



Legal Brief

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Tax and Superannuation Update - Spring 2000 Edition

I never liked my dad's second wife...

Revenge is sweet.

25 years ago my Dad left Mum for another woman. Mum said it wouldn't last but Dad eventually married her. Dad paid maintenance for us, but Mum said that it wasn't enough to bring up 3 children. Dad kept in contact with us over the years. I love my Dad, but I only put up with *Her* for his sake.

Dad died a few months ago. Mum said "I bet he left everything to her in

his Will". A few weeks later I received a letter from Dad's 2nd wife's solicitor asking that I consent to "Letters of Administration" being granted to my Dad's wife. I rang my Adviser who put me in touch with a Lawyer. Apparently an application for Letters of Administration only occurs because Dad left no Will. This means that Dad's 2nd wife is applying for the right to administer my Dad's estate according to law. Apparently, she is only entitled to the first \$50,000 of Dad's estate plus 1/3rd of what is left.

Dad was not a rich man. He owned the house that he and his wife lived in, in his own name. Dad owned nothing else of value. The house was valued at \$350,000. This means that Dad's wife has to either find \$200,000 to pay us our share of the property or find somewhere else to live once the house is sold.

My Dad's wife is now 60 years old and does not work. I hope she likes house hunting....

Does this scenario sound familiar? We encounter it all too often. Your death, is one of the most traumatic periods your loved ones will experience. Dying without a valid Will, only makes this time harder.

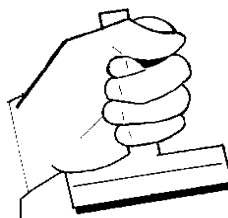
An effective well drafted Will is one of the best ways for you to ensure your

loved ones are provided for after you die. However, if you want to make sure your loved ones are provided for in the most tax effective manner, then get a 3 Generation Testamentary Trust Will individually drafted to suit your beneficiaries' needs. For more information on Estate Planning and 3 Generation Testamentary Trusts see www.taxlawyers.com.au/EPManual.htm

He cheated on her yet his Family Trust got everything! - The Family Court's new love child!

The two biggest times to tax plan are Divorce and Death. Accountants, Advisers and Tax Lawyers get plenty of work in Estate Planning. However, mum and dad don't seem to care much about saving tax at the time of a family break down.

This is sad. There are a lot of tax loop holes for husbands and wives in the transfer of assets. Even without a divorce you can move assets from husband to wife without triggering Capital Gains Tax. You also don't have to pay Stamp Duty. (You need a deed or a court order under the Family Law rules first.) Recently the Victorian Supreme Court went even further. The Court transferred the



Will the stamps man come down on you?

family home to not the husband but to his Family Trust! In my 20 years

as a lawyer I have never seen this before.

The real estate was therefore available beneficially to many people - not just the husband. The husband "controlled" the asset in the Family Trust. For tax purposes he didn't "own" the asset. "Control" of an asset is generally better than "owning" an asset in Australia. The Commissioner of State Revenue was stunned. He wanted Stamp Duty on the transfer.

It didn't look right to the Stamp Duty man. He assessed the transfer as a full conveyance.

The Trustee of the Family Trust went to war. The Trustee claimed the transfer was exempt under the family break down provisions of the relevant Stamp Act. Justice prevailed. The Court held that the Commissioner couldn't have any Stamp Duty.

The facts differ from the usual situation. Usually mum and dad at war are trying to dismantle a Family Trust. The Capital Gains Tax legislation and local *Stamp Acts* in each state focus on transfers to mum and dad themselves - not to their Family Trusts.

So what does it all mean? It may now be possible to use the Federal and State family break down relief to transfer family assets to Family Trusts. Family Trusts have great flexibility in saving tax and protecting the assets from bankruptcy.

Peter Nettleton - ex ATO, now protecting you at Brett Davies Lawyers

Through your Adviser, Lawyer and Accountant you can order Family Trusts 24 hours a day from www.LawCentral.com.au.

Brett Davies Lawyers is a private law firm. It only deals with clients through your professional advisers.



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You already have a Buy/Sell agreement – so why is the Tax Man so happy?

Without an effective Buy/Sell agreement, most businesses are doomed when you are gone. Finally, it seems, the Tax Man agrees. He has taken time out of his busy schedule to clarify the CGT implications of Buy/Sell agreements.

Your Adviser, Accountant and Tax Lawyers can now work together more effectively without having to look over their shoulders to see if the Tax Man is coming to pay an unfriendly visit.

The Tax Man's Council of Elders, operating under the unassuming guise of the Capital Gains Sub-Committee convened late last year to discuss the taxation implications of various forms of Buy/Sell agreements. Over half a year later, the resulting report is surprisingly clear, concise and demonstrates a great deal of common sense (*Is this the same Tax Man we all know and love? - Ed*). The issues dealt with by the committee were those that have affected business succession planners for many years. The only difference is that this time, we got some realistic answers.

The 2 Fundamentals

The Tax Man agrees that the two fundamental aspects of Buy/Sell arrangements are:

The transfer agreement; and

The funding agreement.

We believe that transfer agreements should never be a part of an existing Shareholder Agreement or Unit Trust. Stand alone transfer agreements are needed. Secondly, the funding of the transfer comes from capital proceeds paid by the remaining owners or by proceeds of insurance held by the remaining owners under Self-Ownership, Cross Ownership or through an Insurance Trust. You need to talk with your Accountant, Adviser and Tax Lawyer about which funding mechanism is best for you.

