

SECURING THE FUTURE

ESTATE PLANNING & STRUCTURING ISSUES WHEN EXPECTING A CHILD

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There is a fascinating dichotomy with the subject matter of this paper. While potentially being a statement of sweeping generality, the role of parent is perhaps one of the most taxing, difficult and fraught yet rewarding jobs many of us will ever undertake.

It is a job that brings with it substantial responsibility – dare it be said, even liability – and is in most cases a job for life and from which there is little or no respite or redundancy – personal grievances maybe but escape; no. Yet with all the burdens, responsibilities and obligations that come with parenthood, it is a role that can be assumed either deliberately, unintentionally, or in some cases even unwillingly, but in most if not all cases, it is a job taken on without training, qualifications or benchmarked standards of care or skill.

Despite best efforts, good faith endeavours and even mistaken belief, our success as parents – were it to be graded on the NCEA Scale - could range anywhere from “fails to achieve” to “could try harder”. This is not however a paper on parenting skills but rather, an attempt to address some estate and asset planning issues that, as an adjunct to our parenting skills, may help to bring our NCEA rating up to “achieved”.

The outline for this paper neatly quantifies some of the issues of such a planning exercise and hints at some of the techniques that can be considered for dealing with them.

OFFSPRING ENTITLEMENTS, RISKS AND THE APPROPRIATE ASSET PLANNING INSTRUMENTS

But before launching in to the various aspects of this category, it is appropriate to state several assumptions that are fundamental to this paper, namely that as parents, not only are we aware of the necessity of planning for the future and that we want to plan for our offspring, but also that we have the wherewithal to make such plans and to provide for such objectives.

Offspring

So what are ‘offspring entitlements’?; indeed, what constitutes offspring? That question alone would probably give rise to sufficient issues and considerations for a paper on its own. That said, for the purposes of this paper, it will be assumed that what constitutes ‘offspring’ is not in dispute – it will be a child whether naturally born, adopted or born as a result of assisted human reproduction procedures. Included in this category of offspring are those who are *en ventre sa mere* as well the issue and more remote issue of those offspring. In general terms, it could be said we are looking at children, grandchildren and even great-grandchildren.

But despite this seemingly broad category, a distinction needs to be made between those persons who would automatically fall within the category of offspring (such as those referred to above) and those who may not be classified as of right as offspring such as stepchildren.

Bear in mind also that for the purposes of this paper, we are not concerning ourselves with the day-to-day care and welfare issues in respect of the children (something perhaps better addressed in a separate paper in the context of the Care of Children Act 2004) but rather, addressing the provision that might be made by the parents to assist with the upkeep, maintenance, advancement, benefit and enjoyment in life of the offspring.

Offspring entitlements – what are they?

On the premise the foregoing sufficiently identifies for these purposes the offspring for whom the provision is to be made and if, taking a quantum leap, it is accepted that there are financial resources available to plan for the provision of such offspring, then what is it to which these offspring are entitled?

We have touched briefly on – or perhaps more accurately avoided – the application of the Care of Children Act 2004 and for this paper, that is a strategy from which it is not intended departed. The reason being that such considerations generally relate to the day to day care consideration of the offspring rather than the more esoteric ‘asset planning’ considerations with which we are concerned.

There is presently no specific legislation - no ‘Provision for Children Act’ prescribing what provisions *asset based* provision parents must make for their offspring. Granted there are the obligations to provide the necessities of life, to provide discipline absent corporal punishment and the raft of other rights to which children are becoming increasingly aware. Perhaps the closest we get to a statutory codification of parents obligations to plan for their offspring are the moral obligations referenced under section 3 of the Family Protection Act 1955. That is something that will be touched on later in this paper.

If one accepts though the foregoing as correct i.e. that there is essentially no prescribed obligation - whether in statute or at common law – to plan [financially] for our offspring, then what exactly are the offspring entitlements?

Although the following is a somewhat cynical suggestion, it is submitted that perhaps the most effective way to identify what constitutes ‘offspring entitlements’ is for the parents to die and for the children to make a claim against the parents’ estates under the Family Protection Act! Indeed, in general, it seems it is not until claims are made against estates that the issues that parents should have taken into account in providing [as opposed to planning] for their offspring come under scrutiny.

