time.

Appointing an 'enduring power of guardianship' is one way to control who will make important lifestyle choices in the circumstance of incapacitation.

However, a 'power of guardianship' cannot be used to make financial and legal decisions. It is advisable to use of a combination of these 'powers' to ensure that both financial and personal concerns are accounted for in the event of illness or death.

More detailed advice should be sought when making these important decisions. Certainty over financial, legal and medical affairs is vital, and will make a difficult time much simpler for family and friends.

Consider super binding nominations when estate planning

Many people forget about their superannuation when planning for their family and dependants after their death. Making a binding nomination of beneficiaries for a super fund is worth considering when estate planning.

Under superannuation law, the trustee of a super fund has the discretion and obligation to distribute the funds to the beneficiaries, as they believe is fair and reasonable. Some superannuation funds, however, allow the person in control of the fund to nominate persons to whom the super should be paid on the event of death. This removes any uncertainty over who receives the super and death benefit.

A binding nomination will bind the trustee and allow a dependant or a personal legal representative to be named. Any dependant can be nominated under superannuation law, including a spouse or partner, child or person financially dependant at the time of death. It is also possible to nominate an estate, which means assets as well as super payout will be distributed according to the will.

There are a number of benefits to making a binding nomination. For example, beneficiaries are able to access super tax free. A binding nomination can also be used to direct superannuation benefits away from an estate, reducing the likelihood of claims against the estate from over-looked beneficiaries or creditors. Keep in mind that if super money is left to someone other than a spouse or dependant, it can attract up to 31.5% tax.

Nominations must be updated or confirmed every three years. The binding nomination can be revoked or changed at any time. It is also worth making a contingent binding nomination. This protects the decision in the event that the non-contingent nominee dies before or at the same time as the nominator.

Ensure that decisions about who to nominate are made carefully. Once a nomination is made, the super trustee will have no discretion to consider any dependants who were not named. For example, keep in mind that a nomination is not revoked immediately if divorce occurs. Also remember that the Family Court can overturn a binding nomination.

A binding nomination is easy to make. Most super funds will have a simple form to be filled out in the presence of two witnesses. Members of Self-Managed Super Funds should ensure that their trust deed provides how and to whom they want their benefits paid when they die.

Get in contact with the superannuation fund and an estate planner to talk about binding nominations. Making a nomination could smooth transition for dependants and the estate after death.

Tax avoidance on property sales

This year the ATO are targeting property developers and investors who avoid declaring tax on sales of property. GST, capital gains tax and income tax compliance will be the focus of a specialised program over the next four years.

It is vital to report all tax obligations on property sales. The ATO will be data matching Business Activity Statements (BAS) with income tax returns, as well as reviewing information from the Office of State Revenue and the Land Titles Office.

The ATO are particularly targeting developers that avoid their tax obligations by collecting GST from the property purchaser and then failing to pass this on to the ATO. Usually by de-registering from the GST system or not reporting the sale within BAS.

The ATO are aware that some developers remain intentionally outside the GST system. Many purposefully fail to lodge their BAS and income tax return while claiming GST credits throughout construction. The ATO have announced that infringement will be met with penalties or prosecution.

There are a number of issues to think about when involved with property sales, to ensure that you are GST compliant. If you are carrying out an enterprise, then you must be registered for GST. Some think that a property sale does not fall under the definition of an enterprise, but it may, whether buying, selling, leasing or developing. Be aware that most 'one-off' transactions are required to be registered for GST. If the turnover from the activity is more than the GST registration threshold, then GST registration may be required. Generally, the amount of GST payable is equal to one eleventh of the sales price.

Also note that under GST, property includes land, an interest in land, land and buildings, rights over land and a licence to occupy land.

Make sure that when undertaking any property related transaction, all relevant documentation is kept, including contracts of sale, any calculations and tax invoices.

The only property related sales that are GST free are sales of basic food, sewerage and water, export, non-commercial charitable activities, education and health services and the sale of a business as a going concern. It is advisable to get professional advice when involved with property sales, to both avoid penalties and reduce any excess tax.

Amendments to Division 7A

Two changes to Division 7A are worth paying attention to this year. All companies should take steps to ensure that their business practices are compliant.

Firstly, changes made to Division 7A in July 2009 mean that private company assets given to shareholders for their use, may be taxable as deemed dividends if they are provided for less than their arms length value. Such usage will be considered a payment from a private company.

