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Matthew Burgess, Patrick Ellwood and Tara Lucke are co founders, with Naomi Arnold, of View Legal.

Having previously founded Australia’s first virtual law firm as a wholly owned subsidiary of one of the country’s leading independent law firms, View Legal is results focused and passionate about delivering new solutions in a way that aligns with their ‘SPS’ - service and price satisfaction - guarantee.

As authors, each of Tara, Patrick and Matthew are widely recognised as experts in their fields, who constantly create innovative strategies for the growth, management and protection of wealth.

They are published across a range of topics including:

1. The Nine Steps to a Complete Estate Plan.
2. The Five Foundations of Business Succession.
3. The Eight Essential Blue Journal Articles.
4. The Seven Key Aspects of Testamentary Trusts.
CHAPTER 1(A)

ASSET PROTECTION—PERSONAL
Leading Gift and Loan Back Case

Other posts have dealt with various aspects of gift and loan back arrangements

Arguably, the leading case in relation to gift and loan back arrangements is Atia v Nusbaum [2011] QSC044. As usual, a link to the full decision is as follows

In summary the circumstances of this case were as follows:
(1) Dr Atia (a cosmetic surgeon) entered into a gift and loan back style arrangement with his mother;
(2) when Dr Atia’s mother subsequently called in the debt, Dr Atia argued that the loan and mortgage were not intended to be actually binding and were only a pretence to protect against situations where Dr Atia was sued professionally;
(3) in particular, Dr Atia argued that his mother was only calling in the debt secured by the mortgage because he had married his girlfriend against his mother’s express wishes;
(4) the court found that all aspects of the legal documentation, including a deed of gift, loan agreement and registered mortgage, had been validly signed; and
the court confirmed that the legal effect of the documentation signed was exactly as the parties intended it to be and there was no mistake or sham involved. This meant that Dr Atia’s mother was allowed to enforce recoverability of the debt, and if necessary, exercise her rights under the registered mortgage.
How gift and loan back arrangements work?

Previous posts have touched on various aspects of the gift and loan back strategy


Recently, and as touched on last week regarding Atia’s case, one of the key aspects of the enforceability of this style of arrangement is that all documentation is drafted correctly and duly signed and processed.

In this regard, the main critical steps that need to be followed are set out below with an example.

The ‘gift and loan back’ approach involves the owner of an asset gifting an amount equal to their equity in the property or shares in a company to a family trust (or low risk spouse).

The family trust then lends an amount of money to the owner and takes a secured mortgage over the property or registers a security interest on the Personal Property Securities Register over the shares.

Example

Using property as an example, assume that Anne holds 100% of an investment property and the current value of the home is $1,500,000. There is an existing mortgage of $500,000 owing to her financier.

Step 1: Anne gifts the amount of her equity in the property to a trust

Step 2: The trust subsequently lends the amount back to Anne and takes security over property
Recent posts have touched on various aspects of the ‘gift and loan back’ arrangement.

Recently we had a situation where historically a gift and loan back arrangement had been entered into, however the provisions of the Tax Act under subdivision EA had been ignored.

While there has been some significant dilution of the circumstances where subdivision EA will apply given the Tax Office’s approach to unpaid present entitlements, in the situation we were looking at it remained potentially relevant.

In particular, the second ‘tranche’ of the gift and loan back arrangement involving a loan out of a trust was problematic because at the time the loan was made, there was an unpaid distribution to a corporate beneficiary.

We are working with the relevant adviser to determine the most appropriate approach moving forward, however the example was a timely reminder that in any structuring exercise, it is critical to consider all potential transaction costs and in particular those that are not immediately obvious.
Gift and Loan Back Arrangements–Some Frequently Asked Questions

Recent posts have looked at various aspects of the ‘gift and loan back’ strategy

While there are a myriad of potential issues that always need to be considered, some of the key aspects include:

1. Care should always be taken to ensure that the trust which will make the secured loan does not itself conduct risky activities (for example, run a business).
2. While the arrangement can be entered into without registering a mortgage, if this step is not taken, the trust that has made the loan will simply be an unsecured creditor.
3. The impact of the arrangement in relation to potentially accessing the small business tax concessions should always be carefully considered, because while a family home will generally be excluded from the $6 million test, a secured loan will generally be included if the trust is an affiliate or ‘connected entity’ under the Tax Act (which will typically be the case).
4. To the extent that a third party financier already has a mortgage over the property, they will generally require a deed of
priority securing their lendings (to whatever level they may be from time to time) as a first priority before the trust’s second mortgage.

(5) As flagged in previous posts (http://mwbmcr.blogspot.com/2013/10/one-remedy-where-trust-distributions.html) if no real property is available for registering security over, personal property can be used via the Personal Property Security Register.
Bankruptcy Clawback – A Leading Case

In any asset protection exercise, the impact of the ‘clawback’ rules under the bankruptcy legislation needs to be carefully considered.

One key aspect in this regard is whether a decision by a person to divest themselves of assets was done for the main purpose of defeating creditors.

Recently, I was reminded of arguably the leading case in this area, which is now over 80 years old, namely Williams v Lloyd [1934] HCA1. As usual, a link to the full copy of the decision is as follows – http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1934/1.html?stem=0&synonyms=0&query=title(Williams%20and%20Lloyd%20).

In this case, a bankrupt transferred assets to family members while he was solvent, but knowing that he was likely to start engaging in a ‘risky’ business activity in the future.

The court held that the transfers could not be clawed back and the key aspect of the decision was as follows –

‘Once it is acknowledged, as upon the evidence I think it must be, that in 1926 the bankrupt was in a perfectly sound financial position and had nothing to fear, subsequent conduct and events form an insufficient basis for a finding that the documents were shams, or that he had an intent to defraud his creditors, or that they were made subject to a suspensory condition allowing them to take effect only in case of attack by creditors.’
What strategies are there available to protect at risk beneficiaries?

As set out in earlier posts, and with thanks to the Television Education Network, today’s post addresses the issue of ‘What strategies are there available to protect at risk beneficiaries?’ at the following link – http://youtu.be/Joz2vYxhcDY

As usual, a transcript of the presentation for those that cannot (or choose not) to view the presentation is below –

The obvious solution is to try to minimise the number of distributions that go to the at risk beneficiary. That’s obviously a lot easier said than done. Particularly from a tax perspective, there is a bias towards making sure that the income does flow out to an individual beneficiary, particularly if there’s a capital gain to be distributed.

Leaving that to one side, there are other ways to manage it, the biggest one seen in practice is making sure that the recipient beneficiary is themselves not exposed.

The classic example would be using a corporate beneficiary or company as the recipient. In that scenario, it’s important to remember that the ownership structure of the shares in that company is going to be vital.

You don’t want to create a situation where even though the beneficiary exposed doesn’t directly have the asset or the income distributed to them, they’re the shareholder of the company, which is the recipient beneficiary. The risk is that the wealth is effectively in just as exposed a position as it would have otherwise been.
CHAPTER 1(C)

ASSET PROTECTION –
FAMILY LAW CASES
Tax Office access to family court material

Posted 7 October 2014

One area of the law that continues to evolve relates to the Tax Office being able to access material lodged as part of family law proceedings. A further example of this is the case of FCT & Darling [2014] FamCAFC 59. A full copy of the decision is available via the following link–http://www.austlii.edu.au/au/cases/cth/FamCAFC/2014/59.html

Whereas the original decision prevented the Tax Office from accessing certain information disclosed by the husband in his family court affidavit, the Tax Office was ultimately given access to the material on appeal.

While the court acknowledged that they did not want to create an environment that discouraged those involved in family court proceedings from making full and frank disclosures, it was also the case that, given the family court had an inherent ability to refer matters of tax evasion to the Tax Office, any further access granted on a case by case basis was unlikely to have a significant impact.

The other specific reasons given by the court for allowing access included:

(1) there were significant restrictions on the Tax Office in relation to the ability to use the information that they gained, particularly in relation to releasing it publicly;
(2) while the husband had argued that it would be inconvenient to have the information released, there was no actual evidence supporting this argument;
(3) the Tax Office was engaged in a significant and targeted audit
in relation to the husband – i.e. the Tax Office was not engaged in some form of ‘fishing expedition’.

Overall, it was deemed to be in the public interest to allow the commissioner access to the material.

Next week’s post will consider the Decision Impact Statement recently released by the Tax Office.
Tax Office views on accessing to family court documents

Posted 14 October 2014

As mentioned in last week’s post, in the case of Darling, the Tax Office was given access to material lodged as part of family law proceedings, to further its audit activities in relation to the husband of the marriage.

The Tax Office has now released a Decision Impact Statement in relation to its intended approach in this area. As usual, a full copy of the document is available via the following link–http://law.ato.gov.au/atolaw/view.htm?DocID=LIT/ICD/M34of2014/00001

In addition to providing a useful summary of the key aspects of the court decision, the Statement confirms –

(1) There is an implied obligation on the Tax Office not to make use of documents disclosed as part of a family law case for a purpose not related to the family court litigation (ie to assist the Tax Office with its tax audit activities).

(2) Whenever the Tax Office is wanting access to court documents for use other than in relation to the case in which the documents were filed, it will make an application to the court for release from the implied obligation.

(3) In making an application to court, the Tax Office will have regard to the factors set out in the Darling decision (as summarised in last week’s post).
Tax Office denied access to family law documents

Posted 28 October 2014

Following on from recent posts, another decision arising out of family law proceedings that is worth remembering is International Litigation Partners Pte Ltd v FCT [2014] FCA 671.

As usual, a full copy of the decision is available via the following link


In this particular case, the Tax Office had sought access to material filed in the family court proceedings to assist in determining the tax residency of various related entities of the husband. While the former wife consented to access being granted, the husband opposed access.

