

# INTER-GENERATIONAL ASSET PLANNING

## HOW TO MAKE DOUGH WITHOUT LOSING YOUR CRUST

*Simon Weil, Partner, Morrison Kent, 2006*

### INTRODUCTION

It was the best of times, it was the worst of times. It was the age of wisdom, it was the age of foolishness. It was the epoch of belief, it was the epoch of incredulity. It was the season of light, it was the season of darkness. It was the spring of hope, it was the winter of despair. We had everything before us, we had nothing before us. We were all going direct to Heaven, we were all going direct the other way. In short, the period was so far like the present period that some of its noisiest authorities insisted on its being received for good or for evil in the superlative degree of comparison only.<sup>1</sup>

. . . and so began Dickens epic tale of 18<sup>th</sup> Century France. But while we could consign those turbulent and brutal times to the annals of history, one is strangely tempted to ask whether much has changed in 21<sup>st</sup> Century New Zealand? The suggestion is that the scenario set by Dickens seems just as pertinent today as it did then.

Indeed it is a question that many of us might put to ourselves on a regular basis. As professionals in the current climate, it is submitted that many will not dispute these are the best of times and that these are the worst of times. We work for our clients' on their property transactions where we see prices reach ever increasing highs but where we experience issues that become evermore complex. We have clients living longer than clients ever used to but we have other clients struck down in their prime by insidious and terminal disease and at rates far greater than they used to be. We have clients who accumulate wealth beyond their foreseeable requirements but whose offspring struggle for financial security. We see a society that has ever-increasing expectations of want but diminishing proportions of responsibility and accountability. Basically, it would seem not much has changed since those days of France in the late 1700's.

But amidst the doom and gloom of a world where the fabric of society seems slowly but surely to be fraying and unraveling, there is, underlying that Dickensian paradox, an increasingly apparent challenge; a small cross-section of the community who want to assist the next generation financially but without compromising their own position. Put succinctly, we as professionals are now starting encounter more often clients who want to find a way to have their cake and eat it too.

But is that possible? Can a baker make dough without losing the crust, or is the concept of inter-generational asset planning nothing more than a soufflé i.e. a combination of ingredients that carries great expectation when the ingredients go into the mix, that shows promise as it rises in the oven but disappointment as one plunges the fork of reality into the crust only to see the soufflé of life deflate before ones very eyes.

The underlying precept of this topic of inter-generational asset planning conjures up pictures of one having their cake and eating it too. After all, the challenge is to protect and preserve assets for one generation while at the same time either creating and/or implementing a managed transfer of power/wealth to the next generation. It is fair to say that the inter-generational asset planning exercise can bring with it issues that range from being a recipe for disaster through to the epitome of perfection, or anywhere in between. The aim of this paper is to identify some of the planning issues that may arise and some suggested solutions that will help one generation to make the dough without losing the crust when they pass it on to the next generation.

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<sup>1</sup> "A Tale of Two Cities" - Charles Dickens, 1859

## THE ASSET PLANNING CONUNDRUM

While we are aware of the general principles espoused in *IRC v Duke of Westminster*<sup>2</sup> (i.e. that *inter alia* one is at liberty to choose how best to structure one's affairs) the application of that principle must be balanced in the context of what could be called the Asset Planning Conundrum ('the APC')

That conundrum, simply put, is whether one should structure their affairs with a view to obtaining maximum tax efficiency or alternatively, whether the focus is to be on maximum asset protection. This is an issue because rarely, in reality, does one have the ability, when it matters most, to plan one's affairs so as gain the best of both worlds.

While addressing the APC can be a complicated exercise at the best of times, the complexities of the process can be compounded when adding inter-generational planning issues to the mix. Having said that, it is timely to recognise at this point that the concept of inter-generational asset planning relies on two fundamental assumptions; the first is that one generation has or will have an asset base that, prudence dictates, warrants planning consideration.

