The Art of Estate Planning

Overview

Australians are becoming increasingly wealthier, primarily due to the accumulation of assets in superannuation. Coupled with an increase in blended families, an uplift in vulnerable beneficiaries through such things as age related degenerative diseases and generally a more litigious society, it is becoming increasingly more important to ensure Australians receive thorough succession planning advice to provide certainty that '*the right assets go to the right people at the right time*': which in a nutshell is estate planning.

Furthermore, as the baby boomers age, intergenerational wealth transfer is likely to have a significant impact on the wealth of the recipients. Australia's Future Tax System Review (informally known as the Henry Tax Review) quoted research suggesting that the proportion of all household wealth held by older Australians is projected to increase from 22 per cent to 47 per cent between 2003 and 2030. It is estimated in real terms the amount of bequests passed on would increase from $22 billion in 2010 to $85 billion in 2030. This amounts to a projected increase from around 2 per cent of GDP to 4 per cent of GDP[1].

Given these forecasts, it is clear that without proper succession planning, the next generation could easily be embroiled in conflict and/or face financial disaster. Therefore, there is both a real need and opportunity for advisers to embrace these potential scenarios and provide succession planning solutions for their clients.

Through continual experiential monitoring of process, by adopting the '*Kaizen*' principle, specialists in this area are better able to demonstrate value and position fixed–fees to facilitate succession planning outcomes. For risk specialists where risk remains the core service, risk advice evolves to form part of the conversation rather than the only conversation when following a succession advice process; this can often give these conversations more purpose, leading to greater sums insured as outlined below.

After completing this topic you will be able to:

1. Understand the key components of a succession process and facilitation model.
2. Have the ability to apply technical estate knowledge through practical advice.
3. Identify opportunities and position yourself as a specialist in this growth market.

1. What does a Success process and facilitation model look like?

There is no set process that works best and ultimately your suitable process will be refined over time and with experience. Importantly, good processes will help demonstrate sufficient value for clients and referrers to buy into.

<Required reading 1>

An example of a personal succession process.

[1] Kelly, S & Harding, A 2003, 'You can't rely on the old folks' money', AMP.NATSEM Income and Wealth Report, Issue 5, June quoted in Australian Tax Office 2008, *Australia's future tax system – Report to the treasurer*

<Required reading 2>

This diagram demonstrates both the role of the facilitator and the steps a client goes through to resolve their succession needs. The step focused on below is the **Discovery Meeting**, which again for further information and video explanation of, please click above.

The value of the Discovery Meeting

The Discovery Meeting, which is simply conducted via a whiteboard or piece of paper, identifies a client's:

- **Assets** – Type of asset, ownership structure, current value and debt, and importantly identifies whether they are estate or non-estate assets.
- **Family tree structure** – will reveal any blended family issues, vulnerable beneficiaries, legacy considerations and specific asset bequest.
- **Points for consideration** – will help prise out of clients what is most important to them (i.e. their estate vision), how they wish their estate to be distributed and the key components to create their estate blueprint.

By conducting a Discovery Meeting you are in affect performing a 'Gap Analysis' similar to what is done for retirement planning purposes, that is, asking the client, 'what do you want your estate to look like if you died tonight?' The Discovery Meeting helps your clients identify the current gaps in their arrangements (e.g. no will) so that a solution can be scoped accordingly. Where possible use a red pen to highlight the gaps and finish the Discovery Meeting by presenting a 'fixed price package' encapsulating all of the client's succession needs, preferably inclusive of legal fees, and scope to allow up to a 3 month timeframe to complete.

This is an hour process that if conducted correctly has a high conversion rate.

Note: It's important to remind and refresh clients during the succession process as to what step they are up to and the outcomes required.

2. Applying technical estate knowledge through practical advice

Throughout the process certain scenarios may be encountered that may require technical strategies to achieve the clients desired estate vision.