In ultimately denying the Tax Office access to the documents requested, the court confirmed:

(1) The court must use its discretion to determine whether access to family court documents is appropriate on a case by case basis.

(2) The exercise of the discretion involves the weighing of a number of competing interests, and in particular, whether the Tax Office was likely to derive any substantial benefit by breaching the confidential nature of personal documents filed in family court proceedings.

(3) The court should also take into account practical difficulties in separating documents that might be of use to the Tax Of-
fice and those that disclose personal issues (including those concerning the children of the relationship).

(4) Also of relevance is whether the spouse to the marriage is party to a Tax Office litigation (in this case, the husband was not a party). As set out in earlier posts, in the Darling matter, the husband was a party to Tax Office audit activity.
Family court cases and the Stamps Office

Recent cases have explored various aspects of the Tax Office’s ability to access material lodged as part of family law cases.

The recent family law case of Kern [2014] FCCA 1108 provides an example of where the interest of a State based revenue office can be enlivened.

As usual, a link to a full copy of the decision is as follows—http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCCA/2014/1108.html?query=.

The key components of the case here were as follows:

(1) A couple who had a 9-year marriage were engaged in proceedings in relation to the division of matrimonial assets.
(2) One of the assets related to some land that was gifted to the wife by her parents.
(3) Stamp duty was paid on the transfer at a value of $110,000.
(4) Evidence given by the wife to the family court was that the true market value of the land at the date it was gifted to by her parents was in the region of $150,000 and indeed, may have been closer to $200,000, particularly given that the final sale price for the land when it was subsequently disposed was $325,000.

While the family court accepted the wife’s arguments that she should receive a disproportionate share of the proceeds of the sale of
the land due to the contribution that she made, it was also decided to refer the evidence to the Stamps Office for further investigation.

The family court has the inherent power to make a referral in situations such as this (i.e. effectively fraud) under the *Evidence Act* 1995.

While that Act does provide some protection for self-incrimination, that protection was not available in this case because:

(5) The wife provided the incriminating evidence of her own free will.

(6) The evidence provided was done so before a request for immunity was made.
CHAPTER 1(D)

ASSET PROTECTION—TRUSTS
Importance of minimising loan accounts to at risk beneficiaries

As set out in earlier posts, and with thanks to the Television Education Network, today’s post addresses the issue of ‘Importance of minimising loan accounts to at risk beneficiaries’ at the following link

http://youtu.be/WGNRSm2m9ho

As usual, a transcript of the presentation for those that cannot (or choose not) to view the presentation is below –

The reality in relation to beneficiary loan accounts is that sometimes they’re unavoidable.

If distributions are being made by the trustee down to an at risk beneficiary and those amounts aren’t physically paid, then they’ll sit on the balance sheet either as a credit loan or an unpaid present entitlement.

In either scenario, that’s clearly an asset of the at risk beneficiary. So it’s really important that on a regular basis those potential assets are reviewed and steps are taken to ideally quarantine them away into a protected environment.

The simplest approach, assuming that you can’t avoid the distributions coming down to that person, will be to forgive that debt, or as an alternative, making sure that the outstanding amount is gifted across to a protected environment whether that be a spouse, some other family member or perhaps some other related structure.

The critical thing in all of that, quite aside from the pure bankruptcy issues is however that there must be a particular effort applied to the
related issues. That is, things like the commercial debt forgiveness rules, wider tax planning issues and the stamp duty rules, that are unfortunately different in every jurisdiction around the country, are all potentially relevant before any step can be taken to quarantine the loan account wealth.
Is appointorship an asset?

As set out in earlier posts, and with thanks to the Television Education Network, today’s post addresses the issue of ‘Is appointorship an asset?’ at the following link

https://www.youtube.com/watch?v=Ko5_0YRb204

As usual, a transcript of the presentation for those that cannot (or choose not to) view the presentation is below –

Whether the appointor role is an asset on the holder’s bankruptcy is probably one of the most contentious issues to have arisen in recent years. Certainly, the feeling amongst lawyers that act on behalf of trustees in bankruptcy or creditors is that absolutely the role is a potential asset.

If it is an asset, then it forms part of the bankrupts’ estate. The reality however when you actually look at the decisions that have been handed down is the exact opposite. So in other words, the role of an appointor is a personal role, akin to a directorship. Therefore, that’s not an asset that can be handed onto creditors.

Having said this, the issue does not seem to be going away and the conservative view would be that you would try, when setting up this type of structure, to ensure that you do one of a myriad of things.

So for example, making sure that if there is an at risk person that is needing to fulfil the role of appointor or principal, that they don’t fulfil that role individually and solely, that ideally there’s some other person acting with them.

Secondly, the way in which the role is structured, it’s embedded under the trust instrument, whether it be a family trust or a testamentary discretionary trust, the appointor is automatically disqualified in the event of committing an act of bankruptcy.
Impact of Richstar on discretionary trusts

As set out in earlier posts, and with thanks to the Television Education Network, today’s post addresses the issue of ‘Impact of Richstar on discretionary trusts’ at the following link

http://youtu.be/_bWKp13ACvA

As usual, a transcript of the presentation for those that cannot (or choose not) to view the presentation is below –

Probably the most interesting part of Richstar is that in some respects counter-intuitively, it confirms that trusts remain a very robust structure from an asset protection perspective.

If you actually take a helicopter view of where the court landed in Richstar, it certainly supports this idea that just because an individual happens to be the trustee and beneficiary and appointor will not of itself mean that the trust is ignored and that the assets of the trust will automatically be deemed to be those of the relevant individual.

In contrast however, and the flipside to this argument is that if you do fulfil a number of those roles and the court feels as though that’s enough in combination to create a scenario where a person is effectively the alter ego of the trust, then indeed the trust structure will not provide you any asset protection and the assets will be potentially exposed.
Scope of the Richstar decision

As set out in earlier posts, and with thanks to the Television Education Network, today’s post addresses the issue of ‘Scope of the Richstar decision’ at the following link

http://youtu.be/P38Im4zTZyg

As usual, a transcript of the presentation for those that cannot (or choose not) to view the presentation is below –

It’s fair to say Richstar is seen as probably the high watermark in relation to how the assets of a trust may be exposed in the context of some sort of bankruptcy litigation. Interestingly, it has remained almost as an outlier decision.

There really haven’t been any decisions that have supported the landing the court reached in relation to Richstar. On top of that, the cases like Smith which have come down since Richstar, effectively completely ignore Richstar and go to the extent of saying it doesn’t actually represent good law.

Ultimately, pragmatically and practically what the position seems to be is as long as a trust is structured appropriately it will provide a very good level of asset protection from creditors and should be seen as probably the choice structure in an estate planning exercise under a will–in other words, the use of a testamentary discretionary trust–in order to provide an adequate level of protection.
As set out in many earlier posts, the Richstar case was decided in 2006, and yet, it continues to receive significant attention.

Interestingly, there has not been a substantive case that has accepted the conclusions in Richstar, and indeed, there are now many cases that have effectively rejected the core aspects of the decision in Richstar.

A selection of the subsequent cases is summarised below. If you would like access to the full copies of the decision, please email me:

(1) *Tibben & Tibben* [2013] FamCAFC 145 – The only ‘entitlement’ of the beneficiaries under the Deed of Settlement was a right to consideration and due administration of the trust: *Gartside v Inland Revenue Commissioners*;

(2) *Deputy Commissioner of Taxation v Ekelmans* [2013] VSC 346 – The applicant relied on the decision in Richstar to contend that the cumulative effect of the role and entitlement of Leopold Ekelmans under the trust instruments amounted to a contingent interest in all of the assets of the trust, making those assets amenable to a freezing order as if the assets of Leopold Ekelmans. The Court found that the applicant could not in this matter rely on Richstar;

(3) *Hja Holdings Pty Ltd and Ors v Act Revenue Office (Administrative Review)* [2011] ACAT 91 – not withstanding that beneficiaries under a ... discretionary trust have some rights, such as the right to have the trust duly and properly adminis-
tered, generally a beneficiary of a discretionary trust, who is at arm’s length from the trustee, only has an expectancy or a mere possibility of a distribution. This is not an equitable interest which constitutes “property” as defined;

(4) Donovan v Sheahan as Trustee of the Bankrupt Estate of Donovan [2013] FCA 437—a beneficiary of a non-exhaustive discretionary trust has no assignable right to demand payment of the trust fund to them (and nor have all of the beneficiaries acting collectively) and that the essential right of the individual beneficiary of a non-exhaustive discretionary trust is to compel the due administration of the trust;

(5) Simmons and Anor & Simmons [2008] FamCA 1088 – the court and parties referred to Richstar on a number of occasions and confirmed that a beneficiary has nothing more than an expectancy.
Tax Office access to family court material

Posted 7 October 2014

One area of the law that continues to evolve relates to the Tax Office being able to access material lodged as part of family law proceedings. A further example of this is the case of FCT & Darling [2014] FamCAFC 59. A full copy of the decision is available via the following link http://www.austlii.edu.au/au/cases/cth/FamCAFC/2014/59.html

Whereas the original decision prevented the Tax Office from accessing certain information disclosed by the husband in his family court affidavit, the Tax Office was ultimately given access to the material on appeal.

While the court acknowledged that they did not want to create an environment that discouraged those involved in family court proceedings from making full and frank disclosures, it was also the case that, given the family court had an inherent ability to refer matters of tax evasion to the Tax Office, any further access granted on a case by case basis was unlikely to have a significant impact.