The second – and contingent but equally critical - assumption is that the first generation wants to leave their wealth, or at least a (significant) proportion thereof, to the next and indeed subsequent generations.

The combination of these two assumptions perhaps constitutes a paradigm shift in traditional estate and asset planning techniques. Typically, the conservative approach by and large saw assets retained in personal ownership during life and thereafter passing by Will to children albeit possibly subject to a life interest for the survivor.

The '87 crash together with the zero rating – and eventual repeal - of death duties saw a focus on asset protection and the beginning of a love affair with trusts. And just when it appeared that the trust's honeymoon was beginning to end, along came the PRA to bolster the popularity of trusts. While the proliferation of trusts in the last decade can be attributed to certain specific events, the ongoing popularity of trusts as an effective planning entity seems set to continue as both a positive and a neutral planning measure; positive in the context of addressing intergenerational planning issues and neutral in respect of planning asset ownership so as to minimise adverse tax consequences being triggered on death. The tax neutral planning aspects are at this stage *prima facie* self explanatory but what of Intergenerational Asset Planning?

## WHAT IS INTERGENERATIONAL ASSET PLANNING?

Simply put, it could be described as the means by which assets and/or the power to control assets are transferred from one generation to another in the most efficient manner.

Traditionally, asset planning used not to be an issue of major concern for many people as it was perceived as planning exercise generally for the wealthy. But no longer; the complexity of modern asset owning structures – necessitated in no small part by the dictates of constantly changing social morés – combined with the broad range of risks that threaten the very core of success means that more sophisticated asset planning measures are required to protect and preserve assets during ones life.

As a result, the transfer of residual assets to the next generation must therefore involve a greater measure of sophistication than used to be the case, not only to minimise the impact of any potentially adverse circumstances on the assets as a result of death but also to protect and preserve the 'inheritance' for the next generation

The concept of inter-generational planning has become a natural extension to *inter vivos* Asset Protection Planning. People have recognised that the same reasons why asset protection is

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<sup>2</sup> [1936] AC 1; 19 TC 490 (HL)

appropriate for them during their lives can be equally applicable to their children; maybe not immediately but quite possibly at some stage in the future.

Inter-generational planning contemplates that one generation is sufficiently prudent and motivated to introduce Asset Protection Planning measures to their affairs so as to protect and preserve assets for their long term benefit. Some of these very people are now equally aware of the advantages that can be gained by creating an asset ownership structure and transfer regime that will similarly benefit future generations. In essence, the family is getting two bites of the cherry.

### THE REASONS FOR INTERGENERATIONAL ASSET PLANNING

It is acknowledged that the foregoing is based on the assumption of a discretionary yet willing mind-set of one generation wanting to plan for the next. It does however beg the question of whether there is any **obligation** to make such provision. The case of *Flathaug-v-Weaver*<sup>3</sup> provided:

“The relationship of parent and child has primacy in our society. The moral obligation which attaches to it is embedded in our value system and underpinned by the law if Family Protection Act recognises that a parent’s obligation to provide for both the emotional and material needs of his or her children is an ongoing one. Though founded on natural or assumed parenthood, it is however an obligation which is largely defined by the relationship which exists between parent and childhood during their lives.”

In response to that statement from the Court, it was questioned<sup>4</sup> whether the moral obligation outlined in that case is one that an adult child can force during a parent’s lifetime. It was suggested that as a matter of general principle, the obligation is a *moral* one and not a legal one and was one that cannot be enforced by legal action.

This does not seem an unreasonable proposition . . . although that submission must be caveated by recognising the context in which it is made i.e. in the current legal climate where there is [presently] no obligation to the contrary to provide for the next generation.