It is possible to use independent information to determine the arms length value of usage. Records must also be kept regarding the details of the asset, periods of usage, value of usage, valuation and payments made by the shareholder.

Secondly, the July 2010 ATO tax ruling indicated that unpaid present entitlements (UPE) from trusts to corporate beneficiaries can now be treated by the ATO as Division 7A loans. This has broadened the range of transactions that can be taxed under the Division. The ruling is an integrity measure that attempts to ensure that private companies cannot make tax free distributions of profits to shareholders or their associates in the form of debts forgiven, loans or payments.

An UPE can also occur when a trustee makes a beneficiary entitled to some or all of the income of the trust for that particular income year, but continues to hold those funds on trust for the beneficiary.

A loan by a private company will be a Division 7A loan when:

- The company has a UPE and an agreement as to a loan can be implied.
- The company has an UPE and there's an express loan agreement to the trustee.
- The company owns a UPE and there's a loan within the extended meaning, in that the company provides a loan to the trustee but does not call for payment or simply authorizes the trustee to use those funds for trust purposes.
- Instead of paying money to the company, a trustee pays or applies an amount of the UPE for the benefit of the beneficiary.

This change affects small businesses that use private companies as beneficiaries in order to limit tax on trust distributions. Be sure to review the ruling and get advice on how it will impact on trust positions.

New SMSFs

Opening a self-managed super fund is a very popular option for those planning ahead for their retirement. There are a number of pitfalls that many SMSF members encounter, which may indicate that a public fund would be a more appropriate strategy.

Not knowing the SMSF rules

If a SMSF is deemed non-compliant by the ATO, then the fund will be taxed at the highest marginal tax rate, and up to half of the fund may be lost in tax. The ATO are on the constant look out for non-compliant funds, especially as the industry has exploded so rapidly in recent times. Common rule-breaking consists of providing loans to members or illegally gaining early release.

Having an insufficient initial balance

Industry consensus says the $200 000 is the lowest possible amount that a SMSF's combined value should be. This amount would off-set compliance costs. Unless there are plans to rapidly increase the value of the SMSF, it may be more appropriate to use a publically offered fund. It is important to factor in investment and advisory costs when calculating the value of the fund.

Withdrawing SMSF funds for your business needs

SMSF funds should not be regarded as money that can be withdrawn to cover business costs. Regulation bars fund members from being able to withdraw loans for financial assistance. There is also a ban on lending to members, and only a few loopholes that allow lending to entities owned by members or to relatives.

Members working overseas

For an SMSF to be compliant and receive concessional tax treatment, it must be an Australian resident fund. If members work overseas, the SMSF may be at risk of losing its complying status. The law requires that trustees and most contributing members work and live in Australia. Central management and control of the fund must also be in Australia.

Failing to keep proper records

For those people who barely read their yearly superannuation reports, a SMSF is possibly a bad idea. A SMSF requires detailed paperwork, from contract notes to minutes of investment decisions. If the members of the Fund are poor record keepers, it is worth hiring someone for that purpose, although this adds an extra cost.

ATO targets in 2011

Those who are setting up SMSFs should be aware that the ATO have announced an early intervention strategy to focus on 'at-risk' new funds. For example, those funds that are seen as risk of illegal early release of superannuation.

When setting up an SMSF, make sure that it is truly the best option and that all relevant rules are fully understood and complied with.

The Bookshelf

Social BOOM!

How to Master Business Social Media to Brand Yourself, Sell Yourself, Sell Your Product, Dominate Your Industry Market, Save Your Butt,..

... and Grind Your Competition into the Dirt

Author: Jeffrey Gitomer

"Social Boom" is essential reading for all business owners who want to expand their online market presence. This book explores the variety of ways businesses can make connections with their customers, whether via blog, e-zine or Facebook. The aim of the book is to help convert that online relationship into real business.

Gitmor and a variety of other social media experts give a wide range of views and opinions about social media. They explore the many ways that social media can build a brand and a reputation.

Gitmor offers strategies and tips so that the reader can put the book's suggestions into practical action. These methods are not overly complicated, and the less technologically savvy can certainly build their online presence based on his helpful advice.

There are some basics that Gitmor offers, such as putting an hour a day into social media, whether it is research of the online competition, assessing what regular customers respond to or simply think about innovative strategies to engage new customers.

Almost nothing needs to be known about social media to benefit from this book. In fact, for business owners who haven't even heard of business social media marketing, then this book is an essential beginners read. The principles contained in "Social BOOM!" can apply to any business type and help boost productivity.

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