The other specific reasons given by the court for allowing access included:

(1) there were significant restrictions on the Tax Office in relation to the ability to use the information that they gained, particularly in relation to releasing it publicly;
(2) while the husband had argued that it would be inconvenient to have the information released, there was no actual evidence supporting this argument;
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In addition to providing a useful summary of the key aspects of the court decision, the Statement confirms –

1. There is an implied obligation on the Tax Office not to make use of documents disclosed as part of a family law case for a purpose not related to the family court litigation (ie to assist the Tax Office with its tax audit activities).
2. Whenever the Tax Office is wanting access to court documents for use other than in relation to the case in which the documents were filed, it will make an application to the court for release from the implied obligation.
3. In making an application to court, the Tax Office will have regard to the factors set out in the Darling decision (as summarised in last week’s post).
CHAPTER 2(A)

ESTATE PLANNING –
TESTAMENTARY TRUSTS
Taxation Consequences of Testamentary Trust Distributions—Part I

For those that do not otherwise have access to the Weekly Tax Bulletin, the article from last week by fellow View Legal Director Patrick Ellwood and I is extracted below.

In December 2013, the Federal Government announced its decision to abandon a number of proposed legislative changes in relation to various aspects of the taxation of testamentary trusts—see 2013 WTB 53 [2270] and also 2014 WTB 12 [399]. As a result, there has been a refocus on what is likely to be the approach of the ATO in this area.

Part I of this 2-part article considers the taxation aspects of:

- the transfer of assets under a deceased estate;
- distributions from a will maker to a legal personal representative (LPR);
- distributions from a LPR to a testamentary trust.

Part II of this article will focus on distributions from testamentary trusts to beneficiaries and the abandonment of the previously announced legislative changes.

Transfer of Assets

On the death of a will maker, each asset of the estate will potentially be transferred 3 times:
(1) from the will maker to the LPR;
(2) from the LPR to the beneficiary of the estate, which may be the trustee of a testamentary trust; and
(3) where the recipient was the trustee of a testamentary trust, from that trustee to a beneficiary either as a capital distribution during the lifetime of the trust or as a distribution of corpus upon vesting.

The CGT consequences of each of the abovementioned transfers must be separately considered.

**Distributions from will maker to LPR**

The first roll-over to examine is the initial transfer of a deceased’s assets from the deceased person to their LPR for distribution under the terms of the deceased’s will.

As a starting point, the general position is that, when a taxpayer dies, any capital gain or loss from any event relating to a CGT asset owned by the deceased is disregarded under s 128-10 of the ITAA 1997. This means that the distribution from the deceased to their LPR does not result in a CGT liability for the deceased.

As to the consequences for the LPR, the CGT assets are taken, under s 128-15 to have been acquired by the LPR on the date the deceased died. The cost base of each CGT asset (other than for a property which was a main residence for the deceased immediately before they died) for the LPR is modified under s 128-15(4) so that:

- **for pre-CGT assets** in the hands of the deceased—the first element of the LPR’s cost base (and reduced cost base) is the market value of the asset on the day the deceased died (meaning that pre-CGT assets in the hands of the deceased become post-CGT assets in the hands of the LPR); and
- **for post-CGT assets** in the hands of the deceased—the first element of the LPR’s cost base (and reduced cost base) is the
deceased’s cost base (or reduced cost base) at the date of their death (i.e. the deceased effectively passes their cost base and reduced cost base to the LPR).

**Distributions from LPR to testamentary trust**

From a CGT perspective, a testamentary trust is treated much the same as other trusts. However, it should be noted that CGT event E1 does not apply to the creation of a testamentary trust since that event only applies to the creation of a trust “by declaration or settlement”.

In the testamentary trust scenario, there is no such declaration of trust and there is no initial settlement sum.

The CGT rules which apply to the distribution from the deceased to the LPR apply in the same manner to subsequent distributions from the LPR to a “beneficiary” of the estate.

It would appear that “beneficiary” for the purposes of the ITAA 1997 includes the trustee of a testamentary trust (however, as will be explained in Part II of this article, for the purpose of Div 128, the trustee of a testamentary trust is also treated the same as an LPR by the ATO), meaning that distributions from an LPR to the trustee of a testamentary trust are treated in the same manner as distributions from an LPR to an individual beneficiary.

A CGT asset is taken to have passed to a beneficiary of a deceased’s estate if the beneficiary (or in this case, the trustee of the testamentary trust) becomes the owner of the asset whether under the terms of:

- **a** the deceased’s will;
- **b** under the intestacy laws; or
- **c** under a deed of arrangement.

Section 128-15(3) provides that on a subsequent distribution from the LPR to a beneficiary (including the trustee of a testamentary trust), any capital gain or loss that the LPR makes is disregarded.

Again, the trustee of the testamentary trust is taken to have ac-
quired the CGT assets of the deceased at the date of the deceased’s death (rather than on the date they were distributed by the LPR) and the first element of the cost base (and reduced cost base) for the testamentary trust trustee will be:

- **for pre-CGT assets** in the hands of the deceased—the market value of the asset on the day the deceased died; and
- **for post-CGT assets** in the hands of the deceased—the deceased’s costs base (or reduced cost base) at the date of their death.

The testamentary trust trustee is also able include in its cost base any expenditure the LPR has incurred, up to the time of the disposal by the LPR, that the LPR would have been entitled to include in its cost base had it retained the asset.
Taxation Consequences of Testamentary Trust Distributions—Part II

Again for those that do not otherwise have easy access to the *Weekly Tax Bulletin*, Part II of the article by fellow View Legal Director Patrick Ellwood and I is extracted below.

Part I of this article (at 2014 WTB 19 [658]) considered a number of specific aspects of the transfer of assets under a deceased estate testamentary trust. Part II of the article now considers:

- distributions from testamentary trusts to beneficiaries;
- the proposed changes to CGT event K3; and
- the proposed changes where an intended beneficiary dies.

**Distributions from testamentary trusts**

In 2003, the ATO released PS LA 2003/12, which states that its purpose is to inform ATO staff that the Commissioner will not depart from the long-standing administrative practice of treating the trustee of a testamentary trust in the same way as a legal personal representative (LPR) is treated for the purposes of Div 128 of the ITAA 1997.

In the 2011-12 and 2012-13 Federal Budgets, it was proposed that the current ATO practice set out in PS LA 2003/12 of allowing a testamentary trust to distribute an asset of a deceased person without a capital gains tax (CGT) taxing point occurring would be codified.

While draft legislation to effect the change was prepared, the
Federal Government announced that it was reviewing the progress of a large number of unenacted legislative announcements and ultimately confirmed on 14 December 2013 that the amendments would not be implemented—see 2013 WTB 53 [2270] and also 2014 WTB 12 [399].

As set out at 2014 WTB 16 [561], the ATO recently republished PS LA 2003/12 confirming that it intends to continue to consider itself bound by it. Despite the ATO apparently acknowledging that the Government will not proceed with any legislative changes, some amount of confusion has been caused by the ATO stating in updates on its website that it will “accept tax returns as lodged during the period up until the proposed law change is passed by Parliament”. Those comments are contained in the ATO update entitled “Refinements to the income tax law in relation to deceased estates” (dated 22 April 2014). It is assumed these comments are simply an oversight by the ATO and that PS LA 2003/12 (as amended) will continue to be applied indefinitely into the future.

The position therefore appears to remain that there is exemption roll-over from CGT covering the “transfer” of assets from the LPR to the trustee of the testamentary trust in the first instance and the subsequent transfer by the trustee to an eventual beneficiary of the testamentary trust. The subsequent transfer may either involve a capital distribution being made by the trustee of the trust to a beneficiary during the lifetime of the trust, or a payment of capital upon vesting of the trust.

The result of PS LA 2003/12 is that, on the subsequent disposal of a CGT asset from a testamentary trust trustee to a beneficiary of the testamentary trust:

1. any capital gain or loss that the testamentary trust trustee makes is disregarded under s 128-15(3); and
2. the beneficiary will be taken to have acquired the CGT assets
of the deceased at the date of the deceased’s death (rather than on the date they were distributed by the LPR) and the first element of the cost base and reduced cost base for the beneficiary will be:

a for pre-CGT assets in the hands of the deceased—the market value of the asset on the day the deceased died; and
b for post-CGT assets in the hands of the deceased—the deceased’s cost base (or reduced cost base) at the date of their death.

Ultimately under PS LA 2003/12, Div 128 (in particular ss 128(2), (3) and (4)) effectively applies twice:

a initially, when the LPR is the “LPR” for the purposes of Div 128 and the testamentary trust trustee is the “beneficiary”; and
b subsequently, when the testamentary trust trustee is treated as an “LPR” for the purposes of Div 128 and the beneficiaries of the testamentary trust are treated as the “beneficiaries”.

**CGT event K3**

The ATO has indicated that the position in PS LA 2003/12 is subject to CGT event K3, which covers assets passing to tax-advantaged entities.

CGT event K3 operates to ensure that, where assets pass to concessionally taxed entities from a deceased estate, a capital gain or loss is recognised in the deceased’s final tax return. This prevents assets with embedded capital gains from avoiding capital gains when they are later disposed of by the concessionally taxed entity. CGT event K3 has, in the past, been avoided by ensuring an asset does not pass to a concessionally taxed entity until after the deceased’s standard amendment period (generally 4 years after the assessment) has expired.

As part of the 2011-12 Budget measures, it was announced that amendments would be made to ensure that where CGT event K3 happened outside of the deceased’s standard amendment period, a
CGT liability still arose in the deceased’s tax return. It was proposed this could be achieved by excluding CGT event K3 from the standard amendment period.