Drawing from *Flathaug v Weaver*, it would seem that the issue – of whether or not there is an obligation to provide for successors – is more of a moral issue rather than being a legally enforceable position. It is also a topic that has exercised the minds of respected authors in this field<sup>5</sup> when they touched upon the topic in a recent article in the March edition of the New Zealand Law Journal<sup>6</sup>. In their article entitled “Testamentary Freedom”, the authors concluded that it seemed unlikely there would ever be a consensus on the question of whether testamentary freedom should be freely exercisable or not. The authors were divided on this point. One was of the opinion that the general view of New Zealanders is that “family money” should remain in the family. The other considered that research showed this not to be so. They suggested that perhaps, one day, someone will undertake a detailed study. They went on to suggest that the “family money” view seems to be reflected in Court decisions under the FPA and the legislative approach to after death claims under the PRA. So for the moment, it seems to be the case that testamentary freedom is largely, a myth.

If one considers the vulnerabilities to which Wills and personal estates are subject via the Property (Relationships) Act 1976 (“PRA”), the Family Protection Act 1955, (“FPA”) the Law Reform (Testamentary Promises) Act 1949 (“TPA”) on the one hand, together with the increasing bank of cases on the other hand, it would indeed seem that testamentary freedom is a myth.

If it is accepted that testamentary freedom is [currently] a myth, then we as a profession are faced with the reality that effecting estate and asset planning objectives can not be achieved solely in reliance upon a Will.

<sup>3</sup> [2003] NZFLR 730

<sup>4</sup> Alan Gluestein, ADLS *Cradle To the Grave* Property Law Conference March 2006

<sup>5</sup> Bill Patterson of Patterson Hopkins and Nicola Peart of University of Otago

<sup>6</sup> NZLJ March 2006 46

In fact, the inadequacy of a mere Will is highlighted not only by the myth of testamentary freedom but also by the deluge of threats to which estates are increasingly becoming subject. Many of you will be aware – indeed acutely aware – of the risks posed to estates (both *inter vivos* and *post mortem*) by the PRA, the FPA, the TPA and so on.

Do not be mistaken. The risks posed to estates by any one or more of these legislative avenues of recourse can be significant and can not be underestimated in the context of the impact a successful claim can have against an estate. Indeed, one must also be cognisant of the ‘nuisance factor’ – and the ensuing costs that can arise - in respect of a purported claim under any of those Acts. But in addition to those factors, one must also be aware of the potential tax implications that can be triggered by death which, in a worst case scenario, can have adverse consequences on an estate. It is not a quantum leap in logic that needs to be made to realise that adverse tax consequences on an estate could seriously impact on a testator’s estate and asset planning objectives.

If therefore we proceed on the premise that testamentary freedom is a myth, then it must be accepted that it is unlikely that estate and asset planning via merely a Will would be sufficient and that more sophisticated asset planning measures will be required. Just what those measures may be will in every case depend upon the individual’s circumstances. The structure will need to be tailored to take into account the factors relevant to the client including but not limited to their age, family background, relationship status, relationship history, business activities, assets, liabilities, investments, dependants, obligations, goals and objectives. The distinction between a client’s revenue assets and capital assets is also a critical consideration given the potential tax incidence that could be involved..

For property lawyers, the use of the words ‘tax’ and ‘property’ in the same paragraph can send a shiver down one’s spine – and perhaps even prompt a review of one’s PI insurance cover. Fortunately though, Shelley Griffiths<sup>7</sup> in her paper has addressed some of the important tax-related issues about which we need to be aware in considering the estate and asset planning consideration for our clients.

### **SOME OF THE ISSUES**

So what are the issues that impact on intergenerational asset planning considerations? There are perhaps two main limbs to the issue; one relates to the technical tax issues and the other to the practical succession issues. Shelley Griffiths’ paper addresses the tax issues far better than I am able and I commend her paper to you as a useful guide in identifying the issues to be addressed. If admitting – or in this case recognising – the problem is the major step in avoiding the road to perdition, then Shelley’s paper dealing with some of the tax issues will be a useful companion in our everyday practice.

For my part, I have focused on the some of the practical asset planning issues likely to be encountered in practice.

