

**Partner**

Stewart Lloyd Germann  
B.Com, LLB, FCIS, ANZIM, Notary Public

**Partner**

Clive Frederick Neifeld  
B.Com, LLB

Ground Floor, Princes Court  
2 Princes Street, PO Box 1542  
Auckland, New Zealand  
DX CP20531, Auckland

Telephone 0-9-308 9925  
Facsimile 0-9-308 9922  
email [stewart@germann.co.nz](mailto:stewart@germann.co.nz)

# Estate Planning

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An estate plan is primarily the means by which a person preserves his or her wealth for the future by minimising the liability on his or her estate for tax, protecting assets from creditors, a matrimonial claim or Government means tested benefits while still retaining as much control and use of that person's assets during his or her lifetime as can reasonably be achieved.

## **Estate Duty**

With the abolition of estate duty in December 1992, estate planning still achieves many fundamental objectives as will be later explained. There is a common belief that an alternative regime will be put in place in the near future to compensate for the lost revenue through the abolition of death duty.

The government has indicated that gift duty will also be abolished as soon as a suitable anti-avoidance mechanism can be introduced to prevent an erosion of the revenue base in the area of the GRI surcharge and Social Welfare benefits. The feeling is that some form of Capital Transfer tax may be introduced. Even at a low rate of taxation, more than sufficient revenue would be generated to compensate for any perceived erosion.

At present, inter-family transactions tend to have a primary and secondary phase. The primary phase is the asset transfer and the secondary phase the debt back and debt forgiveness. An assets transfer tax aimed at the primary phase would have an enormous impact. Clients who are disposed to hold off on transfers to family trusts or other entities may well be advised to consider this possibility in determining whether or not to proceed.

A positive aspect of the abolition of estate duty is that it is now possible to consider the use of trusts structures in a rather different form including, in particular, the ability of the client to be a discretionary beneficiary.

## **Creditor Protection**

Where there is a potential or contingent liability, a properly structured estate plan can minimise the ability of creditors to acquire your assets. Individual personal property is becoming increasingly subject to the risk of claims by banks exercising bank guarantees signed by the

company directors, claims by landlords under rental guarantee, creditors claiming against partnerships where each partner is jointly and severally liable for the liabilities of the partnership, and partners in professional practices, where claims for apparent negligence are claimed against all partners in the practice. In these cases, an important element of the estate plan is the protection of assets

### **The Matrimonial Claim**

Under Section 15(1) of the Matrimonial Property Act 1976 there is a presumption that spouses share equally in a division of "matrimonial property" with certain qualifications. The definition of matrimonial property is covered under Section 8 and is very wide. There may be a situation where spouses wish to protect certain assets from a matrimonial claim (eg a business, substantial wealth or merely wealth in a second relationship which is to be preserved for children of a previous relationship) in which case the estate plan can meet that requirement.

### **Means Tested Benefits**

Many people are wishing to divest themselves of assets to ensure that in their retirement years, in the event that Social Welfare assistance is required or available and that assistance is means tested, their income levels are sufficiently low to enable them to obtain the assistance. Also, with successive governments applying taxation surcharges on income levels for superannuitants, assets can be transferred to a trust and the income from those assets earned by the trust. Subsequent drawings by the superannuitant from the trust can be classed as a repayment of the debt back from the assets sold to the trust.

### **Priorities**

A balanced estate plan should take into account in order to meet the following objective.

1. To maintain your present lifestyle and provide for a satisfactory standard of living for you and your spouse in the future.
2. To meet your goals and aspirations (you will still need to have access to an income).
3. To maintain adequate provision for your dependants. The plan will cater for the future needs of your children and other dependants.
4. To prevent further increases in the value of your net wealth for estate purposes. When assessing your net assets, we need to deal specifically with those assets which increase in value over time, eg life insurance policies, superannuation and growth assets. Consideration also needs to be given to future inheritances to determine what effect they would have on your estate and whether they should be redirected.
5. To provide funds available at the time of your death to pay any of the expenses caused by death.
6. To protect assets.

An estate plan encompassing all of the above should be flexible, able to cater for you while you are alive and preserve as far as possible your wealth for the use of your dependants after death.

## **THE ESTATE PLANNERS TOOLS**

### **Wills**

As part of the review it will be necessary to review your will to ensure that the provisions that are contained in the will are in line with the provisions established in relation to your estate plan.

It is common practice for spouses to have mutual benefit wills where the husband leaves his property to his wife and the wife leaves her property to her husband, and on the death of the remaining spouse, the joint property is passed to the children. The effect of the mutual benefit is to double the value of the estate of the surviving spouse.

Consideration should be given to the preparation of a life interest will. This allows the testator to leave assets to a beneficiary or group of beneficiaries, with the proviso that the legacy does not vest until the death of the spouse of the testator. This means that the assets are left to the children but the surviving spouse enjoys the benefit of the income from the assets for the rest of his/her life with the assets passing to the children only on the death of the remaining spouse. The effect is that the assets of the first spouse do not appear in the estate of the remaining spouse but the income from those assets is enjoyed by the remaining spouse for life.