Deeming Disposal

That raging dinosaur, the Mandatory Buy/Sell agreement (*Not as extinct as you may think - Ed*), may now come back to haunt you. The Mandatory Buy/Sell agreement still brings adverse CGT consequences for all parties on the disposal of the business interest. Why? Mandatory Agreements trigger full CGT and

Stamp Duty at the time you sign the Agreement. The Tax Man will thank you for making such an early "deemed disposal". Using Put and Call Options and certain funding mechanisms in separate agreements is the answer.

Deeming Market Value

The Tax Man makes it clear that he *deems* a disposal of your dead partner's interest to have taken place at market value on the date the options are exercised.

The market value substitution rule in sections 116-30(1) and 116-30(2) of the 1997 Tax Act deems market value to have been the "price" of the interest

acquired by the remaining owners and received by the outgoing owner. This is regardless of whether the outgoing owner (or their estate):

1) receives the payment from the remaining owners, or 2) from an insurance payout direct to the outgoing owner, or 3) whether the remaining owners paid less than market value for the interest and the Buy/Sell agreement was not an arms length transaction.

What do I do now?

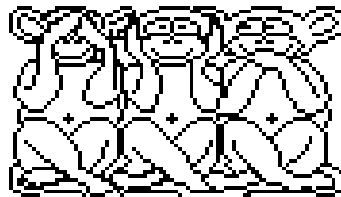
Ask yourself the following questions:

- Do you have a Mandatory Buy/Sell Agreement?
- Are you unsure what type of Buy/Sell Agreement you have signed?
- Is there little or no documents to make your existing business relationship clear and enforceable?
- How well do you know your partner's mistress?

If you don't know what your partner's mistress would do if your partner died, or you answer no to any of the other questions, your business may be heading towards trouble. Talk to your Accountant and Adviser about reviewing your existing documents and ensuring that you have a Buy/Sell Agreement which is both accurate and tax effective.

Now, more than ever, there is a requirement for you as a business owner to consider an orderly exit strategy. Get it right – or pay the price !!

Find out more on Business Succession Planning at www.TaxLawyers.com.au



Have the wise men at the Tax Office finally got it right this time?

Brett Davies Lawyers is a private law firm. It only deals with clients through your professional advisers.



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And to my Mistress I leave my.....semen?

Brett Davies from Brett Davies Lawyers stated recently at a Planner's Conference that your Will should include instructions for the extraction and use of your semen after you die – especially if your wife or mistress is still of child bearing age (*And what a mess that comment left him in! - Ed*).

This raises all sorts of societal, moral and ethical dilemmas. Father a child from your coffin? Expect a knock on the coffin from Centrelink? After all the child can challenge your Will. Is it right for your grieving mistress to keep part of you – for her use and enjoyment? Should the grieving widow be prevented from fulfilling her desire to have children fathered by you?

Both your politicians and courts have shied away from the issue. Tina Berry from Brett Davies Lawyers advised that, generally the Courts don't allow semen extraction without consent. However, semen is more likely to be removed if your Will gives the go ahead.

So if your Will says "OK, extract away", is that enough?



Will the stork be making a late delivery after you die?

when the Will is brought out 3 days after you are buried in Karrakatta cemetery everybody says oops! It is a lot of money to dig you up – and the paper work! Why? Because your body is not yours to dispose of. Even if your wishes were known they are not binding. Your Executor and next of kin have the final say as to where and how your body is disposed of.

So yes, you can put instructions for your sperm into your Will. However, Brett Davies Lawyers advise that you share your intentions with your Executor and family – before you die. What the Courts or the God Complex doctor dictates may be something different.

The law will one day catch up with technology – it always does – in time. Until then if you wish that your sperm be extracted, preserved and used by someone in particular, then put it into your Will. At least your wishes will be known. Conversely if you have instructions for sperm presently frozen and stored, then put this into your Will.

However your Will has no effect until you die. Consequently your Will can

Do you believe that you own your body? Well think again. Even while you are alive your body may not be under your full control (*Or your spouse's! - Ed*). If you decide to damage your body too severely you will be committed for your own safety. If you ask someone else to damage you, they can still be guilty of a crime. Further you may decide you would like to be buried at sea. This is fine. You can put the request into your Will. However,

not govern any decisions made before your death. Even a Mutual or Cascading Power of Attorney can't help you here. Lets face it, before you die is a better time to extract semen – by whatever means.

The moral of the story...if you want children..."make hay while the sun shines". There is no point in flogging a dead horse.

Brett Davies Lawyers do Estate Planning Australia wide via your Adviser, Accountant and Lawyer.

Confidentiality Deeds go on-line

You can now get your Confidentiality Deed without having to see a lawyer. Confidentiality Deeds now join the stable of products available from the on-line Legal document provider Law Central.

Law Central was initially started by Brett Davies Lawyers to provide standard legal documents such as Family Trusts and Self Managed Superannuation Funds without legal consultation.

More Documents will be available as Law Central moves towards a proposed listing with the ASX early next year.



LAWCENTRAL

Law Central Legal documents are currently only available through your Adviser, Accountant and Lawyer

You can visit Law Central at www.LawCentral.com.au

Brett Davies Lawyers is a private law firm. It only deals with clients through your professional advisers.