### **THE ASSET PLANNING MODELS**

To assist identifying the inter-generational asset planning opportunities and issues – and I hasten to add that a well implemented structure adds benefit both to the client and of course our practices – there are several asset planning models to consider. For all intents and purposes, there are three main models:

- Where the client retains personal ownership of assets during their life and provides via their Will for their residual estate to pass to the next generation
- Where the client retains personal ownership of assets during their life and provides via their Funnel Will for their residual estate to pass to a trust for the benefit of the next generation; and

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<sup>7</sup> Law Faculty at University of Otago

- Where the client transfers assets to trust during their lifetime and provides in their Funnel Will for the successor appointments in respect of the trust.

The success of the first and second options is dependent upon the assets surviving the risk of creditor attack both during the life of the first generation and also the beneficiary second generation.

For reasons of the risk of expose to assets to potential claims under any number of Acts and for reasons that will become apparent as you work your way through Shelley's paper, the first option is not considered a viable proposition in this day and age to achieve inter-generational asset planning objectives

The second option is also vulnerable to failure if the assets become subject to claim before they vest in the trust for the benefit of the next generation.

From a practical perspective, there is only one model to adopt – the third one where assets are transferred to trust *inter vivos* - if one is serious about implementing inter-generational asset planning measures.

### **TRUST OWNERSHIP**

Experience suggests that the greater public perceives that trust ownership of assets is the panacea for all ills. While there is little doubt that assets held in trust will generally enjoy a level of protection significantly greater than assets held outside of a trust, it remains to educate the profession and the public alike that it takes more than mere trust ownership of an asset to maintain the desired levels of protection.

Take for example hypothetical clients who are well versed in the nature and extent of their rights, duties and obligations in respect of the trust. The trust has been properly established, managed and maintained. All decisions have been carefully minuted before any action taken, all advances to the trust have been clearly documented and the clients have clearly understood the concept of trust versus personal ownership. The clients have arranged for 'Funnel Wills' to be put in place whereby any residual assets held in their personal estates will, on death, be channeled into the trust for the benefit of the survivor and thereafter the children. Powers of attorney – both enduring and general – are in place and the memorandum of wishes is reviewed regularly. In a nutshell, they are the epitome of the perfect client.

These clients are satisfied they have done all that they can and indeed all if that is required of them to protect and preserve assets during their lifetime for their long term benefit and to maintain the integrity of the trust. Despite their pro-activeness, as the years have advanced and the clients have enjoyed the benefits that their hard work and prudent asset planning have offered them, it has recently been playing upon their minds as to whether the asset planning measures that have served them so well will similarly serve their children and further, if the same trust is satisfactory and indeed appropriate for their children.

Presently, the clients, who are included as trustees as well as discretionary beneficiaries of the trust, also have the joint power of appointment of trustees. The clients 3 children are the final beneficiaries of the trust.

The issues to be addressed in the context of their inter-generational planning concerns include:

- Who should succeed the parents as trustees of the trust when eventually, the survivor of the parents passes away?
- Who should inherit from the parents the power to appoint trustees of the trust when eventually, the survivor of the parents passes away?

- How safe will be the children's interests as final beneficiaries when eventually, the survivor of the parents passes away?
- How should the trust be structured for the benefit of the children when eventually, the survivor of the parents passes away?

Addressing the issue of the successor trustees and appointors is not so much a technical issue but rather one of a practical nature. The parents need to identify who they want to inherit the powers so as to ensure the trust can continue for the benefit of future generations. Any such nominations which be included in the Funnel Will.

As for the most advantageous structure for the trust for the benefit of the children – that will depend upon the nature and extent of the trust assets as well as the children's respective requirements and expectations. If the trust fund comprises income producing assets, it may be that subject to any tax implications, the children's best interests may be served by resettling the trust into a separate trust for the benefit of each child. That way, each child can become master of their own destiny and no child will be beholden to the others when seeking benefit from the trust. If the trust fund comprises lifestyle assets such as a bach, it may be that continued ownership of the property within the existing trust structure may remain appropriate. Whether such appropriateness would be ongoing is not so certain.