### **Matrimonial Property Agreement**

The Matrimonial Property Act 1976 provides that all assets acquired by you and your spouse since marriage are jointly owned. Notwithstanding that your business assets might be all in your name, it is possible using the Matrimonial Property Agreement to transfer half, or a lesser proportion, of your assets to your spouse. Any combination of transfer of assets is possible with a maximum of a 50/50 split. The effect is immediate with no time delays being imposed.

This Act is one of the most important pieces of estate planning legislation passed in recent years as it enables married couples to transfer assets between one another. With its effects being immediate, it is available for use when one of the parties is suffering from a terminal illness.

It is essential that wills of both parties are reviewed at the same time to ensure that the deceased's estate remains in trust for the use of the surviving spouse during his or her lifetime. This effectively avoids the deceased's estate being transferred to the surviving spouse and thereby negating the advantages of the Matrimonial Property Act.

### **Trusts**

A trust is an equitable obligation recognised by law by which a person (the Trustee) declares that certain assets in their name (the trust property) are held for the benefit of third parties (the Beneficiaries). A trust is created by a person (the Settlor), who may be a trustee but not a beneficiary, settling property in the name of the trustees for the benefit of third parties. Thus the beneficial ownership of the assets is separated from the legal ownership.

Trustees are often given discretions of various kinds. The phrase "discretionary trust" usually means a trust under which the trustees are given a discretion to pay or apply capital and/or income to or for the benefit of all, or any one or more, of a specified class or group of persons, no beneficiary being able to claim as of right that all or any part of the capital and/or income is to be paid or applied for his benefit.

The arrangement is for the settlor to settle say \$100 by way of gift upon the trustees which establishes a trust fund. The trustees, acknowledging their office, from that time onwards purchase or acquire other assets or funds which they ultimately utilise for the benefit of the beneficiaries. Obviously you will be the provider of most of such assets or funds, particularly by way of sale and purchase, with you accepting in part, or full satisfaction of the purchase price, a mortgage or other debt security from the trustees which you may or may not forgive from time to time as part of your gifting plan.

The income, and ultimately the capital, of the trust fund is divided between the beneficiaries of the trust. As they are in fact the owners, no duty, either stamp duty or otherwise, is payable upon the transfer of the assets to them. There are two types of beneficiary, "discretionary beneficiaries" and "final beneficiaries". The discretionary beneficiaries are those people who participate in the income and capital of the trust fund until the date on which the final distribution is made. Upon the final vesting date it is the final beneficiaries only who share in the proceeds of the trust. These are usually your children and grandchildren. Consideration should be given to the inclusion of a charity as a final beneficiary should all beneficiaries die before the final vesting day.

The maximum period of a trust is 80 years, being the rule against perpetuities. At the expiration of this term, the capital of the trust must be distributed to the beneficiaries.

Once assets are transferred to the trust you lose ownership of them and such disposition cannot be reversed if you change your mind at a later stage. It is important for you to realise that the trust cannot be seen to be an artificial arrangement and must be strictly bona fide.

The power of appointment of new trustees is vested in you. This gives you a measure of flexibility with regard to who may be trustees from time to time. Generally speaking however, people who should be trustees should be persons who are well known to you and who you would feel would understand the needs of the beneficiaries from time to time in the administration of the affairs of the family trust.

The trust deed should contain the power to resetttle the trust which may be necessary if the terms become too narrow for the operation of the trust. However, the term of the trust cannot be extended beyond the term of the original deed.

It is usual for the trustees to be given a memorandum of wishes setting out your intentions or you could from time to time give your trustees written advice as to how you would want your beneficiaries looked after.

There are tax advantages resulting when allocations of income are made to discretionary beneficiaries. If the trustees resolve within six months of the end of the income year to pay or apply the income earned on the trust property to or for a particular beneficiary, then that income is taxed as the income of the beneficiary. A benefit arises where the tax rate of the beneficiary is lower than that of the trustee or the settlor. In the case of a family trust, the beneficiaries may be persons with no other source of income and consequently, the appropriate tax rate is low. Once again any tax benefits are secondary to the main goals of the estate plan.

Generally speaking, the provisions of the trust deed should be wide enough to enable trustees to comfortably enter into any prudent and property business transaction.

## **Limited Company as Trustee**

There are three reasons for appointing a specially incorporated company as trustee. When an asset is acquired by trustees it is transferred into their name and the trustees then become personally liable to the beneficiaries for their administration of the trust. This can sometimes be an uncomfortable position for a professional adviser, trustee or for yourself. Personal liability is overcome when a limited liability company is the trustee.

You will appreciate that if you appoint three professional advisers as your trustees at the beginning it would be too much to expect them to be alive at the end of 45 or 50 years. Each change of trustees whether by death or retirement or because you simply have decided to use another firm of accountants or solicitors means a transfer of the assets of the trust to the new trustees. For shares and land this can often be a time consuming and expensive task but by appointing a limited company as the trustee this problem is overcome for all time. Any change of trustees is simply accomplished by changing the directors and notifying the Companies Office accordingly.

