



Estate Preservation Planning Utilising Private Placement Life Insurance Strategies – Post GFC

Issue 7 – 5 March 2010

Regardless of the economic circumstance during good times Businesses may succeed despite certain weakness. During the Great Financial Crisis many bad businesses failed because of bad economic circumstances.

Nevertheless in the event of Death the value of a deceased's Estate can be significantly reduced through delays in administering the Estate, disputes between potential or actual beneficiaries, Asset sales at liquidation value or inappropriate timing of Asset sales to meet liabilities and debts of the Estate.

Furthermore unnecessary expenses incurred in the administration of the Estate and payment of tax may also occur.

In many instances Estate Shrinkage can be minimised with the appointment of a competent Executor, who has the appropriate powers and liquid funds available to prevent Estate Shrinkage.

Similarly liquid funds to preserve the Estate from unnecessary shrinkage can be provided with correctly structured Private Placement Life Insurance (PPLI). Nevertheless structuring effective PPLI Strategies involves an understanding of the role and power of the Executor and the liability that

an Executor may encounter in order to establish a reasonable basis to recommend PPLI Strategies.

What follows is an overview of the role of the Executor and the need for appropriate powers and liquid funds whether in good or bad economic circumstances to prevent Estate Shrinkage.

1. Carefully choose the Legal Personal Representative of the Estate

Implication: The Executor plays a central role in the administration of an Estate. An Executor is always appointed by the Will, of the deceased, the Court having no statutory right to make such an appointment. Nevertheless the Court may make a grant of letter of administration to an administrator, where the Will does not appoint an Executor, where the appointment of an Executor is for whatever reason ineffective, or where the deceased dies without a Will.

Action Required: Appoint the most appropriate person to be the Executor of the Estate by preparing a Will.

2. Understand the Role of the Executor

Implication: An Executor's duties include:



- Taking custody of the body and appropriately disposing of the body;
- Locating the Will and potential beneficiaries;
- Preparing an inventory of Assets and liabilities;
- Publishing notice of application for Probate; and
- Applying for the Grant of Probate.

Probate is a Latin term meaning “proving a valid Will”.

Once Probate has been granted the Executor must:

- Collect all of the Estate Assets;
- Manage the Estate Assets - by supervising, maintaining, insuring and securing Estate Assets;
- Process and pay all creditor claims;
- File all tax returns and pay all outstanding taxes; and
- Distribute Assets.

The above tasks are initiated and followed by a critical path that an Executor must follow. The tasks are time consuming, can be subject to court imposed delays or delays incurred in locating Assets and depending on the nature of the Assets can be a very complex with liabilities that the Executor may personally incur.

Action Required: Depending on the complexity of the Assets of the Estate an appropriate Executor should be appointed who understands the nature of the Estate Assets and the dynamics of potential beneficiaries.

Executors can either be a:

- **Family member;**

- **Friend;**
- **Business Associate;**
- **Professional - solicitor or accountant; or a**
- **Institution - e.g. trustee company**

Whoever is chosen should have the characteristics of integrity, dependability, judgement and fairness. Furthermore they should be in close proximity to the Assets of the Estate and where appropriate understand the nature of the Assets and the implications and risks associated with managing and preparing for distribution of Assets from the Estate.

3. Disposal of the Body

Implication: An Executor may incur funeral expenses including the erection of the monument, as are reasonable having regard to the Estate and the deceased's condition in life. Ordinary Life Insurance proceeds whilst generally protected from creditors are not exempt from funeral or testamentary expense creditors if paid to the Estate.

Whilst the Executor may have a right of indemnity from the Estate to pay for funeral expenses including the erection of a monument, the emphasis is on reasonable expenses in respect to the deceased's condition in life.

If therefore the Executor used Estate funds including Life Insurance proceeds to pay for funeral expenses that in the circumstances were held to be unreasonable the Executor could be personally liable for the excess funeral expenses.

Action Required: Ensure the Estate has the liquid funds to pay for funeral expenses and



check any expenses incurred such as funeral expenses are reasonable to ensure that the Executor can be indemnified from the Estate.

4. Collection of Assets - Assets Devolve to the Executor

Implication: Where a person holding an Asset of the deceased fails to give possession to the Executor, the Executor may bring proceedings to recover the Asset. An indemnity for costs from the Estate may be obtained. Nevertheless it may be prudent before enacting proceedings to first obtain directions from the Court in order to avoid the risk of failing to obtain an indemnity for costs from the Estate. The pressing need to recover Assets quickly maybe mitigated by having liquid funds available to pay creditors.

Action Required: To avoid needless legal expenses and illiquidity of Estate Assets, ensure that the Estate has liquid funds to pay all creditors and meet all liabilities.