THE RISKS THAT INFLUENCE THE ASSET PLANNING CONSIDERATIONS

Indeed, it is submitted that in order to identify how best to structure any provision for offspring, one needs to work backwards and identify the possible risks to which any such provision could be or become exposed. The scenarios addressed for that purpose are:

1. provision for offspring personally pursuant to parent's will
2. provision for offspring via trust pursuant to parent's will
3. provision vested directly in offspring's ownership
4. provision for offspring via inter vivos trust

PROVISION FOR OFFSPRING PERSONALLY PURSUANT TO PARENT'S WILL

This contemplates that on the death of the last surviving parent, the residual estate will pass to the offspring personally and if more than one, then in the shares prescribed in the Will. Once title to the inheritance is vested in the offspring personally, it could be or become vulnerable to risks including:

- If a child under the age of majority passes away, it is likely they will be intestate. That means the provision made for them under their deceased parents wills shall be subject to the statutory trusts under section 77 of the Administration Act 1968. The risk is that if there is no surviving to take under those statutory trusts, then the provision made by the parents could vest in the crown as *bona vacantia*.

- Before that occurs, there are of course a number of avenues to be explored to identify persons to take under the intestacy but it is a risk that can not be discounted out of hand
- If the reason for providing for the child in the first place was to preserve assets and make long term provision for the offspring and their issue, then the risk of intestacy and the possible vesting of the provision in the Crown as bona vacantia is a consequence that can be planned not to arise
- If the child is over the age of majority, the same risk of intestacy could apply.
 - Added to that though is the potential exposure to claims under the Property (Relationships) Act 1976 if the child is in a personal relationship to which the Act applies. That would be the case whether the relationship came to an end either during the child's life or on their passing away.
 - The provision made for the child could also be subject to the usual creditor issues if the child experiences financial difficulties at any time after the provision is vested in them.
 - If the child passes away but leaves their own offspring, then the potential exists that the provision made for the deceased child could be vulnerable to claims under the Family Protection Act 1955. A closer analysis of the relevant aspects of this Act follows later in this paper.
- Perhaps the greatest risk to the provision made for a child pursuant to the parents will is claims against the parents' estate. As touched on already in respect of the offspring's position, the usual culprits apply to threaten the parents' estates and hence any residual provision for the offspring.
 - Creditor issues arising from financial difficulties could be a major issue as a dissipation of the parents' wealth will clearly impact adversely on the parents' ability to provide for their offspring.
 - Challenges to their wealth could come arise in respect of any one or more of the following, just to name a few:
 - Business failure
 - Professional/product liability
 - Malfeasance of others
 - 3rd party liability such as personal guarantees of others or residual liabilities under assigned leases
 - IRD; and
 - Rest home care.
 - Property (Relationship) Act claims remains a real and evolving threat. It is stating the obvious to say that such claims can impact on the parents' ability to provide for offspring both during their lifetime and after their passing. Given however the nature and extent of this particular issue, it is not intended to do anything more than flag the potential of PRA claims as an area of adverse impact on the parents' position. There is a raft of current and no doubt future papers on this evolving field that can address more fully the

issues involved in this area. At the risk of being repetitive, it is however a crucial consideration to be taken into account in an asset planning exercise

- Family Protection Act 1955 claims are also a significant area of vulnerability. As with other area of potential vulnerability, it is not intended to address FPA exposure in any great detail other than to flag it as another area of critical concern to be taken into account in the asset planning exercise. Having said that, it is appropriate to canvas generally the nature and extent of vulnerability that can surface

- Section 3 of the Act provides that an application for provision out of the estate of any deceased person may be made under this Act by or on behalf of all or any of the following persons:-

- (a) the children of the deceased;
- (b) the grandchildren of the deceased living at his death;
- (c) the step-children of the deceased who were being maintained wholly or partly or were legally entitled to be maintained wholly or partly by the deceased immediately before his death.

[It may be recalled that earlier in this paper, a distinction was made between children and step-children – it is critical to note under the FPA, that distinction does NOT apply]

- Under section 3 (2) though, bear in mind that in considering any application by a grandchild of any deceased person for provision out of the estate of that person, the Court in considering the moral duty of the deceased at the date of his death shall have regard to all circumstances of the case and shall have regard to any provision made by the deceased or by the Court in issuance of this Act in favour of either or both of the grandchild's parents.