What has become critical as a result of recent cases is the status of the final beneficiaries' interests. In that regard, we need to be guided by the recent decision of *Q & Q*<sup>8</sup>

This case involved the separation of the parties in a 22 year marriage. Mrs Q was a beneficiary of a Trust settled by her father 2 years after the marriage began. The husband, who was not a beneficiary of the trust, worked physically on the trust property and provided professional services to the trust. The issues in relation to the Trust were:

- Whether the rights and interest Mrs Q had in it as a beneficiary are property under the Property Relationships Act. If so, the value and classification of the property, whether Mr Q was entitled to share in it and if so, to what extent.
- If not, whether he was entitled to compensation or other relief under various other provisions of the Act.
- Whether Mr Q could pursue common law or equitable remedies in the event his claims under the Act were unsuccessful.
- Whether section 182 of the Family Proceedings Act could and should be applied.

It was held that Mrs Q's interest as a Final Beneficiary in the Trust was her separate property.

In respect of Mrs Q's trusteeship, it was recognized that a trustee holds the legal interest in the Trust Fund but not the equitable interest. This was not a right or interest in respect of the property for the purposes of the Act, therefore Mrs Q did not have qualifying property rights in relation to the trust by virtue of being a Trustee.

In this case, Mrs Q's discretionary interest was of a conventional sort. It did not create for her a right or interest in the Trust property and did not therefore qualify as property under the Act either. It is a mere expectancy. In that regard, the case of *Yu Ping Gao-Elledge*<sup>9</sup> was distinguished.

The chose in action and various rights and interests Mrs Q had by virtue of being a Discretionary Beneficiary were not in respect of the property held in trust and do not qualify in terms of definition.

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<sup>8</sup> (2005) 24 FRNZ 232

<sup>9</sup> 2003] DCR 145; (2003) NZLFR 378 (DC)

Mrs Q had an interest in the Trust property as a Final Beneficiary. Contingent future interests were considered property under the Act in the context of insurance policies. **Mrs Q's interest as a Final Beneficiary of the Trust was property in terms of section 2 of the Act.**

Under section 10, Mrs Q's interest in the Trust was her separate property, having been acquired because she is a beneficiary under a Trust settled by a third person – her father. The “property” had not been so intermingled with other relationship property that it was unreasonable or impracticable to regard that property as separate. Here, the relevant asset was the property interest in the Trust and not the Trust assets themselves. That property had not been intermingled so as to lose its separate property status.

The evidence showed that the value of an interest in the Trust had increased during the marriage. This increase in value was attributable in part to the application of relationship property and also in part to Mr Q's direct and indirect contributions which were referred to in the findings of fact. The increases were therefore relationship property under ss9A(1), (2).

Had the claims of Mr Q under the Act been unsuccessful on the grounds of property owned by the Trust, to which he had contributed significantly, being outside the net provided by the Act, then a constructive trust would have been imposed to achieve a result like that referred to in para 196 of the judgment.

There was jurisdiction to impose a constructive Trust on property owned by a Trust – *Prime-v-Hardie*<sup>10</sup> was followed.

What we need to recognise from this case is:

- The interest as a final beneficiary of a Trust is property in terms of section 2 of the Act and
- The fact that assets are owned in trust does not preclude the imposition of a constructive trust on top of the discretionary trust

The distinction between an interest as a discretionary beneficiary and a final beneficiary was also made in *JKK-LDK*<sup>11</sup>. In that case, Mrs K applied for occupation of the family home; where the home was owned by the family Trust Mr and Mrs K entered into in 2000. Their children were listed as primary beneficiaries. It was held that the Trustees hold the legal interest in the Trust Fund and the land but not the equitable interest, therefore, parties have no right or interest in respect of property for the purpose of the Property Relationships Act 1976. Consequently, the Court has no jurisdiction to grant occupation. The application was denied.