5. Administering the Estate - Within Time

Implication: The general duties of the Executor are to collect the Assets comprised in the Estate, realise the Asset to the extent necessary to meet debts, liabilities and all other obligations or defectiveness applicable in the particular circumstances, pay the debts and liabilities and distribute any surplus to those entitled under the Will. The Executor is allowed one year from the Testator's death, that is, the Executor's year, in which to ascertain the testator's Assets and

liabilities so that the Estate maybe properly distributed. The Executor cannot be compelled to pay a legacy within that time, irrespective of any direction in the Will.

Nevertheless if the circumstances permit the Executor is free to pay out the legacy. If the legacy remains unpaid at the end of the Executor's year the Executor may have to explain the delay - for example: the existence of a discretion to postpone conversion. Nevertheless notwithstanding that the Executor cannot be compelled to distribute the Estate within the Executor's year, a creditor may immediately sue for a debt.

Action Required: To prevent action being taken by creditors to recover debts of the Estate, ensure as much as possible that liquid funds are available to meet all creditor liabilities without incurring action by creditors to force unnecessary or potential costly realisation of Assets.

6. Power of Sale

Implication: The Executor has an absolute Power of Sale over Assets of the Estate. Therefore the Executor may sell Assets for the purpose of administration of the Estate. If the Estate is illiquid the Executor maybe left with no choice but to sell Assets to create liquidity.

Action Required: The Executor should be provided with liquid funds to prevent where possible from exercising their Powers of Sale in times where an Asset sale may invoke a distressed sale. Furthermore to prevent the Executor exercising the Power of Sale to sell Assets, the Executor should be given



powers to delay or postpone Asset sales.

7. Carrying on a Deceased Principal's Business or Professional Practice as a Going Concern

Implication: In the absence of either an expressed or implied authority the Executor of an Estate has no authority to carry on the Business or Professional Practice, except for the purpose of realising the Business or Professional Practice as a going concern. Even where the Executor is authorised to conduct the Business or Professional Practice for the purpose of realisation the Executor still remains personally liable on all contracts made by the Executor in the course of carrying on the Business or Professional Practice. Nevertheless the Executor has a right to an indemnity out of the Estate but only where the Executor is authorised to conduct the Business or Professional Practice.

Action Required: Check and ensure that the Executor has the power to conduct the Business or Professional Practice for the purpose of realisation. Furthermore ensure appropriate liquid funds are available to enable the Business or Professional Practice to trade for the purpose of realisation.

8. Experience to Carry on a Business or a Professional Practice as a Going Concern

Implication: Even if the Executor is authorised via the Will to conduct the Business or Professional Practice for the purpose of realisation if the Executor has no experience or does not have the professional qualifications to maintain the

Business or Professional Practice as a going concern until realisation, the value of the Business or Professional Practice may diminish due to inexperience in obtaining an appropriate value. Liquid funds may be needed in order for the Executor to appoint an experienced manager or professional to run the Business or Professional Practice until it can be realised for an appropriate value.

Action Required: Ensure that the Executor has both the appropriate experience and liquid funds to carry on the Business or Professional Practice.

9. A First Right of Refusal May not provide Estate Liquidity

Implication: A First Right of Refusal to purchase the deceased Principal's interest in their Business or Professional Practice may not necessarily provide the Executor with liquid funds to administer the Estate and payout creditors. Such arrangements in many circumstances do not set a price or make immediately available funding arrangements which may result in the Executor negotiating the sale of the Business or Professional Practice at "liquidation value" rather than an "ideal value" that could perhaps be obtained if the deceased was alive. Furthermore the potential purchasers of the Business or Professional Practice may not necessarily have the funds available to purchase the Business or Professional Practice. As such terms may have to be negotiated in respect to not only actual price, but time and payment



method. This could cause delays in administering the Estate.

Action Required: Liquid Funds should be available to keep the Business or Professional Practice as a viable going concern in order to arrange the best possible terms for a sale, irrespective whether an appropriate Buy Sell Agreement is in place. Options to Purchase - May not provide Estate Liquidity

Implication: Where a Will provides an option to purchase in many instances the Executor still must negotiate with the potential Purchaser price and terms of payment. Similarly the prospective purchaser must still have to find the funds to purchase the Business or Professional Practice.

Action Required: Liquid Funds should be available via a PPLI Strategy to keep the Business or Professional Practice as a going concern in order to arrange the best possible terms for a sale, where an option to Purchase within a Will is utilised.

10. Structure PPLI Strategies to correctly provide Estate Liquidity

Implication: PPLI Strategies should be structured to provide much needed liquidity to the

Executor to prevent unnecessary realisation of Assets at liquidation values, without unnecessary expense or costly delays. Unfortunately in many instances this simple principal is not followed.

Action Required: To prevent Estate from Shrinkage correctly structure PPLI arrangements to ensure that the right amount of Liquid Funds are available at the right time to the Executor.

Conclusion

For more information about how ili can assist you to adopt skills and implementation tools in respect to Estate Preservation Planning and Business Succession Strategies please visit our website www.ili.com.au.

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