- Bear in mind also that the child seeking to claim under the Act must be the child of the deceased. Children who are not children of the deceased but who were living with the deceased are not eligible under section 3(1)(b). The terms "child of a de facto relationship" and "child of a marriage" do not have the extended meaning given to those terms in section 2 of the Property Relationships Act.

- Adopted children are eligible to claim as children of the deceased by virtue of section 15 of the Statutes Amendment Act 1947. Section 16(2) of the Adoption Act 1955 deems an adopted child to be a child of the adopted parent. However, children adopted by Maori custom, whangai, are not eligible to claim under the Family Protection Act.

- In respect of step-children, section 2(1) of the FPA provides that step-children in relation to any deceased person means any child who is not a child of the deceased but is a child of:

1. The deceased's husband or wife;
2. A de facto partner who was living in a de facto relationship with the deceased at the date of his or her death and

- (a) who the Court can make an order under the Act in favour of; and
 - (b) who is living at the date of the marriage of the husband or wife to the deceased or as the case requires when that de facto partner and the deceased started living in the de facto relationship.
- That means the children of the deceased's de facto partner will now be eligible claimants as step-children of the deceased under section 3(1)(d) provided:-
 1. The de facto relationship was existing when the deceased's partner died; and
 2. The child was alive when the de facto partners started living together; and
 3. The step-child was being maintained wholly or partly or legally entitled to be wholly or partly maintained by the deceased immediately before his or her death.
 - The significance of the legislative door being opened to step-children is that there is yet another area of exposure to which a parents' estate can be threatened. Indeed, with the anecdotal evidence of the increasing number of blended relationships and the associated increase in the number of step-children – and given the difficulties that can sometimes arise in 'step' relationship - this may become a more significant source of threats to estates than the other claimant categories.
 - The foregoing are reference to the main statutory bases to support claims against estates. Some of the principles of the claims to these statutory rights have been enunciated in *Williams –v- Aucutt* [2000] 2 NZLR 479, a case which was considered by Hansen J in the High Court in December 200 in the case of *Brown –v- Harrop* in respect of the estate of Eric Clausen Miller.
 - While this is neither the time nor the place to consider such issues or cases, it is sufficient for the purposes of this paper to flag that the potential remains for estates to be challenged, a result of which could be adverse in respect of parents' intended planning for their offspring

CARE OF CHILDREN ACT 2004

Presuming though the provision for the offspring under the Will goes unchallenged – and granted, that could be a significant quantum leap these days - it is timely to address briefly the provisions of the Care of Children Act 2004 (which repealed the Guardianship Act 1966).

- Initially, it is important to recognise the different categories of guardians and also identify the nature and extent of the powers, duties and obligations that go with guardianship.
- Section 26 of the Care of Children Act 2004 provides that the parent of a child may by deed or will executed before or after the child's birth appoint a person to be a testamentary guardian of the child after the parent's death.

- Section 27 provides that the Court may appoint a person as a guardian of a child either in addition to any other guardian or a sole guardian either on an application for the purpose by any person, or by its own initiative on making an order removing a guardian under section 29.
- When dealing with the questions of guardianship, in the context of this paper, the focus is on the issue of testamentary guardianship. It is important therefore to recognise the difference between custody – or more particularly the 'day-to day care' of the child as referred to in section 26 (5) of the Act and duties, powers, rights and responsibilities of the testamentary guardian as set out in section 16 of the Act which provides:
 - (1) The duties, powers, rights, and responsibilities of a guardian of a child include (without limitation) the guardian's—
 - (a) having the role of providing day-to-day care for the child (however, under section 26(5), no testamentary guardian of a child has that role just because of an appointment under section 26); and
 - (b) contributing to the child's intellectual, emotional, physical, social, cultural, and other personal development; and
 - (c) determining for or with the child, or helping the child to determine, questions about important matters affecting the child.
- So what then are the practical implications of all of that? Basically, a parent has the ability to nominate someone to act as a guardianship of their children on the death of the parents. There are a number of philosophies in respect of this issue – some consider it critical to address the issue while others are not concerned. Often, it is seen as such a difficult issue parents elect not to deal with it. In many cases, there will likely be no problems from that approach because the parents will survive to see their children attain majority. It is in the circumstances where that does not occur – where the parents pass away leaving 'infant' children that it can become an issue.
- It is suggested that if parents cannot decide who they want to assume the role of guardian should they pass away prematurely, how much more difficult might it be for the Courts and other parties to decide the matter? If the premise of the whole planning exercise is to take control of circumstances and plan as best one can for the future, then surely nominating a guardian is in everyone's best interests.
- The interface with family and property law that faces us in this context is highlighted by section 4 of the Care of Children Act 2004 which provides to the effect that the child's welfare and best interests is to be paramount. Perhaps therefore the crux of those guardianship provisions – or should we say, care and welfare of the children – are that the testamentary guardian does not necessarily have the custody of the child but rather the responsibility for overseeing the day-to day care. That being the case, there can be some significant planning issues to be addressed by the parents, not the least of which are:
 - who should have the day-to-day care of the child, and
 - who should be appointed as testamentary guardian to make the decisions regarding the care and welfare of the child; and
 - how do they plan their affairs to enable the testamentary guardians to carry out their
- Given that a testamentary guardian needs to be 20 years of age or older (per section 26(2) of the Act), circumstances can arise where an older child can sometimes be nominated as the testamentary guardian for younger children. Whether it is appropriate to impose such duties and responsibilities on a young person is something that would need to be considered on a case by case basis.