In particular, the CGT event would have been deemed to happen to the relevant entity that passed the asset to the concessionally taxed entity (rather than with the beneficiary), avoiding the need to amend the deceased’s tax return. This change would have allowed the entity to which CGT event K3 applied to be able to utilise its realised capital losses against CGT event K3, instead of the deceased utilising their capital losses against their capital gain from CGT event K3.

The change would have been consistent with how Div 128 operates under PS LA 2003/12 where an LPR or testamentary trust trustee sells an asset to a third party, rather than passing the asset to the intended beneficiary of the estate.

However, as with other proposed changes mentioned below, the announced changes to CGT event K3 were abandoned in late 2013.

**Where an intended beneficiary dies before administration is completed**

The Federal Government released a proposal paper “Minor amendments to the capital gains tax law” in June 2012 which specifically addressed the circumstance where an intended beneficiary dies before administration of an estate is completed. Generally, in that situation, s 128-15 provides a CGT roll-over provided that the asset passes from the first deceased’s LPR to the beneficiary’s LPR.

However, no CGT roll-over exists where the asset passes (ultimately) from the first deceased’s LPR via the second deceased’s LPR to the trustee of a testamentary trust or a beneficiary of the intended beneficiary’s (i.e. the second deceased) estate because the asset was not one which the intended beneficiary owned when they died.

The former Labor Federal Government proposed to introduce measures to allow the intended beneficiary’s LPR to access the roll-over where the intended beneficiary died before an asset that the first
deceased owned passed to them, regardless of whether it passed first
to a testamentary trust trustee. Again, however, the Coalition Govern-
ment confirmed the amendments would not be implemented.

Arguably, PS LA 2003/12 can be relied on to provide relief in this
type of situation.
What are the exceptions to the assets of a testamentary trust being protected?

As set out in earlier posts, and with thanks to the Television Education Network, today’s post addresses the issue of ‘What are the exceptions to the assets of a testamentary trust being protected?’ at the following link http://youtu.be/y8w8QgVYmkI

As usual, a transcript of the presentation for those that cannot (or choose not) to view the presentation is below –

The main exception that comes up in a practical sense is primarily for tax reasons where distributions have gone down to an at risk beneficiary out of the trust and then those amounts remain unpaid, so they become an unpaid present entitlement or they become a credit loan on the balance sheet of that trust.

In that scenario, obviously, if the at risk beneficiary gets into strife and a trustee in bankruptcy is appointed, even though the asset is ultimately inside the trust, that trust has the obligation to repay the debt and the asset effectively comes out sideways in that scenario.

There are however a myriad of other reasons that trusts can be at risk. Some of the obvious ones include where the at risk beneficiary fulfils a really important role in the trust, whether that be an individual trustee, a director of a corporate trustee, a shareholder of a corporate trustee, or perhaps most relevantly, where the at risk beneficiary fulfils the role of an appointor.
Segregating assets via multiple TDTs

As set out in earlier posts, and with thanks to the Television Education Network, today’s post addresses the issue of ‘Segregating assets via multiple TDTs’ at the following link

http://youtu.be/OXZHUtBnqXU

As usual, a transcript of the presentation for those that cannot (or choose not) to view the presentation is below –

TDTs or testamentary discretionary trusts have historically been considered almost immune from anything in relation to wider asset protection issues, simply because they’re set up under the will of the will maker.

What we’ve seen over time however is that what has been a fairly traditional approach in terms of having very passive assets sit inside the trust has gradually expanded. It’s not unusual to have business run through a testamentary trust or a partnership interest through a testamentary trust. In any of those scenarios, all of the normal principles that apply to asset protection and limited liability equally apply to testamentary discretionary trusts.

As there’s no extra protection provided by the testamentary trust, basic structuring issues such as utilising a corporate trustee to provide limited liability for the structure, or more importantly, ideally, using separate special purpose vehicles to undertake each uniquely risky business activity is strongly preferred.
Cascading testamentary trusts and stamp duty risks

With thanks to co-director View Legal Patrick Ellwood, today’s post looks at an estate planning approach that is often raised, namely the use of ‘cascading’ testamentary trusts. The structure usually involves a single testamentary trust being established upon the death of one spouse, which then ends and ‘cascades’ into multiple testamentary trusts (usually one for each child) upon the death of the surviving spouse.

This strategy is intended to avoid the issues that can arise where clients ultimately want their children to receive control of separate shares of their estate, while minimising the potential burden for their spouse with the administration of multiple trusts while they are alive.

Previous posts confirm that there should be no tax consequences of the cascading trust approach, for example see Do ‘cascading’ testamentary trusts cause a tax problem and Taxation consequences of testamentary trust distributions–Part II.

Although the ‘cascading’ trust structure can be useful in some circumstances, it is vital to consider the risk that stamp duty will normally apply on the transfer of assets from the original testamentary trust to the separate trusts for the children. The stamp duty rules are different in each jurisdiction, however will usually be around 5% of the value of the assets being transferred.

An alternative approach is to establish a single trust on the death of the first spouse, and ensure the terms of that trust are broad enough to allow capital distributions to be made to other trusts. This means that, if the stamp duty cost can otherwise be managed, the trustees
can ‘split’ the assets of the trust into separate trusts at the appropriate juncture by way of a capital distribution.

A further alternative is to simply establish multiple testamentary trusts on the death of the first spouse and ensure the trustee of each trust (normally the surviving spouse) is empowered to administer all trusts as if they were a single trust. This approach generally provides the most flexibility and ensures there will be no unnecessary stamp duty costs.

The perceived complexities of using multiple trusts are normally not significant if the same trustee acts as trustee of each trust certainly no more complex than (say) 2 individuals owning a house, which is obviously very common.
Important considerations when establishing a TDT

As set out in earlier posts, and with thanks to the Television Education Network, today’s post addresses the issue of ‘Important considerations when establishing a TDT’ at the following link - http://youtu.be/8PiFnBIEiGU

As usual, a transcript of the presentation for those that cannot (or choose not) to view the presentation is below –

Probably the two main components, although there’s a myriad of things to be taken into account, but the two main components in light of Richstar would be firstly around control issues.

Particularly looking at things like who the trustee is of the trust, if there’s going to be a corporate trustee, which is not unusual nowadays in relation to testamentary trusts, who will be the directors of the corporate trustee, who will be the shareholders of it, will there be any restrictions or prohibitions on who can fulfil those roles.

Similarly in that control context, exactly who will have ultimate control if there’s going to be an appointor power? So that would be the first main category and obviously there’s a range of issues that sit around that.

The second category is exactly how regulated the trust is going to be in a mechanical sense in terms of the provisions of the will. The particular things that advisers should be focusing on are issues like:

a are there automatic disqualifications for particular roles;
if there are automatic disqualifications, do they apply permanently, or is it just during a period where a particular beneficiary or a particular appointor is in strife from creditors.

Combining these two core components and there’s obviously a range of issues in between them, but generally as long as you can get those two broad silos right, that will set a good framework for a very strong structure.
September 16, 2014

**Future of TDTs Post Richstar**

As set out in earlier posts, and with thanks to the Television Education Network, today’s post addresses the issue of ‘Future of TDTs Post Richstar’ at the following link

http://youtu.be/z0HLr5OSx0Q

As usual, a transcript of the presentation for those that cannot (or choose not) to view the presentation is below –

The reality is that even despite decisions such as Richstar, testamentary trusts have always been a very strong vehicle from asset protection perspective.

They’re not a recent vehicle—they go right back into early English law, over hundreds of years. While there has undoubtedly been an amount of white noise around them in recent times, the reality is that they are by far and away the most robust structure from an asset protection perspective.

Importantly, they also ‘tick the box’ in terms of issues such as flexibility, tax planning and overall estate and succession planning objectives can almost always be achieved via a tailored testamentary trust.

Ultimately, despite the Richstar decision, it is absolutely the case that testamentary trusts remain the choice structure for most estate planning exercises.
What are superannuation proceeds trusts

Recently, an adviser contacted me in relation to an estate planning exercise they were assisting with.

The lawyer advising the client recommended against establishing testamentary trusts until both the husband and wife had passed away.

The financial adviser was therefore exploring whether it would be possible to establish a ‘superannuation proceeds trust’ to effectively ‘sidestep’ the lawyer’s recommendations.

For those not familiar with the superannuation proceeds trust structure, it is very similar to an estate proceeds trust (which was profiled in the post from 19 May 2010).

A summary of estate proceeds trusts is available on the View Legal website (www.viewlegal.com.au) via the core services section.
CHAPTER 2(B)

ESTATE PLANNING
– GENERAL
Digital Assets on Death

The virtually limitless ability to create digital content has seen an increasing amount of media attention focused on ownership of content, particularly in the event of death.

In most jurisdictions, government legislation does not separately deal with digital assets, and therefore, the same rules that apply to physical assets will generally apply.

Unfortunately, many of the rules in this area lack this sophistication required to deal with digital platforms that are normally either hosted outside Australia, or alternatively, perhaps outside any discrete jurisdiction on the basis that they are cloud based.

While most digital platforms do offer deactivation mechanisms or automatic closure due to inactivity (similar to the much publicised approach taken by Google), these features do not necessarily of themselves assist in relation to ownership of the data.

Ultimately therefore, digital assets should be treated in the same way as any other asset, and to the extent that they are of significant emotive or financial value, dealt with in the last will of the owner.

Alternatively, digital assets (including passwords) should at least be communicated via documents such as letter of wishes (click here for a letter of wishes summary on the elawyer site).

Some of the specific information that should be documented includes a listing of every digital platform utilised, account, user name and passwords for each platform, security question answers, and even directions as to post death activity and ultimate closure of the various accounts.
While not as quickly as other areas of the community, the legal industry is starting to embrace technology changes.