It is important to remember that the facilitator's role is to work with other professionals, such as the accountant and solicitor, to draw on their technical expertise as and where required ensuring the client's estate vision is structurally sound, tax effective and legal.

The following are four common scenarios requiring technical ability:

1. Linking non-estate assets to the estate (illustrated in this estate vision flow chart).

   As stated in the overview, a vast amount of wealth is often held in areas such as family trusts and superannuation funds and a will has no bearing upon them.

   - **Family Trust Succession**. It is important to understand the key components and roles within a typical discretionary family trust:
     - **What is a Discretionary Family Trust?** – A trust established for a family with payment of an amount, called the 'settled sum' by the settlor to the trustee to be held in trust in accordance with the deed for the benefit of the beneficiaries. The trust may run for up to 80 years and upon termination date is called the '*vesting day*' when beneficiaries are entitled to the whole of the trust fund.

- **Role of Settlor** – A trust is created by a 'declaration of trust' on property of the trust or by payment of settlement of money by a person called the 'Settlor' to an entity called the 'trustee', to deal with trust funds as provided in the deed of settlement. **Note:** care should be taken that the Settlor is an independent person.
- **Role of Appointor** – The appointor can remove or replace the trustee. The appointor 'in de facto' controls the trust, since, if the trustee does not follow the appointor's directions, the appointor can simply remove the trustee and appoint another trustee.
- **Role of Trustee** – The Trustee is appointed by the Settlor with powers contained in the trust deed. The Trustee owes a duty of care of 'good faith' to the beneficiaries and the deed requires that all trustee(s), at all times, act in best interests of all beneficiaries. Trustee(s) are responsible to look after trust funds by investing, managing it and distributing to various beneficiaries. Trustee(s) can either be individual(s) or a company. Individual trustee(s) should not be below 18 years of age and should not be a disqualified person(s). If the trustee is a company, its affairs are controlled by its directors and eventually by its shareholders by virtue of their power to appoint or remove directors.
- **Role of Beneficiary** – A beneficiary is a person for whose benefit the trustee holds trust assets. In most trust deeds 'initial beneficiaries' are noted in a schedule and are usually family members or other close relatives. There are classes of beneficiary who can be parents, grandparents, brothers, sisters, children, grandchildren, aunties, uncles, nephews, and nieces of initial beneficiaries.

Why is Family Trust Succession important? Typically clients will want the control of assets held in their family trust to flow to one another and then to their children. Therefore, it is important that the children are nominated as the final '*succession appointor*' in the will(s) to create certainty that *the right assets end up in the right hands*.

As explained, the appointor of a trust has the power to appoint and sack the trustee(s), so if only the eldest child assumes control this may lead to potential conflict as it is reliant on the eldest child to act in the best interest of their siblings.

Succession of the family trust is complete when the succession of appointor has been stated in the will and the trust deed has been verified by a solicitor to legally allow for succession appointor.

- **Self Managed Superannuation Fund (SMSF) Succession** – most superannuation funds have beneficiary nominations bypassing the estate. However if the client requires certainty that all their assets flow via the estate, they can elect to implement a **Binding Death Benefit Nomination to their Legal Personal Representative**, which means the assets pass to the estate and are distributed according to the will and may be held in a testamentary trust where required. Flexibility may also be required to maintain assets in superannuation where the fund is in '*pension phase*', so it is important there is a degree of flexibility in the drafting of the beneficiary nomination and appropriate financial advice provided at the time of death to ensure the most advantageous outcome for the beneficiary.

2. **Testamentary Trusts** – A common objective of many clients is to ensure what they leave behind not only ends up in the right hands but is protected loosely from '*Predators and Creditors*' or the beneficiary themselves who may be vulnerable due to age and therefore requires a trustee to look after their financial wellbeing until they reach age of entitlement.

   Common discussion points in relation to testamentary trusts include:

   - **Who are appropriate trustees?** – Certainly someone with good financial acumen is a starting point and preferably where multiple appointed trustees have the capacity to work together.