- Whether or not it is an older child who is appointed as testamentary guardian or an adult, the manner in which the parents structure their estate and asset planning considerations will be important.

THE OPTIONS, RISKS AND STRATEGIES

Armed now with a better awareness of some of the matters that influence how a parent plans for the provision of their offspring, it has been seen that claiming against a parent's estate seems to be perhaps the only sure way to identify the provision the parents should have made for their offspring. It is suggested though that allowing matters to be redressed through the Courts after the parents' decease is a negative and retrospective approach to the subject. The focus of this paper is the positive planning strategies that parents can consider to provide for offspring. The following therefore assumes that:

- the parents wish actively to plan for their offspring's provision; and
- that the provision to be made for offspring is such that the parents are able to provide.

That in itself presents a wide spectrum of possibilities but I have designated 3 scenarios to explore.

The first is perhaps the most common that we are likely to encounter as practitioners – those parents whose primary focus in life is perhaps to have something left over when they have gone to pass on to their children;

The second group is those people who are able to put something aside for their offspring and to assist them in advance of the parents passing away; and

The third is that group of people who have the wherewithal to make substantial provision for their offspring early on in their offspring's lives without impacting adversely on the parents' lifestyle.

A fundamental precept of each of the scenarios is that at some stage, the provision made for the offspring will end up at their disposal in one way or another. That being the case, the following is a look at the asset planning considerations for each of those scenarios.

Group 1

The scenario in this sort of situation is generally that the last surviving parent will leave the residual estate – often the family home – to the children equally. The passing of the parent's estate to the children is generally achieved by Will.

- ❖ To avoid the risk of being side-tracked at this point in time, it is assumed that the division of the residual estate between the children is not challenged whether under the Family Protection Act, the Property (Relationships) Act, the Law Reform (Testamentary Promises) Act or in any other way.
- ❖ That means the children will likely each receive an equal share of the residual estate. If the parents had a modest unencumbered home in Auckland; each child may receive an inheritance to the value of say \$200,000.00. Whether that inheritance is received in cash or in kind may depend upon the age of the offspring at the time and the structuring of the Will.
 - If after the death of the last surviving parent the children are under the age of majority:
 - it may be that the Will provides to the effect that while the youngest of the offspring are under the age of say 20, the home is held by the executors for the offspring to live in.
 - This assumes though that the estate comprises sufficient funds to meet outgoings for the property. Ideally, life and/or mortgage

repayment insurance will be in place to clear any mortgage indebtedness.