In *Fox v Allan*<sup>12</sup>, the wife's inheritance was paid to a joint account with her husband and the husband and wife as Trustees then borrowed those funds from themselves on security of a debt back. Following separation, it was held that the debt from the Trustees to the husband and wife was relationship property and the Trust capital was therefore relationship property.

In *P V P*<sup>13</sup>, the husband bought an investment property from a bequest from his father's estate with the mortgage as security over the family home. After separation, the husband submitted it would be unfair to have equal division of any of the property. Recognising the intermingling of the property, it was held in the end that the property was divided in the proportions of 70% to the husband and 30% to the wife subject to settlement of a portion of the family home for the benefit of the parties' children.

<sup>10</sup> (2002) 22FRNZ 553 (2003) NZFLR 481 (HC)

<sup>11</sup> unreported case of the Family Court on 20 December 2005

<sup>12</sup> FAM2003-091-388, FC Porirua, 24 November 2004, Judge Moss

<sup>13</sup> 2002 FRNZ380

The other aspect of the finding in *Q v Q* of which we need to be wary is the constructive trust issue, a legacy of *Lankow v Rose*<sup>14</sup>. In that case, it was held, in dismissing the appeal and allowing the cross-appeal on the points relating to the actual implementation of the division:

To be awarded a beneficial interest in property owned in law by the other partner, a de facto claimant must show

- (a) Contributions, direct or indirect, to the property in question;
- (b) The expectation of an interest in the property;
- (c) That such expectation is a reasonable one in the circumstances; and
- (d) That the defendant should reasonably expect to yield the claimant an interest.

If the claimant can demonstrate each of these four points, equity will regard as unconscionable the defendant's denial of the claimant's interest and will impose a constructive trust accordingly.

The *Lankow v Rose* style concepts have been supported in *Prime v Hardie*, *Glass v Hughey* and now *Q v Q*.

## SUMMARY

So what does all of this mean in the practice of intergenerational asset planning?

- Having an inheritance pass directly to a trust rather than to an individual will minimise if not avoid the risk of the inheritance being construed (albeit initially) as relationship property
- If the inheritance is left to a trust of which children are the final beneficiaries, the interest as final beneficiary will be treated as separate.
- If the value of that separate property interest has the potential of being increased as a result of the contributions (direct or indirect) by another person, then the increase in value of that separate property has the risk of being treated as relationship property under the PRA
- If there is a risk of an interest as a final beneficiary becoming subject to claims, should the trust be resettled so as to avoid PRA claims against a child's interest?
- If the Trust is resettled, are there any tax implications that could be triggered by the resettlement?
- Are the potential tax consequences (of resettlement) worse than a potential claim under the PRA or is isolating assets from potential claims under the PRA a price worth paying in respect of the tax implications triggered by resettlement?
- Once the next generation receives their inheritance, how safe will it be?
- Is the next generation aware of the potential for claims even though assets are held in trust?

Clearly, each situation will present a number of issues to address. But it is not just trusts that are of concern.

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<sup>14</sup> (1994) 12 FRNZ 682

## COMPANY OWNERSHIP

In addition to some of the trust issues raised above, we can also expect that we will need to address issues concerning clients' interests in private companies.

While succession planning for clients' businesses could itself be the topic for another paper, there are some issues in respect of companies that affect the inter-generational asset planning matters.

In particular, consideration needs to be given to shares. In the case of a non-family business, the transmission of shares should be covered either by the company's constitution or alternatively, a shareholders agreement. On that basis, the inter-generational planning issues would be simplified in that rather than dealing with shares, it will be the proceeds of sale of the shares that will be dealt with.

Of particular interest though is what happens to a shareholder in an LAQC? The death of a shareholder in a LAQC constitutes an automatic or a deemed revocation of the shareholders election to be an LAQC. In that case, new shareholder elections about qualifying company status are required within 12 months of the date of death of the shareholder if qualifying status of the company is to be maintained. The IRD can extend that time period upon application to them.

