

Estate Planning: The market has moved and it's a whole new ball game

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Presenting Wednesdays with Redchip Webinar



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Emily's work with the Private and Commercial teams involves working with clients to develop plans for their business or personal situations.

Prior to March 2020



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- Somewhere between 35% and 47% of adult Australians have a valid Will
- Lack of urgency amongst general population
- Advisers referred clients to lawyers as they thought necessary

Post March 2020

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- Every day the news there are 10's of thousands of stories about people all over the world dying
- People are genuinely worried about themselves, their families and their assets
- Estate Planning has become real and meaningful



What does the new reality mean for you as the trusted adviser?

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- In uncertain times, clients are looking for leadership
- They are not looking for a recommendation or guidance. They want you to provide a solution
- You as the adviser have the opportunity to lead them through, take control and deliver solutions

How to guide

- Estate Planning is more than just the preparation of a Will
- A Will must make provision for those people to whom the Will Maker has a legal obligation to support
- So how do you help your clients do this?

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The process

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Step 1

Data collection

Step 2

Collate data

Step 3

Devise strategy

Step 4

Prepare and finalise Estate documents

What is legal advice?



LEGAL PROFESSION ACT 2007 (Qld) - SECT 24

Prohibition on engaging in legal practice when not entitled

1) A person must not engage in legal practice in this jurisdiction unless the person is an Australian legal practitioner.

Maximum penalty – 300 penalty units or 2 years imprisonment.

4) A person is not entitled to recover any amount in relation to anything the person did in contravention of subsection (1).

What is legal advice?

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“Engage in legal practice” and “legal practice” are not defined terms but were considered in the case of *Cornall v Nagle [1995] 2 VR 188*:

“The giving of legal advice... can properly be said to lie at or near the very centre of the practice of the law...”

“Legal advice” has no statutory definition however was considered in the recent case of *Legal Practice Board v Computer Accounting and Tax Pty Ltd [2007] WASC 184* where:

- The accountant argued she had performed a clerical function by filling out the variables in a template precedent for a SMSF Deed;
- The court disagreed, and said that there was the use of intellect in deciding to use the particular precedent chosen and completing the particulars so that it met the clients requirements;
- Drawing and preparing a SMSF Deed was found to be “engaging in legal practice”; and
- providing a trust deed “involved the (Accountant) directly or indirectly performing, carrying out or engaging in work in connection with the practice of law.

What is legal advice?



Step	Action	Is it legal advice?
Step 1 Data collection	Collecting client information is not legal advice. Advisers do this every day.	No
Step 2 Collate data	Collating that information and preparing a report to be used by your client's lawyer is not the provision of legal advice.	No
Step 3 Devise strategy	Making <u>recommendations</u> about the legal documents that the client may require as part of this Estate Plan is legal advice. Discussing what a Testamentary Trust Will is and how it works, is not legal advice, however telling your clients they need one, is legal advice. Referring your clients to a lawyer and supplying the Estate Plan drafted by an Adviser is not giving legal advice.	Yes
Step 4 Finalise documentation	Prepare Wills and other Estate Planning documents is giving legal advice.	Yes

How to approach your clients about Estate Planning

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- Be **bold** – don't be afraid of having a different conversation with your clients
- Be **honest** – don't be afraid of telling your clients 'I don't know'
- Be **proactive** – project manage the whole process including getting the lawyer involved



How to approach Estate Planning with your clients

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- Complex issues, and technical solutions but a simple process
- Build that process inside your practice
- Have a dedicated client meeting to discuss estate planning issues
- Have checklists and a template estate planning document you can fill out
- Build a relationship with a lawyer your talk to and ask for assistance
- Take baby steps, and get your lawyer involved in the process early, if that makes you more comfortable
- Understand the value you bring and know how you can explain that to your client
- Decide your financial model and how you recover your costs from this process



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Common Estate Planning Issues

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Common Estate Planning issues

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- What do we mean when we say Estate Planning is more than just a will?
- Deal with assets owned personally
- Deal with assets controlled but not personally owned
- Address issues of at risk beneficiaries



Common Estate Planning issues

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There may be other work required to be done, such as:

- Updating the governing rules of a self managed super fund
- Amending the terms of a discretionary family trust
- Providing asset protection advice
- Changing title to certain property including real estate
- Putting succession plans in place for the Will maker's business interests
- Implementing strategies to give effect to that advice which can include restructuring and advice on taxation strategies
- Considering the need for life or other insurances and referring the client to appropriate professionals for that advice

Common Estate Planning issues – Witnessing

Queensland

COVID-19 Emergency Response Bill 2020 (Qld)

Practice Direction 10 of 2020

- the will was drafted by a solicitor, or a solicitor is one of the witnesses or person supervising the execution of the will;
- the deceased intended the document to take immediate effect as their Will (or as an alteration or revocation of their Will);
- the testator executed the Will in the presence of at least one witness by way of audio-visual link;
- the witness(es) were able to identify the document executed; and
- the reasons for the testator being unable to execute the will in the physical presence of two witnesses in the usual way was due to COVID-19.



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Common Estate Planning issues – Witnessing

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New South Wales

Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020

- A person can witness a document by audio-visual link and must observe the signing of the document in real time and then sign the document or copy of the document;
- There must be an endorsement by the witness specifying how the document was witnessed and that it was witnessed in accordance with the Regulation;
- The witness must be reasonably satisfied that the document which the person signs is the same document that the witness signs.



Case Study: Dying Intestate

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- Self Employed, married with kids
- House jointly owned with wife
- \$1 million life insurance in super fund
- No Will or Estate Planning



Case Study: Estate Planning for Asset Protection

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- Self Employed, married with kids
- House jointly owned with wife but highly geared for the business
- Provided personal guarantees to cover business loans
- \$1 million life insurance in super fund
- No Will or Estate Planning
- Business is forced into liquidation
- Declared personal bankruptcy

Case Study: Pre-empting Estate Challenges

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The Facts

- Husband and wife both with 3 children from previous marriages
- All children are now adults with families of their own
- Husband and wife want to leave their Estate to each other, and then to the wife's 3 children equally
- They do not wish to leave any gifts to the husband's 3 children
- Key estate asset is the family home valued at about \$1 million and which is unencumbered



Case Study: Pre-empting Estate Challenges

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Estate Planning Considerations

- Challenge to husband's estate by his 3 children
- Challenge to wife's estate by her 3 step-children
- What are the assets that need protecting?



Case Study: Pre-Empting Estate Challenges



The Strategy

- Prepare mutual Wills
- Prepare a Statutory Declaration
- Protect the equity in the family home by way of a Personal Protection Plan

Case Study: Trust Control

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- Bob is 45 years old, single and never married
- Purchased two properties within a family trust
- Bob's brother Jerry is the Trustee, Principal and Primary Beneficiary
- Bob is not named in the trust deed and had no legal control
- Arrangement worked well until Jerry passed away in a car accident
- Jerry's Will left everything to his partner, then to charity
- Jerry's partner also died in the same car accident

Case Study: Trust Control

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What happened?

- The charity applied for and became the Executor of Jerry's Estate
- Bob's Trust Deed said that on the death of the Principal, the Principal's Legal Personal Representative became Principal of the Trust. SO, the charity became the Principal of Bob's Trust and appointed itself as Trustee
- We had to intervene before the charity sold the 2 properties and distributed the proceeds to itself



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Questions?

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