- That still leaves however the continuing outgoings of the property such as rates, insurance, utilities not to mention day-to-day household expenses.
- If there are not sufficient funds to cover those outgoings, the trustees of the estate may have no option but to sell the property so as to maximize the value of the estate before it is eroded by liabilities.
- After the youngest child attains the specified age or perhaps no longer lives at home, the Will may provide for the property to be sold with the net sale proceeds either distributed to the offspring or perhaps held in trust until the youngest child attains the age of say 25 years.
- Perhaps the critical issue to address then is the vulnerability of the inheritance received by the offspring. As touched on earlier in this paper, the potential risks that could threaten the inheritance include
 - Creditor attack if the child is in financial difficulty at the time
 - Property (Relationship) Act claims in particular if the child applies their inheritance whether directly or indirectly to or for the benefit of a relationship.
 - It is perhaps this last category – of potential claims from estranged partners that is becoming an increasing concern for many parents.
- If the aim of the asset planning strategy is to pass on to children the residual estate, the foregoing highlights some of the risks that can face the children's inheritance if the planning mechanism used to achieve the goal is simply a Will.

Group 1 – Solutions

If parents' concerns are to protect and preserve whatever inheritance their offspring may receive against claims, in particular arising from relationship failures, there are several planning techniques available, including:

- Transferring the core family assets (i.e. the home) to a trust during the parents' lifetime. The advantage of this strategy is that the parents may also receive benefits from the trust structure during their lives such as:
 - Protecting their assets against creditor attack if, for some reason, the parents find themselves in financial difficulty;
 - Protecting and preserving the assets against possible PRA claims if for example one of the parents passed away prematurely and the survivor entered into another relationship – which subsequently failed. The loss of half the estate pursuant to a PRA claim would impact dramatically on the offspring's inheritance entitlement (if for example the surviving parent's new but failed relationship had achieved at least 3 years in duration and the new couple had lived in the family home).
 - This strategy – of transferring assets to a trust during the parents' lifetime - contemplates that the parents will embark upon a gifting programme in respect of the sale price owing back to them by the trustees following the sale of their home to the trust.

- In conjunction with the Trust, it would remain critical to prepare a 'Funnel' Will which not only channels all the parents' remaining personal assets (other than personal effects) to the trust for the benefit of the survivor and the offspring, but also which:
 - Addresses any residual debt still owing at the date of death under a under a gifting programme
 - Nominates successor trustees
 - Nominates a successor appointor – being the person(s) who has the power to appoint and remove trustees; and
 - Nominate testamentary guardians for any children who survive but are under the age of majority – presently 20 year of age
- It would also be important to prepare and maintain a Memorandum of Wishes setting out the parents more specific – albeit non (legally) binding - wishes for the management and administration of the trust following their death.
 - This could become a critical document in time to come in particular as to if and why the parents would like assets retained, and of so, upon what basis and for how long. It might also be that the Memorandum requests the trustees to consider sub trusts and/or resettlement to new trusts for each child, depending upon the nature and extent of the assets comprising the Trust Fund.
- To complete the estate and asset planning jigsaw, it would be prudent to prepare for the parents Enduring Powers of Attorney for both Property and for Care & Welfare and possibly even general Powers of Attorney and Deeds of Delegation.
- If the parents do not wish to settle assets on the trust during their lifetime, a second planning option for them to consider would be for them to settle a passive 'receptacle' trust (holding only the initial settlement of say \$10.00) but to retain ownership of assets in their names during their lifetimes.
- The parents Funnel Wills would channel the deceased parents' assets to the Trust for the benefit of the surviving partner/spouse and offspring
- A critical feature to the success of this technique will be ensuring that the assets such as the home are owned by the parents as tenants in common rather than as joint tenants. If assets are held in a joint tenancy, that would defeat some of the benefits of this planning strategy as the surviving spouse/partner would inherit all assets. This could be disadvantageous if the surviving spouse/partner were for some reason to become subject to means testing in the future.
- It should be pointed out that a life interest Will – conferring on the survivor the right to use and occupy the home for their lifetime with the interest in remainder being held for the offspring - would likely be effective to protect the survivor (and hence ½ of the assets) from means testing but it would not protect the offspring's inheritance when the life interest comes to an end.

Group 2

The second scenario comprises a group of people we as advisers are seeing on a more regular basis – those people who are able to put something aside for their offspring and to assist them in advance of the parents passing away.

The provision could range from or include education funds to which the parents contribute on a regular basis from the birth of their children through to setting aside a portion of their discretionary income from time to time.

Looking at part 1, the education fund option; this gives rise to some interesting issues. Gift duty considerations aside, there are some tax implications to consider.