One case that highlights the point is Mellino v Wnuk & Ors [2013] QSC336. As usual, a link to the full decision can be found here. http://archive.sclqld.org.au/qjudgment/2013/QSC13-336.pdf#

In summary, the critical aspects of this case are as follows:

(1) a deceased man, who had committed suicide, had made a DVD shortly before his death;
(2) on the physical copy of DVD, the man had written ‘my will’;
(3) the content on the DVD also, in a very informal way, explained the intention that the recording was to operate as a will on death;
(4) the court decided that each of the main requirements from a succession law perspective had been satisfied and therefore the DVD could operate as the deceased’s last will;
(5) the three main tests in this regard were as follows:

a the DVD was considered to be a ‘document’;
b the clear intention of the document was that it articulated the deceased’s testamentary intentions; and

c the DVD adequately dealt with all property owned by the deceased at the date of his death.
Age of majority

Last week an interesting issue arose with the child of a client who was about to travel overseas on an exchange.

The child was a part time employee and member of a superannuation fund. Under the superannuation fund, they were automatically entitled to a life insurance policy which gave a payout of $200,000 on death. The fund required that any payout be made to the legal representative of a deceased member.

The parents of the child felt that it would be prudent to ensure that on receipt of these insurance proceeds the estate would be able to administer them easily – the obvious answer in this regard was the creation of a will.

Unfortunately, in these circumstances, no will is able to be made because in order to make a will, the individual involved must be 18 years of age.

The only substantive exception to this rule is if the will maker, being under the age of 18 years, has lawfully married.
Age of entitlement

Following last week’s post some questions were raised about at what age a person can be entitled to receive benefits under a will. The issues in this regard are a little more complex, however broadly:

(1) If a specific entitlement under a will passes to anyone under the age of 18, the trustee of the will effectively holds it for them on a bare trust until their 18th birthday.

(2) If an age is nominated in the will for a beneficiary to receive their entitlement, it will be held on trust until that age, unless the will is not drafted correctly (there are some complex issues that can apply in this regard). If the will is not drafted correctly, then regardless of the age nominated, the beneficiary can get access to the gift on their 18th birthday.

(3) Generally, none of the above rules are applicable where the asset passes to a testamentary trust – in this instance, the assets normally remain indefinitely within the trust structure, regardless of the age of the beneficiaries.
CHAPTER 3(A)

TRUSTS – TAX
Trust distributions – 3 reminders for 30 June 2014

For the fourth time in recent weeks we have been fortunate to have an article featured in the Weekly Tax Bulletin. This time it is by fellow View Legal Director Patrick Ellwood and I and is extracted below for those who do not otherwise have easy access.

As regularly addressed in the Weekly Tax Bulletin, a methodical approach is needed when preparing trust distribution resolutions to ensure the intended outcomes are achieved.

With another 30 June fast approaching, it is timely to consider 3 key issues often overlooked, namely:

(1) ensuring that the intended recipient of a distribution is in fact a valid beneficiary of the trust;
(2) avoiding distributions to beneficiaries who appear to be validly appointed under a trust deed, however are in a practical sense excluded; and
(3) complying with any timing requirements under a trust deed, regardless of what the position at law may otherwise be.

Further comments on each of these issues are set out in turn below.

Is the intended recipient a beneficiary?

A beneficiary is a person or entity who has an equitable interest in the trust fund. A beneficiary has enforceable rights against a trustee who fails to comply with their duties, regardless of whether they have ever received distributions of income or capital from the trust.
The range of eligible beneficiaries will generally be defined in the trust deed and the first step in any proposed distribution should be to ensure that the intended recipient falls within that defined range.

Once the range of eligible beneficiaries has been determined, the next step is to identify classes of specifically excluded beneficiaries.

These exclusions will usually override the provisions in a trust deed which create the class of potential beneficiaries and some common examples include:

1. persons who have either renounced their beneficial interest or have been removed as a beneficiary of the trust fund;
2. the settlor and other members of the settlor’s family;
3. any “notional settlor”; and
4. the trustee.

A comprehensive review of a trust deed must include an analysis of every variation or resolution of a trustee or other person (such as an appointor) that may impact on the interpretation of the document.

The range of documents that could impact on the potential beneficiaries of a trust at any particular point in time is almost limitless. Some examples include:

1. resolutions of the trustee to add or remove beneficiaries pursuant to a power in the trust deed;
2. nominations or decisions of persons nominated in roles such as a principal, appointor or nominator; and
3. consequential changes triggered by the way in which the trust deed is drafted (eg beneficiaries who are only potential beneficiaries while other named persons are living).
Does the intended recipient appear to be a beneficiary, yet practically is excluded?

It is important to remember that the unilateral actions of a potential beneficiary may impact on whether they can validly receive a distribution. For example, a named beneficiary may disclaim their entitlement to a distribution in any particular year, or may in fact renounce all interests under the trust.

There are also a number of potential issues that can arise in relation to beneficiaries that appear to have been nominated as beneficiaries, as to whether the nomination is effective. These issues can include:

1. whether the appointment needs to be made in writing;
2. whether the appointor has been validly appointed to their role;
3. at what point the nomination needs to take place in the context of the timeframe within which a distribution must be made; and
4. are there any consequential ramifications of the nomination, eg stamp duty, resettlement for tax purposes or asset protection.

Family trust election

In addition to the traditional trust law related restrictions on the potential beneficiaries of a trust, it is important to keep in mind the consequences of a trustee making a family trust election or interposed entity election.

Where such an election has been made, despite what might otherwise be provided for in the trust instrument, the election will effectively limit the range of potential beneficiaries who can receive a distribution without triggering a penal tax consequence (being the family trust distribution tax).
A family trust election will generally be made by a trustee for one or more of the following reasons:

a. access to franking credits;
b. ability to utilise prior year losses and bad debt deductions;
c. simplifying the continuity of ownership test; and
d. eliminating the need to comply with the trustee beneficiary reporting rules.

While a full analysis of the impact of family trust elections and interposed entity elections is outside the scope of this article, it is critical to consider the potential implications of any such election on what might otherwise appear to be a permissible distribution in accordance with the trust deed.

Complying with any timing requirements under the trust deed

Historically, the Commissioner permitted resolutions to be made after 30 June each year via longstanding ITs 328 and 329, however as practitioners will recall, these were withdrawn in 2011.

The current law does allow resolutions in relation to capital gains to be made no later than 2 months after the end of the relevant income year. Any other distributions, including in particular franked distributions, must be made by 30 June in the relevant income year.

Notwithstanding the general position above, the ATO has regularly confirmed its view that regardless of any timing concessions available under the tax legislation or ATO practice, these concessions are subject always to the provisions of the relevant trust instrument.

In recent times, we have reviewed a number of trust deeds by different providers that require all resolutions to be made by a date earlier than 30 June, e.g. no later than 12pm on 28 June in the relevant financial year. Unfortunately, in every situation we have seen, all distributions for previous income years were dated 30 June, meaning
each resolution was in fact invalid under the deed, regardless of the fact that the resolution otherwise complied with the law.

In these situations, arguably the only practical solution is to proceed with lodgment of amended returns, relying on the default provisions under the trust deed – assuming there are adequate default provisions.
Some ramifications of failed trust distributions

OCTOBER 21, 2014

For those that do not otherwise have access to the Weekly Tax Bulletin, the most recent published article by fellow View Legal Director Tara Lucke and I is extracted below.

As regularly addressed in the Weekly Tax Bulletin, a methodical approach is needed when preparing trust distribution resolutions to ensure the intended outcomes are achieved.

As explored at 2014 WTB 27 [942], there are a range of issues often overlooked in relation to distribution resolutions.

Where a purported trust distribution is subsequently found to be invalid, several potential ramifications arise, including:

- The “knowing recipient” principle.
- Disallowed deductions.
- Disclaimers.
- Equity and rectification.
- Impact of any default provisions.

Further comments on each of these issues are set out in turn below.

“Knowing recipient” principle

“Knowing recipient” is a principle that evolved out of situations where a trustee (who holds property on trust on behalf of the beneficiaries of a trust) appropriates trust funds for the benefit of a third party who has knowledge of the trust relationship.

The concept gives the “wronged” beneficiaries the right to make a personal claim against the third party on the basis that the third party
received the trust property, whilst having knowledge of the relationship between the property in question, the trustee and the beneficiaries.

**Impact of disallowed deductions**

The treatment of disallowed deductions turns largely on the way in which the relevant distribution resolution is crafted.

Broadly, there are 3 possible outcomes, namely:

- the amounts representing the disallowed deductions will be validly distributed to a particular beneficiary via the provisions of a distribution resolution;
- the default provisions under the trust deed will regulate the distribution (further comments in this regard are set out below); or
- the amount will be treated as an accumulation to the trust and the trustee will be taxed at the highest marginal tax rate is applied.

**Disclaimers**

In *FCT v Ramsden [2005]* FCAFC 39, the court held that the purported disclaimers by particular beneficiaries were ineffective. However, it was confirmed that any interest acquired in the net income of a trust under the default provisions of a deed could be disclaimed by a beneficiary separately from any other entitlements which might accrue to that beneficiary under other provisions of the deed.

It was also confirmed that a disclaimer can be made retrospectively, provided it is made within a reasonable period of time from the beneficiary first becoming aware of the relevant interest that they wish to disclaim.

**Equity and rectification**

A court may use the equitable remedy of rectification where there is an error in a trust document which does not reflect the intentions of the parties and in turn, results in an invalid distribution.
In order for rectification to be granted, the party applying for the court to exercise its discretion must establish 3 elements:

• the intention that the parties had in relation to the document up until the time the distribution resolution was executed
• a mistake was made in the document that does not reflect the parties’ true intentions; an
• if the rectification order was granted, it would correct the mistake and match the parties’ intentions.

