



MILLS
OAKLEY

Estate Planning

Tales from the Grave

Presentation by Ross Higgins and Troy Palmer
Private Advisory, Mills Oakley



Mills Oakley Private Advisory

- Private Advisory is a multi-disciplinary team of lawyers that work together to deliver the best outcomes for private clients
- Our focus is on working closely with small to medium-sized accounting firms



Areas of Expertise

**Mergers and
Acquisitions**

**Estate planning
(including wills) and
Estate Litigation**

**Business Succession
Planning such as
buy/sell agreements**

**Co-ownership issues
such as shareholders
agreements**

**Asset and
intellectual property
protection**

**Tax and
Superannuation
Law Services**



Overview

Ross Higgins and Troy Palmer from Mills Oakley lawyers will scare you all with tall tales and true stories from the grave. Strap in for the Estate Planning ghost train session and your Mills Oakley legal experts will stir your mortal souls into action.



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1. Powers of Attorney

- I was involved in a car accident and lost capacity prior to death
- With no POAs in place my spouse couldn't access my account to pay my bills, refresh my BDBN, correspond with Centrelink, make decisions regarding residential aged care nor my medical treatment
- My spouse had to apply to VCAT to appoint an attorney, however as it was contested, VCAT appointed a trustee company, not whom I would have chosen. All this was costly and time consuming

- The likelihood of loss of capacity before death is increasing with increasing longevity; other events may also arise
- Everyone should have POAs
- POAs in Victoria:
 - Enduring financial
 - Personal (Guardianship)
 - Medical
 - Supportive



2. A Will

- I never bothered with a Will. Too hard to have to think about such morbid issues.
- As a result, being intestate I got a Clayton's Will, deemed by law, which is not how I would have distributed my estate.
- I had a partner and no children so I assumed my partner would get everything. Trouble was my partner died in the same car accident before me.
- I thought that if that happened my sister would benefit, but the next closest person was my abusive father who got everything.



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- If you don't make a Will you have a rigid legislative formula imposed on your estate.
- The position on intestacy can be complex and you should at least know the outcome on your estate if you die intestate.
- Far preferable is to have a Will of your choosing, catering for your circumstances and your wishes.



3. Include Testamentary Discretionary Trusts

- I thought that keeping it simple was a good thing, so I simply gave my estate to my partner with a gift over to our children.
- My partner pre-deceased me so my enlarged estate ended up going to our three children.
- One child was declared bankrupt shortly prior to my death and the whole of his share went to his creditors.
- Our second child had mental health issues and a drug and alcohol problem and either squandered the money or was “relieved” of it by persons of bad influence.
- Our third child had four children under age 18 and was struggling to make ends meet.



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- Simple Wills may be OK, however lack sophistication and miss opportunities.
- Most of our clients should have testamentary discretionary trusts in their wills and even more importantly in their parents' wills!
- Testamentary discretionary trusts in the will would have avoided the problem of bankruptcy of the beneficiary, it could have avoided the problem with squandering the inheritance and could have provided the third child's family a tax effective income for all the years before the grandchildren turned 18 and beyond (for up to 80 years)



4. Not rented out my home after I went into residential aged care

- I went into residential aged care as I was frail and struggled to look after myself.
- I rented out my home to my niece for a nominal amount and continued to pay the rates.
- I did not realise that this “mistake” meant that following my death:
 - My estate/beneficiary for a post-CGT home would miss out on the reset of the CGT cost base to market value at date of death
 - My estate/beneficiary would miss out on the two year window to sell the home tax-free



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- Estate planning is not just about deciding who will benefit, but understanding the pre-death planning and optimal structure within the will to achieve desired objectives





5. Understood the importance of passing on control of my wealth outside of my estate

- I arranged for a simple will, all to my spouse and if deceased to my kids; thought it was straight forward.
- I didn't distinguish in my mind between my personal property that would pass under my Will and property in trusts where the passing of control is the key issue
- My Will was therefore completely ineffective in many respects
- I failed to include directions in my Will about my appointor role for my family trust. Turns out the surviving sole appointor is my ex-spouse- whoops, another lack of attention to detail.



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- I owned 20% of the shares in a company running a business with four other shareholders. But while these shares passed into my estate, there was no right for my executor to become a director of the Company and no shareholder agreement or buy/sell agreement to facilitate my executor exiting the Company in an orderly fashion. This put my executor/family in a difficult position.