- **Where more than one trustee what capacity do they operate in?** – Typically they would either operate jointly or jointly and severally , which are explained as follows:
  - **Joint Trustees** – Two or more persons who are entrusted with property for the benefit of one or more others. Joint trustees cannot act separately, but must join both in conveyances and receipts, for one cannot sell without the others, or receive more of the consideration money, or be more a trustee than his partner.
  - **Joint and Several Trustees** – In general, trustees are under a duty to act jointly and have authority to act individually if the trust deed so provides. In principle, each trustee has an equal say in the management of the trust property and therefore in the event of a breach the trustees are jointly and severally liable for their actions. This option provides more flexibility in decision making, for example, where one trustee maybe overseas the other may act independently on behalf of the beneficiaries.
- **What is an appropriate age of entitlement?** – When is a child old enough to make rational financial decisions on their own and become their own trustee, which of course varies from one child to another and needs to consider any vulnerabilities they may have, for example drug dependencies, disabilities or a propensity towards financial irresponsibility. This refers to the succession phrase '*…..at the right time*' and in the Discovery Meeting the trusts are represented as triangles and in red to highlight their importance.
- **Do you stagger the entitlements?** – It may not be appropriate for a 21 year old to inherent $1 million given most children are not completing tertiary education until 21 and while they may be smart could possibly not yet have an appreciation for the value of money. In this case it may be more appropriate to stagger entitlements, for example, ages 18, 21, 25 and 30 where the child has access to lump sums of money for particular events before age of entitlement such as the purchase of their first car at age 18.
- **How important is it to protect the bloodline?** – Generally this is a key driver for clients ensuring what they leave behind not only ends up in the right hands but continues to cascade from one generation to the next down the bloodline.
- **What about 'predators and creditors'** – By holding the estate in trust creates more certainty by safeguarding against predatory behaviour, for example, from an ex-spouse or creditors chasing funds where a beneficiary's business has gone into administration.

3. **Living Wills** – These are legal documents for when a person is alive for when they have lost mental capacity, which requires careful planning and consideration. The three types are:

   a. **Enduring Power of Attorney (EPOA)** – An EPOA empowers others to step into a person's shoes to make financial and property decisions on their behalf. It is vitally important an attorney(s) is chosen carefully as they will control the person's finances and property. Another consideration is whether they are to act '*immediately*' or on '*incapacity*' only. For an attorney to act on incapacity only means approval has been sought and granted to allow the power of attorney to come into force during any period when a declaration by the State Administration Tribunal that the donor does not have legal capacity is in force under section 106 of the *Guardianship and Administration* Act, 1990.

   b. **Enduring Power of Guardianship (EPOG)** – An EPOG empowers others to step into the person's shoes to make personal, lifestyle and medical decisions on their behalf. An EPOG can grant full or limited powers as desired and required. **Note:** an attorney for an EPOG may be different to the attorney chosen for the EPOA, as the EPOA requires those will financial acumen whereas the EPOG generally requires someone empathetic who would personally understand how the person arrives at decision making.

c. **Advanced Health Directive (AHD)** – Unlike the EPOA & EPOG, the AHD rather than empower others, instead directs others to specifically how medical treatment only is to be administered. An example maybe where someone is on life support and the AHD directs family, courts and medical practitioners as to how you wish treatment to be administered. **Note:** where a client has both an EPOG and AHD, the AHD has hierarchy over the EPOG.