Importantly, rectification will not be granted where there is simply an inadvertent financial result that occurred due to a misunderstanding of the consequences of a deliberate act.

**Default provisions**

From a trust law perspective, default capital provisions, and in some cases, default income provisions, under discretionary trusts are generally seen as important to ensure that the trust is valid at law.

From a tax perspective, the main objective of a default distribution clause, particularly for income, is to ensure that the default beneficiaries are assessed on the failed distribution, rather than the trustee being assessed at the top marginal rate.

The case of *BRK (BRIS) PTY LTD v FCT* (2001) 46 ATR 347 is arguably the leading example in this regard. In this case, the default distribution clause of the relevant trust required, where there was a failure to distribute, that the trustee “divide the Fund equally among the beneficiaries named in the Schedule hereto”.

However, the clause was crafted such that the distribution did not take place until a date after the end of a tax year.

Based on the drafting of the relevant clause, the court confirmed that while the provisions were valid from a trust law perspective, the trustee was unable to make the required distribution to the default beneficiaries until after the end of each tax year. This, in turn meant that all undistributed income was in fact effectively accumulated for
tax purposes each tax year. Therefore, all undistributed income was taxed to the trustee at the top marginal rate.

**Conclusion – start by reading the deed**

Given the range of significantly adverse consequences that can result where a purported trust distribution is subsequently found to be invalid, advisers should proactively invest in processes and systems to minimise the risk of such an outcome.

Invariably, best practice dictates that in every situation before preparing a resolution there should be:

(1) a comprehensive review of the relevant trust deed including an analysis of every variation or resolution of a trustee or other person (such as a principal, appointor or guardian) that may impact on the interpretation of the trust document;

(2) specific review of the relevant tax legislation applicable to the amounts to be addressed by the resolution; and

(3) thought applied to the exact factual scenario that the trustee is addressing, in the context of the trust deed and tax laws.
Extensions to vesting dates – some lessons from Re Arthur Brady Family Trust; Re Trekmore Trading Trust

Posted 11 November 2014

For those that do not otherwise have access to the Weekly Tax Bulletin, the most recently published article by fellow View Legal Director Patrick Ellwood and I is extracted below.

Often a key reason for seeking to extend the vesting day of a trust will be to defer the likely tax and stamp duty implications that would arise where the trust vests and assets are distributed to the beneficiaries.

The recent Queensland case of Re Arthur Brady Family Trust; Re Trekmore Trading Trust [2014] QSC 244 (see 2014 WTB 42 [1416]), provides a useful illustration of the way in which the Courts respond to applications where deferring revenue costs are arguably the primary driver for the application.

The case follows previous decisions such as Stein v Sybmore Holdings Pty Ltd [2006] NSWSC 1004 in NSW and Re Plator Nominees Pty Ltd [2012] VSC 284 in Victoria, each of which are discussed below.

Legislation

In each State, the Court has statutory power to vary trust instruments in particular circumstances.

In the Northern Territory, this power can be exercised where the Court “thinks fit”.

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In Western Australia and Queensland, the power can be exercised where the Court considers the variation “expedient” or where the transaction is in “the best interests of the beneficiaries”.

In all other jurisdictions, the “expedient” test applies.

In circumstances where a trust has been established with a vesting period of less than 80 years, the trustee may vary the trust deed, in accordance with an express power of variation in the trust instrument, to extend the vesting day.

The decision of FCT v Clark [2011] FCAFC 5 provides comfort that in many circumstances, such a variation will not trigger a resettlement of the trust for tax purposes.

However where the trust instrument does not provide the trustee with adequate powers to extend the vesting day, an application to the Court may be necessary.

The Court would therefore need to consider whether the trustee’s reasons for wanting to extend the vesting day are “expedient” or “in the best interests of the beneficiaries”, depending on the jurisdiction.

**Cases**

Stein v Sybmore Holdings Pty Ltd involved an application under s 81 of the Trustee Act 1925 (NSW) to extend the vesting day of a trust established in 1978, which was to vest in 2007.

The trustee sought an order authorising it to extend the vesting date of the trust, notwithstanding that the variation power in the trust instrument was insufficient to allow such an amendment.

The trustee’s reasons for seeking the authorisation included:

1. the trust had been established for the intended benefit of the applicant’s children and grandchildren, however his adult children were unmarried and without children and unless the application was granted, the trust would vest before his grandchildren could benefit; and
The trustee anticipated that capital gains tax of $690,000 and stamp duty of $620,000 would be payable on vesting of the trust, diluting an asset pool valued at approximately $13m.

The Court granted the order requested as it considered the amendment to be “expedient”. The judgment focused primarily on the first reason for the application outlined above, however the dilution to the value of the trust that would have been caused by the capital gains tax and stamp duty costs outlined above were a relevant factor.

A similar sentiment can be found in the Victorian case of Plator Nominees Pty Ltd. The case involved a trust established in 1972 which had a 40 year vesting period. Consequently the trust was due to vest in 2012.

The trustee brought an application under s 63A of the Trustee Act 1958 (Vic) that the vesting day be extended to the date 21 years after the death of the last living relative of one of the primary beneficiaries.

The trustee’s application included the following justifications for the extension:

1. the trust was established as a property investment vehicle intended to survive the primary beneficiaries for the benefit of their children, but if it vested in 2012 it would not achieve that purpose;
2. all of the beneficiaries had consented to the extension;
3. no specific reason could be identified as to why 2012 had been nominated as the vesting day; and
4. if the trust vested in 2012 a “significant capital gain” would be realised.

The Court granted the extension and noted that, consistent with previous judicial authority, the fact that deferral of taxation costs was one of the drivers for requesting the extension did not preclude it from granting the extension.
Re Arthur Brady Family Trust; Re Trekmore Trading Trust arguably further clarifies the position set out in the previous cases.

In that case, the first trust was established in 1977 with a vesting date of 2017. The second trust was established in 2008 with near identical terms to the first trust (presumably as part of a trust ‘cloning’ arrangement), including the 2017 vesting date.

The applicants sought an order for an extension to the vesting date under the *Trusts Act 1973* (Qld).

The sole reason for the application outlined in the judgment was the applicant’s desire to defer capital gains tax and stamp duty costs which would substantially dilute the overall pool of assets to the detriment of the beneficiaries.

The total tax and stamp duty costs across both trusts were anticipated to exceed $1.8m out of an asset pool of $15m.

The applicant submitted that, in order to maintain the property portfolios, the beneficiaries would need to borrow funds to meet the transaction costs. Each of the contingent beneficiaries supported the application.

After a detailed analysis, the Court granted the requested extensions as it was satisfied the “very substantial impact of taxes and duties upon the trust funds” and the unanimous approval of the beneficiaries supported the exercise of its discretion.

**Lessons**

A few key lessons can be taken from the cases above.

First, many trust deeds from all eras, and particularly those established in the 1970s and 1980s include vesting periods significantly shorter than 80 years.

Practitioners should be alert to this issue and ensure they methodically check the vesting day of every trust as part of any trust dealing.

Secondly, *Re Arthur Brady Family Trust; Re Trekmore Trading Trust* provides authority that the Court may grant an order for the exten-
sion of a vesting day even where the sole purpose of the extension is to defer the capital gains tax costs and stamp duty costs that would otherwise arise as a result of the vesting, provided it can be shown that those costs would have a material adverse impact on the beneficiaries.

Finally, although any application to Court carries a degree of risk, recent cases indicate the Court will generally react positively to applications for the extension of vesting dates, where there are compelling commercial or family reasons to order the extension.
CHAPTER 5

POWERS OF ATTORNEY
EPAS and Conflicts of Interest

With the aging population, conflicts of interest arising particularly in relation to the use of an enduring power of attorney (EPA) are becoming far more prevalent.

Previous posts have looked at cases like Stanford. Recently we had a client situation that underlined how critical it is to include a conflict of interest provision in an EPA. This style of provision is not standard in any government form and indeed many lawyers do not choose to include such a provision.

The situation the client faced was as follows:

(1) The main asset in the estate was a family home which was owned as joint tenants.
(2) The husband lacked capacity due to advanced dementia, although was otherwise in good health.
(3) Our client (the wife) wanted to include testamentary discretionary trusts under her will to provide for the children of the relationship.
(4) The husband’s will was a very basic document and did not allow for testamentary discretionary trusts.
(5) To ensure that half the value of the house would pass into an appropriate structure if the wife predeceased the husband she was wanting to rely on her appointment as the husband’s EPA to sever the joint tenancy (for a summary of the distinction between owning assets as joint tenants and tenants in common see http://mwbmcr.blogspot.com/2010/02/what-exactly-does-jointly-mean.html).
Due to an appropriately crafted conflict of interest clause in the EPA, the wife was able to quickly and easily implement the severance and avoid some of the more complex solutions that might also have been available such as the unilateral severance of the tenancy or applying for a court ordered will (the court ordered will process is featured in previous posts: http://mwbmcr.blogspot.com/2013/08/court-drafted-wills.html and http://mwbmcr.blogspot.com.ar/2013/09/using-court-drafted-wills-to-achieve.html).
Following the recent post about conflict of interest provisions under an enduring power of attorney (EPA) a question came up as to whether a gift and loan back arrangement would have provided another solution.

A summary of the general way in which a gift and loan back arrangement would work is set out in recent posts (http://mwbmcr.blogspot.com/2014/04/how-gift-and-loan-back-arrangements-work.html).