The company procedure has an added benefit. Because the directors control the company you can be included as one of the directors who will practically make all the decisions relating to the trust property. Providing you can always be seen to be outvoted by the other directors (who would hopefully be your professional advisers or close friends), you cannot be said to have control. The shareholders in any trustee company will be your professional advisers and not yourself, so that the control that the shareholders exercise in such a company can be seen to be beyond your reach.

Effectively the company structure gives you a large measure of control.

## **Gifting Plan**

The transfer of assets to a trust is accomplished by the trust purchasing from you the assets that you wish to transfer to it. The purchase price is satisfied by the trust executing in your favour a Deed of Acknowledgment of Debt or other security. For the purposes of the Estate and Gift Duties Act 1968 this is a separate transaction and to avoid any element of gifting which might appear in the transaction the transfer must be for the full value of the asset.

The result is that the asset itself is then owned by the trust and you are left with a debt security of an equal amount. At that point nothing has been achieved other than transferring into the trust all future growth of that asset. The value of your estate has been fixed at the transfer amount and any growth of the asset will be in the trust and not in your name.

The second stage is to reduce the value of the debt held by yourself which is accomplished by the gifting plan. Presently \$27,000 can be gifted in any 12 month period (not necessarily a taxation year) free of duty. Duty increases on a percentage basis but is never greater than 25%. As an indication of the size of gifts that can be made it is useful to note that gifts totalling \$50,000 in any one year attract duty of \$1,850 and gifts totalling \$70,000 attract duty of \$5,000.

A gifting plan would be established based upon the type of assets that are to be transferred to the trust and the amount of time it would take to get the resulting debt out of your estate having regard to your age, state of health and likely allotted lifespan using actuarial tables.

If a Matrimonial Property Agreement is completed and half or a lesser proportion of your assets are transferred to your spouse, then your spouse would subsequently transfer those assets to the family trust and commence his or her own gifting plan. By doing this the duty free gifting limit is effectively doubled to \$54,000.

### **Memorandum of Wishes**

The key to all of the above is to maintain flexibility so that elements of your estate plan can be adapted where possible to your changing circumstances. Obviously from time to time you will want to inform your trustees of your current thoughts with regard to your support of your dependants and this can be done either by a Memorandum of Wishes or by your leaving a letter to your trustees to be opened in the event of your death. Either way the fact that a trust remains in operation after your passing means that you have put in place structures that can ensure your family receives the most benefit from your assets and accumulated wealth.

### **Summary**

Whether or not there are advantages for you in pursuing any of the above is dependent upon your personal circumstances, of which we have little specific knowledge. Such circumstances include the likely value of your estate, the ages of yourselves and your children, whether your assets are income producing or likely to benefit from capital growth, and what your wishes are.

Should you wish to pursue planning your estate further we attach a form to be completed showing all assets owned by yourself and your spouse whether individually or jointly so that we can obtain an overall picture of your estate position and can determine what action, if any, should be taken to reduce your exposure to creditors and matrimonial claims. The subject of trusts need not be complex. Simple structures can be designed using some of the above tools so please do not be deterred by the terminology.

If you wish to take this matter further then please contact the writer who would be very please to assist you.

## STATEMENT OF ASSETS AND LIABILITIES

AS AT     /     /

	TOTAL	HUSBAND	WIFE
<b>Home</b> (Valuation)	\$	\$	\$

Whose name is it registered under?

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Is this registered as a Joint Family Home under the Joint Family Homes Act?    Y/N

If no, is it registered in another form or do you want us to check?

**Chattels** (Personal possessions) Detail below

	\$	\$	\$
	\$	\$	\$
	\$	\$	\$

### Life Insurance

List policies (show policy value in column)

Company & Policy Type	Owner/ Beneficiary	Life Value & Date	Surrender Value & Date			
				\$	\$	\$
				\$	\$	\$
				\$	\$	\$
				\$	\$	\$

### Investments

List all investments such as bank deposits shares, etc and show market value in column

Type of Investment	Name of Owner			
		\$	\$	\$
		\$	\$	\$
		\$	\$	\$
		\$	\$	\$
		\$	\$	\$

(With shares a formal valuation will need to be prepared on drafting the plan)

**TOTAL      HUSBAND WIFE**

**Properties**

List all properties held and any mortgages with market value in column

Owner	Address	Type	Mortgage	Valuation			
					\$	\$	\$
					\$	\$	\$

Current Government valuation or assessed value. A formal valuation will be required on drafting the plan)

**Business Assets**

List ownership of business and show assessed value in relevant column

\$	\$	\$
\$	\$	\$

**Other Assets**

List any other assets (eg boats, cars etc)

Asset	Owner			
		\$	\$	\$
		\$	\$	\$
<b>Total Assets</b>		<b>\$</b>	<b>\$</b>	<b>\$</b>

**Ages**

\_\_\_\_\_

**Dependents**

List all children and their ages

Name	Age	Annual Income
		\$
		\$
		\$
		\$

**Other Information**

List any relevant information