4. Estate Funding – Most estates are encumbered, so it is important to ask the client how important is it to unencumber the estate so assets may flow to the beneficiaries intact. If the answer is yes, then typically we could consider life insurance funding strategies to unencumber the estate. Common scenarios include:

   a. **Unencumbering the family home or business** – parents may wish for their children to remain living in the family home should something happen to them and therefore the asset needs to have all debt and personal/directors' guarantees extinguished. Their wish maybe for the family business to continue on and therefore provision to extinguish debt to eradicate any bank guarantees.

   b. **Estate equalisation** – where a large asset is being distributed to one beneficiary, for example, the family farm is bequeathed to one child only , parents may wish to equalise the estate by having appropriate insurance funding in place to top up the non-farm assets for the other children to create an equal distribution.

   c. **Capital Gains Tax (CGT) Planning** – it is often said that CGT is the hidden death duties and some clients may wish to plan for potential CGT liabilities on their estate by utilising life insurance to extinguish the liability. **Note:** it is important to seek the accountants help and advice when calculating the future CGT liability by understanding what the difference between the original cost base of the asset(s) and potential future gain maybe. Once a figure is established insurance funding can be recommended for consideration.

   d. **Business Succession Funding** – it is not uncommon for personal estates to have an interest in a business where the interest in the business is handed back to the surviving business partner by the estate, in return for the deceased's interest in the business being received by the estate through insurance funding.

   e. **Other covers** – naturally when reviewing insurance funding needs, it is also prudent to review all of the clients' personal insurance needs and provide a written statement of advice accordingly on other needs such as income protection and trauma cover.

3 How do you position yourself as the expert and identify estate opportunities?

One of the challenges of a specialised model is the need for referrals to sustain a business, which is similar to a medical specialist who is reliant on the GP to refer them work. Therefore, it is important that the perception your referrers have of you is one of 'expert' when it comes to succession planning.

The following are five examples of ways to help build credibility, trust and referrals with referrers:

1. '**Tools of the trade**' – Provide referrers with the same marketing materials used in front of clients, namely:

   a. *A Facilitation and Process flyer* as illustrated under point 1 of which most referrers should experience firsthand themselves.

   b. *A Succession Directory* as outlined below.

   c. *Business cards and marketing brochure* to provide to their clients.

   d. Provide ongoing *training and education* for the referrer and their staff.

2. **Fees** – It is important the referrer have an understanding of your fee ranges to help position with their clients as this is a common question raised by the prospective client. Do not get drawn into specifics until an opportunity to conduct a Discovery Meeting as client scenarios typically vary and are unique in some manner, therefore important to 'know your client' before engaging in specifics.
3. **Succession Directory** – For the purpose of an example succession directory click on the following link: http://successionmatters.com.au/the%20succession%20directory/.The aim is to provide something tangible at the '*Handover*' meeting to clients which helps communicate their estate wishes to love ones and provides an end to end process of winding up an estate such as the responsibilities of being an executor and trustee.
4. **Referrer luncheon** – organise an annual referrer's luncheon to say thank you for their support and take the opportunity to update referrers of WHAT you do, HOW you do it and most importantly WHY you do it, which is not to be underestimated or forgotten.
5. **Quarterly catch-ups** – have a dedicated team member's KPI to ensure they arrange quarterly meetings where you provide each referrer with a report detailing progress of referrals and highlight challenges and successes which help build credibility, trust and education.

Conclusion

This article has considered the art of estate planning by demonstrating a process to follow from a practicing succession adviser, how to incorporate technical expertise through practical advice and ideas on how to promote yourself in your referrers eyes as the preeminent expert in succession planning solutions.

The article also highlights the need and growth trend of intergenerational wealth transition associated with estates, in particular the baby boomer generation.

Finally, for risk specialist the article also highlights how risk can be presented in a different perspective often resulting in more purpose behind the client's decision making and translating into larger sums insured as a result.

References

www.successionmatters.com.au – example of personal succession process & discovery meeting.

http://www.trustdeed.com.au/how-discretionary-trust-works.html - explanations of roles within a discretionary family trust.

http://www.mooreslegal.com.au/factfinders/estate-planning - explanation of testamentary trusts

http://www.sgsep.com.au/baby-boomers-housing-and-productivity - intergeneration wealth statistics for baby-boomers.