The concept raised in the scenario touched on in the recent post was as follows:

(1) The attorney could arrange for a cash gift equal to the value of the husband’s interest in the home to a discretionary trust that would ultimately pass to the control of the children of the marriage.

(2) That trust would then lend the amount back to the husband (via his wife as the attorney).

(3) The husband’s estate (following his death) would then be required to repay the debt to the trust effectively ensuring that only nominal assets would pass under the husband’s will and the main value of the estate would in turn be held via a more robust structure, being the previously established trust.

Obviously the ability to implement this approach would depend entirely on whether the appropriate conflict of interest provision existed under the EPA and whether the attorney could satisfy them-
selves that they would not be breaching their fiduciary duties to the principal by undertaking the arrangement.

There would also be a range of commercial issues that would need to be considered, not least of which the fact that the trust involved would not be a testamentary trust and therefore would not enjoy the various advantages that testamentary trusts have as compared to standard discretionary trusts.
CHAPTER 8

SUPERANNUATION
It is well understood that, in order to obtain the concessional taxation available for superannuation savings, a superannuation fund must have its sole purpose as being the provision of benefits to members on retirement, or their dependants or legal personal representative (LPR) on death.

In this context, one issue that is often raised is whether a superannuation fund can pay the costs of ensuring its members have their estate planning affairs in order.

In the absence of any specific guidance from the Tax Office in this area, there are a range of views about the legitimacy of this approach. Some advisers believe that any estate planning related expense is clearly incurred in order to help provide for the dependants or LPR of a member and therefore properly payable by a superannuation fund.

The conservative position is that either all estate planning costs should be incurred by members personally, or alternatively where they may be paid by the superannuation fund, there must be a direct and clear nexus between the expense incurred and the ultimate provision of benefits to dependants or LPR on the death of a member.

Next week’s post will consider some specific examples of the types of costs that may be legitimately incurred by a superannuation fund on behalf of a member.
Costs Paid Via Superannuation

Last week’s post looked at the debate surrounding the incurring of estate planning costs by superannuation funds.

While the conservative approach seems to be that all estate planning costs should be incurred by members personally, practically, there are a number of examples where having a superannuation fund incur the relevant expense would appear reasonably arguable, including:

(1) where a superannuation trust deed is being updated as part of an estate planning exercise, clearly these costs should be incurred by the fund;
(2) where, as part of the update, binding nominations are prepared (either on a standalone basis or ‘hardwired’ into the trust deed), then again these costs are legitimately payable by the fund;
(3) where superannuation makes up a significant component of a member’s overall wealth and the member intends (either via binding or non-binding nominations) for their superannuation entitlements to pass via their will, then the costs of the will (including any testamentary trusts incorporated into the documentation) should also be able to be paid by the fund;
(4) strategic advice to members in relation to the impact of death on their superannuation entitlements should also be properly payable by the fund; and
(5) while the nexus might be slightly less obvious, ensuring that a member has a legal personal representative able to take over the trusteeship of a self managed super fund may also justify a
fund incurring costs for implementing a member’s enduring power of attorney.

As with many similar topics, the general position outlined above will depend on the particular factual situation and the approach adopted by the advisers and firms directly assisting superannuation fund members in these areas.
Estate Planning 101 with Superannuation Entitlements

Last week, I was again reminded of the very strange way in which the superannuation laws currently operate concerning death benefits, and more particularly, the distinction between someone withdrawing their superannuation on the day before death as opposed to it being paid out as a death benefit.

All other things being equal, it is often very likely to be the case that a withdrawal immediately before death will be completely free of tax, whereas the same funds distributed as a death benefit can be liable for tax of up to 30% (plus Medicare).

Obviously, there are a range of competing issues that need to be considered as part of any superannuation and estate planning exercise, however we are certainly seeing an increasing number of people more seriously consider the total amount they wish to retain in super in their later years.
Receipt of Superannuation Death Benefits

Following a recent post, I had a number of enquiries, and one particular adviser raised an issue with me which (as she flagged) is often overlooked.

The particular issue relates to the payment of superannuation benefits on death. The legislation requires (and there have been cases supporting this) that the recipient of any death benefit must be alive on the date of the payment themselves – in other words, if the recipient is no longer living at the date the payment is ultimately due to be made, then neither they (nor their estate) will be entitled to receive it.

There are a number of ways to minimise the impact of this rule, however the steps must always be taken as part of the overall estate plan.
Death Benefit Nominations – Read the Deed

Following on from recent posts concerning superannuation death benefit payments, I was reminded this week of the absolute importance of reading the superannuation trust deed before making any death benefit payment.

It is becoming more and more regular to see many people, as part of their overall estate plan, embedding their required superannuation distribution provisions into the superannuation trust deed. Where this is done, the fact that there might be other nominations, or even provisions in a person’s will, not be of any effect – rather the terms of the deed must be followed.

In a future post, I will touch on a related issue concerning binding nominations that are entrenched in superannuation trust deeds.
Double Entrenching Binding Nominations

In a recent post, we touched on the importance of *reviewing a trust deed before making any superannuation death benefit payments.*

The ‘read the deed’ mantra, which is so often used in the context of family trusts, is of similar importance in relation to self managed superannuation funds.

One particular provision to be aware of in this regard is that, even if a nomination (which appears to be binding) is embedded under the deed, unless the provision of that deed has a prohibition against amendment, the intentions of the parties may not in fact be achieved.

For example, the remaining trustees after death could elect to vary the deed (and effectively remove the binding nomination) before ultimately making a death benefit payment.
Super Deed Variations and Resettlements

Last week we had an adviser, probably quite rightly, question us as to why a superannuation trust deed could be totally revoked and replaced with a completely new document, while changes to a family trust deed tend to be extremely piecemeal.

The issue can be largely answered by reference to the Tax Office’s approach to resettlements.

Broadly, the Tax Office accepts that in relation to superannuation funds, a resettlement for tax purposes will never occur. Due to this approach (and stamp duty exemptions that apply in essentially every Australian state), most advisers recommend that when updating a superannuation trust deed, it is best to adopt a completely new deed.

In contrast, where updating a family trust deed, because of the risks associated from a resettlement perspective, it is usually best to only amend the provisions that are in particular need of being addressed.
Again this week we have had an article featured in the Weekly Tax Bulletin. This time it is by fellow View Legal Director Tara Lucke and I and is extracted below for those who do not otherwise have easy access.

If is often said, there is nothing certain in life but death and taxes…and adjustments to the limits for superannuation contributions. In recent times, particularly given the ongoing adjustments to the limits for concessional superannuation contributions, the way in which to maximise contributions has been an area of focus.

Overview

As is well understood, concessional contributions to superannuation can generally be made by:

a  an employer of a member;
b  a member; and
c  the spouse of the member.

The rules in relation to the quantum of permissible concessional contributions (historically referred to as deductible contributions) have been subject to regular change. The changes have primarily focused on the dollar limit for contributions made in each financial year.

Concessional contributions which currently count towards the annual concessional limit include:
a all employer contributions (eg super guarantee, salary sacrifice);
b member contributions which are claimed as a tax deduction; and
c in some situations, allocations from any fund reserves.

Concessional contribution limits

The maximum amount of concessional contributions that may be paid for the 2014-15 year of income without being subject to excess contributions tax were confirmed at 2014 WTB 9 [286] as follows:

a $30,000 per annum per person aged under 49 years on 30 June 2014;
b $35,000 per annum per person aged 49 years and over on 30 June 2014.

These limits have been increased, by way of “stepped” indexation, for the first time since the current contribution limit regime was introduced and are unlikely to be indexed again for at least 3 years.

Non-concessional contribution limits

Subject to potential variations by adopting one of the accelerated contribution approaches explained below, the maximum non concessional limits for the 2014-15 year of income (without being subject to excess contributions tax), have also been increased for indexation and are now as follows:

a $180,000 per annum per person (for contributions on or after 1 July 2014); and
b $540,000 per person averaged over three years (if a 3 year contribution was started before 1 July 2014, then the limit remains $450,000).
Historically, when the per annum limit was capped at $150,000 (and the 3-year average at $450,000), the main strategies available in relation accelerating contributions have been best exemplified by the following table:

<table>
<thead>
<tr>
<th>Member age</th>
<th>61</th>
<th>62</th>
<th>63</th>
<th>64</th>
<th>65</th>
<th>Total Contributions</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Financial year</strong></td>
<td>2013/14</td>
<td>2014/15</td>
<td>2015/16</td>
<td>2016/17</td>
<td>2017/18</td>
<td></td>
</tr>
<tr>
<td>Scenario 1</td>
<td>$150,000</td>
<td>$150,000</td>
<td>$150,000</td>
<td>$150,000</td>
<td>$150,000*</td>
<td>$750,000</td>
</tr>
<tr>
<td>Scenario 2</td>
<td>$150,000</td>
<td>$150,000</td>
<td>$450,000</td>
<td>nil</td>
<td>Nil</td>
<td>$750,000</td>
</tr>
<tr>
<td>Scenario 3</td>
<td>$150,000</td>
<td>$150,000</td>
<td>$150,000</td>
<td>$450,000</td>
<td>Nil</td>
<td>$900,000</td>
</tr>
<tr>
<td>Scenario 4</td>
<td>$450,000</td>
<td>nil</td>
<td>nil</td>
<td>$450,000</td>
<td>Nil</td>
<td>$900,000</td>
</tr>
<tr>
<td>Scenario 5</td>
<td>$150,000</td>
<td>$450,000</td>
<td>nil</td>
<td>nil</td>
<td>$450,000#</td>
<td>$1,050,000</td>
</tr>
<tr>
<td>Scenario 6</td>
<td>$150,000</td>
<td>$150,000</td>
<td>$150,000</td>
<td>$150,000</td>
<td>$450,000*</td>
<td>$1,050,000</td>
</tr>
</tbody>
</table>

In relation to the above table (and the further table below), it is important to note the following:

(1) * Assuming contributions are made prior to member’s 65th birthday or made after reaching age 65 and the member continues to satisfy the required gainful employment test.