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- The Will plays a critical role in the passing on of control of entities like family trusts where most wealth apart from the family home may reside.
- Other key mechanisms of control and passing on wealth effectively should also be addressed or else awkward or unexpected results can arise, e.g in one family trust if the key beneficiary died the only remaining beneficiaries were charities – needed to vest the trust to pass the property into the estate to benefit other family members.
- For all entities, business and investments you are involved in you need to ask – what would be the situation if I died? Are my beneficiaries protected?



6. Updated my Will etc, on separation from my spouse

- I got caught up in discussions about a property settlement before getting divorced and forgot to rewrite my Will.
- I upped and died in a car accident and she got the lot without further negotiation. I didn't get to provide for my kids.





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- Regular revision of Wills and your estate plan is advised, even to confirm everything is OK.
- Assets change, structures change, people change, wishes change.
- Specific review triggers include separation/divorce, pending marriage, death of intended executors or beneficiaries, changes in circumstances of beneficiaries including bankruptcy, divorce, business ownership and other major changes that are not reflected in your estate plan.

7. Not written on my own Will

- Writing my own Will was a big mistake.
- In parts the Will was clear and in parts it wasn't. Some issues were not dealt with.
- The Will covered certain property but because of lack of sophistication there were elements of intestacy
- My executors had to seek advice from lawyers and then counsel and make an application to the Supreme Court for guidance on certain issues.
- What a mess I created. Effectively froze the estate and frittered away my beneficiaries money.

- People writing their own Wills is a source of a lot of work for estate lawyers and not in a good way. Unexpected and possibly unfair outcomes can also eventuate.
- Such costs, delays and unexpected outcomes should be avoided by making a proper Will in the first place.





8. Planned better to avoid challenges to my estate

- I was a very singular and determined person in my life.
- I had a large family, five spouses and fourteen children over time.
- I accumulated a fortune and my affairs were complex.
- I had no idea wishes as clearly expressed in my Will, with added commentary about those worthy and those unworthy, would not be honoured. After all, it was my money!
- It is incredible that 22 people are challenging my estate to get a larger share.

- Certain property and wealth can pass outside the estate and this may be effective to avoid challenge to those wishes; property may be moved out of personal names to achieve this prior to death.
- However, personal property passes through the estate and challenges may be made within 6 months of the grant of probate.
- Adequate provisions for certain persons likely to challenge otherwise may avoid costly disputes and delays in distribution.



9. Planned my estate better and not just “let them work it out”

- I worked hard all my life and was very successful in business and property investment, and made a Will. I had provided for my spouse to get certain assets and a right to occupy the family home and the adult children were to get the rest in equal shares.
- Unfortunately, my Will referred to assets I no longer owned, it purported to give away shares in my valuable business company which were owned in a family trust and my home was held jointly with my wife and it went to her on survivorship.



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- Further, I intended for my children to benefit equally, although only one of the three was involved in the business and one had shares in a trustee company for convenience that had been used as a corporate beneficiary and those shares were worth \$5m.
- My Will did not take these issues into account and when I was alerted to this I said “let them work it out”. I regret that now.
- It took over a year for my children and their lawyers and accountants to work this out, resulting in a deed of arrangement to effectively re-write the Will how it should have been written in the first place.
- My children no longer talk to each other as a result.
- So despite leaving a generous legacy based on a successful life, the wrangling over money and assets split my family



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- You don't write a Will for yourself – you write it for your family/beneficiaries.
- A good estate plan and Will should largely reduce or eliminate disputes, promote a smooth and certain transition and result in appreciative beneficiaries
- If you have worked hard to create wealth and protect and grow your wealth then it makes sense to plan to pass that wealth on in an effective manner.



10. Planned a better succession for my SMSF

- I followed advice to maximise contributions to my SMSF all my life, so the SMSF was my most valuable asset apart from my family home.
- Unfortunately I did not plan for control of the SMSF to pass to my children as the intended beneficiaries and my estate wishes were defeated

- In *Katz v Grossman* [2005] NSWSC 934 on death of the father the SMSF was left in the control of the daughter. The daughter caused the deceased's superannuation death benefit to be paid directly to her. Accordingly, the son did not receive half the superannuation as intended.
- In *Wooster v Morris* [2013] VSC 594 the second spouse controlled the fund and disputed the BDBN which gave the benefit to the deceased's children. She lost the case but frittered away most of the money in the process.

- In *Ioppolo & Hestford v Conti* [2013] WASC 389 the deceased (Francesca Conti) had made her will and purported to leave all her superannuation entitlements to her children. Following her death, her husband Augusto retired as trustee and appointed a corporate trustee (controlled by him) and paid the benefit to himself.

Questions?





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