What is interesting to note though is that the revocation (of the election of qualifying status) applies from the beginning of the income year in which the death occurs (subject to agreement from the IRD on application to defer the cessation date).

What all of this means is that as part of the intergenerational asset planning exercise, consideration needs to be given as to whom the shares in the LAQC will pass. If reliance is had on the Funnel Will, then the shares would pass to the trust. A trust can hold shares in an LAQC. That means that if the trust makes new shareholder elections within 12 months from the date of the shareholders death, the LAQC would continue. But would that be appropriate?

Perhaps. The IRD rules provide to the effect that the status of an LAQC will be affected by a change in the status of a shareholder where a trust shareholder does not distribute all the qualifying company dividend income as beneficiary income. Depending upon the class of beneficiaries, it may be that the trustees can distribute the dividend income through to the beneficiaries. But to what advantage?

One needs to bear in mind that if an LAQC was considered the appropriate entity in the first place to hold the rental properties (as opposed to the trust), does the shareholders' death mean that the trust then becomes the appropriate beneficiary of the shares? If the losses can be passed through to the beneficiaries, how do the trustees balance the needs of the respective beneficiaries in the context of the need to distribute all dividends from the LAQC. This will depend upon the circumstances in each particular case. At the end of the day, it might be that the shares do indeed pass to the Trust but that the trust does **not** elect new shareholder qualifying status. That way, the trust can carry forward losses generated from the company and defer the use of the losses until sufficient income is derived. The fully imputed dividends can then be capitalized and the trust funds grown .. . at least that's one possible scenario; there will be others depending upon the circumstances.

There are always lots of is buts and maybes so perhaps the following case study may assist to give some insight as to the some of the issues.<sup>15</sup>

## A CASE STUDY

Mr Morgan Samson and his wife Susan have been married for 27 years. When they married, Morgan was 20 and Susan was 19. They have 3 children, Michael aged 23 who is studying a degree in Computer Science. Dellah aged 20 who is studying chemical engineering, and the youngest child Samuel who is aged 8 and presently at primary school.

<sup>15</sup> The facts and names of the parties are fictitious and have been contrived for the purposes of this paper

Morgan, being an entrepreneur at heart, has tried many different business ventures and is currently developing an internet based HR programme called Train Me. He is also working on an internet recruitment business for chefs. Susan does a little bit of the work for that business, booking the cooks, but otherwise works as a senior PA in her uncle's spice importing business, Cumin Get Me Limited.

Presently, Morgan and Susan have only limited assets of any significant worth and are trustees and discretionary beneficiaries of a family trust.

The Trust Fund of the trust comprises

- The initial trust corpus in the sum of \$10.00
- The home in which the Samsons live
- 98% of the shares in Hold Me Limited, the holding company of Trade Me
- cash deposits of about \$50,000

The Property is subject to a mortgage to the bank which is sitting at about 25% of the current estimated market value of the home

Morgan and Susan each hold 1 share personally in Hold Me Limited.

Morgan has a managed fund investment portfolio in his sole name which has a current estimated market value of about \$175,000. It started with his initial contribution of \$100.00 when he began his first job packing groceries at the local supermarket aged 14. He has contributed regularly to the portfolio ever since.

Susan has a holding in GPG in her sole name worth about \$50,000 – this was something she inherited several years ago from her grandfather.

Morgan and Susan are also the personal shareholders in an LAQC which holds 3 rental properties. The latest rental property was bought 6 months ago and was financed 100% by bank loan.