(2) # Assuming contributions are made prior to member’s 65th birthday or the member was aged 65 at any time in the year and continues to satisfy the required gainful employment test or the contributions were made after the member’s 65th birthday.

With the changed superannuation thresholds commencing on 1 July 2014 (again as noted at 2014 WTB 9 [286]), it will be important to reference an updated version of the table, as set out below.

Critically, the updated table assumes that the first contribution is made after 1 July 2014.

As set out in the earlier article, if a combined contribution is commenced before 1 July 2014, the previous table continues to apply until the accelerated approach is completed.
### Member age

<table>
<thead>
<tr>
<th>Financial year</th>
<th>61</th>
<th>62</th>
<th>63</th>
<th>64</th>
<th>65</th>
<th>Total Contributions</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014/15</td>
<td>$180,000</td>
<td>$180,000</td>
<td>$180,000</td>
<td>$180,000</td>
<td>$180,000*</td>
<td>$900,000</td>
</tr>
<tr>
<td>2015/16</td>
<td>$180,000</td>
<td>$180,000</td>
<td>$540,000</td>
<td>nil</td>
<td>Nil</td>
<td>$900,000</td>
</tr>
<tr>
<td>2016/17</td>
<td>$180,000</td>
<td>$180,000</td>
<td>$180,000</td>
<td>$540,000</td>
<td>Nil</td>
<td>$1,080,000</td>
</tr>
<tr>
<td>2017/18</td>
<td>$540,000</td>
<td>nil</td>
<td>nil</td>
<td>$540,000</td>
<td>Nil</td>
<td>$1,080,000</td>
</tr>
<tr>
<td>2018/19</td>
<td>$180,000</td>
<td>$540,000</td>
<td>nil</td>
<td>nil</td>
<td>$540,000*</td>
<td>$1,260,000</td>
</tr>
<tr>
<td></td>
<td>$180,000</td>
<td>$180,000</td>
<td>$180,000</td>
<td>$180,000</td>
<td>$540,000*</td>
<td>$1,260,000</td>
</tr>
</tbody>
</table>

(1) * Assuming contributions are made prior to member’s 65th birthday or made after reaching age 65 and the member continues to satisfy the required gainful employment test.

(2) # Assuming contributions are made prior to member’s 65th birthday or the member was aged 65 at any time in the year and continues to satisfy the required gainful employment test or the contributions were made after the member’s 65th birthday.

As a comparison of the 2 tables clearly illustrates, in many client situations there will be a significant differential in delaying non concessional contributions until 1 July 2014 to take advantage of the increased thresholds.
Accessing disablement proceeds via superannuation

This week’s post addresses an issue recently raised with us by an adviser, focussing on the ability to access insurance proceeds from a superannuation fund on an event of permanent incapacity.

The particular issue raised involved the fact that best practice often dictates that clients should obtain insurance protection on the basis of an inability to work in their ‘own’, as opposed to ‘any’ occupation.

The satisfaction of the ‘own’ occupation test is obviously easier than the condition of release set out under the superannuation legislation, being that a member must be incapable of working in ‘any’ occupation.

Where insurance is owned via a superannuation fund there is therefore a risk that while the fund will receive an insurance payout, it will be unable to release it to the member until some other condition of release is satisfied (for example, reaching the retirement age).

Historically therefore, the conservative view was undoubtedly that own occupation insurance should always be owned outside super. Importantly, since 1 July 2014, own occupation insurance is no longer available via superannuation, subject to a grandfathering for arrangements already in place before that date.

For those pre-existing arrangements, there appears to be a pragmatic approach adopted, particularly by those with policies via a self-managed superannuation fund. This approach involves assuming that a trustee (who will also be a member of the relevant fund) will adopt a liberal interpretation of the ‘any’ occupation definition under the superannuation legislation and therefore always allow the release of insurance proceeds.
CHAPTER 9

ADVISER TOOLS
August 5, 2014

Two View Legal iPhone and Android apps launched

Based on feedback from advisers, View Legal has recently developed and launched two new iPhone and Android apps.

Each app can be downloaded via the following links –

(1) iPhone Directors’ Duties – https://itunes.apple.com/us/app/directors-duties/id902289581?ls=1&mt=8

Directors’ Duties App

Acting as a director of a company imposes many obligations and duties. The directors’ duties app is designed to allow the user to help narrow down some of the broad areas that might be relevant in relation to their current or any intended directorships.

Depending on the answers provided, the app generates a free white paper that sets out general information about numerous aspects of the duties directors have.
Estate Planning App

Estate planning is the process of ensuring wealth is dealt with, after death, as intended, while minimising the impact of challenges against the arrangements and costs such as stamp duty, tax and administration expenses.

The estate planning app is designed to allow the user to help narrow down some of the broad areas that might be relevant in relation to implementing, or updating, an estate plan.

Again, depending on the answers provided, the app generates a free white paper that sets out general information about a range of estate planning strategies.
Latest View Legal Apple and Android app launched

Posted 4 November 2014

Following the successful launch earlier this year of the View Legal Directors Duties and Estate Planning apps, we have now developed and launched another Apple and Android app.

The new app is in relation to Business Succession and can be downloaded via the following links –


Business succession is the important process of ensuring a plan is in place for a person’s business assets so they are dealt with, after death, as intended, while minimising the impact of challenges against the arrangements and costs such as stamp duty, tax and administration expenses.

The business succession area is however heavily regulated and it is vital that business owners and their advisers have a deep understanding across all relevant areas.

The business succession app is designed to allow the user to narrow down some of the broad areas that might be relevant in relation to a business succession plan.

Depending on the answers provided, the app generates a free white paper containing general information in relation to some of the issues that are often relevant.
Another View Legal Apple and Android app launched

Posted 18 November 2014

Following the successful launch earlier this year of the View Legal Directors Duties, Estate Planning and business succession apps, we have now developed and launched a further Apple and Android app.

The new app is in relation to binding death benefit nominations (BDBN) and can be downloaded via the following links –

(1) iPhone – https://itunes.apple.com/au/app/bdbn/id931237201?mt=8


BDBNs can be an essential tool for anyone with superannuation savings. BDBNs are however heavily regulated and there are many aspects that can cause irreversible damage if misunderstood.

The app explores some of the fundamental issues that arise for anyone with superannuation savings considering making a BDBN.

Depending on the answers provided, the app generates a free white paper containing general information in relation to some of the issues that are often relevant.
And another View Legal Apple and Android app launched

Posted 2 December 2014

Following the successful launch earlier this year of the View Legal Directors Duties, Estate Planning, business succession and binding death benefit nomination apps, we have now developed and launched a further Apple and Android app.

The new app is in relation to Self-managed superannuation funds (SMSF) and can be downloaded via the following links –

(1) iPhone – https://itunes.apple.com/au/app/smsf/id931264885?mt=8

SMSFs can provide a range of benefits and opportunities not available via any other retirement savings approach.

SMSFs are however heavily regulated and it is vital that fund members have a deep understanding across all relevant areas.

The SMSF app is designed to allow the user to narrow down some of the broad areas that might be relevant in relation to establishing, or updating, an SMSF.

Depending on the answers provided, the app generates a free white paper containing general information in relation to some of the issues that are often relevant.
ABOUT THE AUTHOR
Matthew Burgess

Matthew Burgess is one of the four directors and founders of specialist firm View Legal.

Having the opportunity to help clients achieve their goals is what he is most passionate about.

As Matthew always works in conjunction with trusted advisers (whether it be accountants, financial advisers or other lawyers) and their clients, finding ways to fundamentally improve the value received by those advisers, and in turn their clients, has led him to develop numerous game changing models. Examples include providing guaranteed upfront fixed pricing, founding what is widely regarded as Australia’s first virtual law firm, and more recently, developing a platform that gives advisers access to market leading advice and support for less than $1 a week.

Matthew’s specialisation in tax, structuring, asset protection, estate and succession planning has seen him recognised by most leading industry associations including the Tax Institute, the Weekly Tax Bulletin and in the 2014 ‘Best Lawyers’ list for trusts and estates.

Work is one aspect of his life Matthew loves, so there is no need to be constantly searching for ‘balance’. His other great loves are:

(1) Family – they are profiled in various ways through the series of children’s books he has written under the pseudonym ‘Lily Burgess’ – see www.wordsfromdaddysmouth.com.au and various TV commercials (which is a story for another time);
Learning – going cold Turkey on television and most forms of media in late 2005 (the reasons for this are a story for another time) has radically increased Matthew’s ability to study the great authors and inspired him to recently publish a book that explores the concept of ‘true success’ – see www.thedreamenabler.com.au

Health – aside from being a foodie and swimming at least a 5km a week, Matthew installed a stand up workstation in 2007 and among a few other lifestyle choices, it changed his life (again, stories for another time).
Acknowledgement

This book is the result of contributions from a number of people, each of whom I thank.

In particular:

(1) The team I work with at View Legal, provide an environment dedicated to continual improvement. Our sharing of knowledge as a team is reflected by the sharing of knowledge each week in the posts, that ultimately result in this publication.

(2) All members inspire me to do better each day, and particularly thank you goes to Naomi Arnold, Patrick Ellwood and Tara Lucke for constantly raising our standards from a legal perspective.

(3) More recently, Winnie Van has added significant value to the View Legal platform.

(4) Finally, thank you to my family, for being on this journey with me.