Perhaps the final part to Morgan and Susan's jigsaw is their philosophy in life. Neither came from affluent backgrounds. Both have worked hard to get where they are and they have experienced their fair share of struggles, trials and tribulations. They are at last starting to enjoy the fruits of their labour and are beginning to appreciate the rewards of their thrift and hard work over a number of years. They realise they have been fortunate with the success that has begun to come their way and they are aware of the stresses and strains that life presents. They have also seen how a little help at the right time can help to alleviate what they see as unnecessary challenges for families starting out in life. Although they were never the beneficiaries of such assistance, they are determined to assist their children – something they believe they can achieve without adversely compromising their lives.

Morgan and Susan have recently received a letter from their lawyer advising of the upcoming Trust review. In anticipation of that meeting, Morgan and Susan have taken greater interest than usual in various newspaper reports about Trusts. The questions they have identified for discussion at the Trust review meeting include the following:

1. What happens to the shares in the LAQC when they pass away?
2. What happens to the shares in Train Me when they pass away?
3. What happens to the directorship in Trade Me when they pass away?
4. How safe will their children's inheritance be if their inheritance is held in the family trust?

5. Who exactly are the beneficiaries of the family trust?
6. Who should be the trustees of the Trust when they pass away?
7. Who should become the Appointor of the Trust when they pass away?
8. How can they avoid conflict between his 3 children in respect of the Trust after he passes away?

Being the organized people that they are, Morgan and Susan thought it would be advantageous if they submitted the list of questions to their lawyer before the meeting so he would have time to consider them. They sent the e-mail through at 9.30 on Sunday night in advance of the meeting at 10.00 on Monday morning. The lawyer had the following responses for Morgan and Susan's questions. The lawyer flagged the answers as being more of an indicative rather than definitive nature and may need to be worked through with Morgan and Susan's accountant

1. What happens to their shares in the LAQC when they pass away?  
**A. They are to pass to the Trust via the Funnel Will.**
2. What happens to his shares in Train Me when he passes away?  
**A. They are to pass to the Trust via the Funnel Will.**
3. What happens to his directorship in Trade Me when he passes away?  
**A. The Trustees as successor shareholders will appoint an director to represent their interests**
4. How safe will the children's inheritance be if their inheritance is held in the family trust?  
**A. It will depend upon the respective ages and relationship status of the children at the time.**
5. Who are the beneficiaries of the family trust?  
**A. Morgan and Susan are discretionary beneficiaries**  
  
Morgan and Susan's children **Michael, Delilah and Samson are the final beneficiaries but and they are also discretionary beneficiaries**
6. Who should be the trustees of the Trust when he passes away?  
**A That will be a matter of personal choice for Morgan and Susan. All things being equal, it may be that Michael and Delilah are appointed to serve as additional trustees together with the continuing independent trustee. When Samuel attains an age specified by Morgan and Susan, he may then also be appointed as a trustee.**
7. Who should become the Appointor of the Trust when he passes away?  
**A Until all 3 children have attained an appropriate age as specified by Morgan and Susan, it may be that the power to appoint new trustees passes to a party or parties specified by Morgan and Susan pending the appointment of the 3 children (or the survivors of them) as the joint appointor.**
8. How can they avoid conflict between their 3 children in respect of the Trust after they pass away?

- A** Depending upon the nature and extent of the trust fund, it may be that the trust is resettled to new trusts for the benefit of each child

## **CONCLUSION**

The field of inter-generational asset planning is evolving. A structure that was satisfactory 10 years ago for transferring residual wealth from one generation to the next may well be vulnerable today. What will be appropriate in the future is an exercise in crystal ball gazing. Having said that, it is submitted that the transfer of assets to a trust during a settlor's life is likely to put the next generation in a better position than they would be in if the assets remained in personal ownership.

If we can encourage our clients to spend some time, money and effort now in respect of inter-generational planning matters, they can be assured that the next generation will be in a better position. Indeed, one could assuage client concerns as to the merit of such an exercise by reminding them of the parting words of Monsieur Sydney Carton "it is a far, far better thing that I do than I have ever done"<sup>16</sup>.

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<sup>16</sup> Charles Dickens A Tale of Two Cities