- If the parents make contributions to a fund in the parents' names as (bare) trustee for the children, any income derived from those funds will likely be subject to tax at the trustees' rate which is presently 33%.
- Even if the income were distributed to the children, it is likely that section HH 3A (1) of the Income tax Act 2004 would apply so as to close out the ability to subject the income to the children's marginal tax rates. – so no tax benefits there.
- Bear in mind also the children's rights under *Saunders -v- Vautier* to call for the funds to be paid out upon the beneficiaries all being *sui juris*. If the funding is intended to assist with secondary education, there may be no issues in respect of the *Saunders -v- Vautier* position. If however there is a carry over intention that residual funds are also applied to tertiary education or are solely dedicated for tertiary education purposes, the ability to call for the funds upon attaining majority may become an issue.
 - If the funds are merely invested by the parents in their names but with the intention of providing long term assistance to meet the offspring's educational needs, then children's recourse to the funds will not be an issue – it may be though for the parents if they are able to call the funds back! i.e. the funds they had planned for and set aside have now gone.
 - If the funds are invested directly in the children's names, while the income derived from the funds would be taxable in their hands at their respective marginal tax rates, the funds would be at recourse of the offspring upon their attaining the age of majority, possibly even sooner. Again, this gives rise to the possibility of the funds being dissipated for purposes other than as intended.

The second part of this category of provision is where parents are able to set aside a portion of their discretionary income from time to time. Unlike the education provision referred to above, it is anticipated that the funding set aside will be more substantial. For discussion sake, we will assume it is \$27,000 per annum.

- Over the period of say 10 years, a significant sum of money will be involved. When the benefits of compound investment are taken into account, the offspring entitlement will be considerable.
 - With investment directly in the offspring's name, income will be taxed at the children's marginal tax rate. But at this level, it is submitted that tax breaks on income are not the major issue. Long term protection and preservation of the capital base will become paramount
 - The risk is that upon the offspring attaining the age of majority - or possibly even sooner - they can call for the funds and apply it at their discretion. The risk here is that the exercise of discretion by a 20 year old will generally be more short-sighted and less prudent than the exercise of discretion by a parent!

- The risk therefore is that a frivolous exercise of discretion by the offspring could easily result in the loss or at least serious erosion of the provision made by the parents
- In addition, the risks outlined above in respect of provision made by group 1 parents for their offspring will also apply here i.e.
 - Creditor attack if the child is in financial difficulty at the time
 - Property (Relationship) Act claims in particular if the child applies their inheritance whether directly or indirectly to or for the benefit of a relationship.

Group 2 – Solutions

So how can the parents plan in this manner for their offspring without compromising the long term integrity of the capital?

As indicated above, this planning decision perhaps becomes a balancing act between asset protection planning –v- tax planning on the premise that in general, when implementing a structure, one can not derive maximum tax planning advantages and maximum asset planning benefits at the same time

Given however the level of funding involved in this scenario, it is suggested that the focus is on long term asset protection planning rather than the short term tax breaks. That means the answer is planning via a trust. But if that is the answer, the question becomes what sort of trust structure? Should a separate trust be established for each of the offspring or should the parents proceed with one trust and address any resettlement and/or sub trust issues subsequently.

There is no right or wrong answer – it will be a matter of fact and degree in each particular circumstance. It is important though to bear in mind the different planning strategies that are available and the need to tailor the structure to the client rather than the client to the structure.

Planning options would include starting with just the one trust, then perhaps as children are born, to create a sub trust for each of the offspring and as they attain the age of majority, perhaps resettle to separate trusts for each child.

Conversely, it may be more appropriate to start as the parents mean to go on and settle a separate trust for each child as they are born. Care would need to be taken though to provide for substitutionary beneficiaries if something were to happen to the child who is the 'primary' beneficiary of the trust.

In these circumstances, the parents' Wills might not have the same significance as part of the planning structure as with the Group 1 scenario but reference may still need to be made in respect of successor trustees and appointors to ensure that there is a continuity of control for the trust. Memoranda of wishes will also be important for reasons referred to above.

Group 3

That now leads us to the 3rd group of people – the clients who have resources that enable them to set aside substantial funding for the future of their children. In this scenario, provision in the ball park of say \$500,000 to \$1,000,000 for each child is being contemplated. While it is unlikely that many of us will have a stream of such clients beating down our doors, some of us will encounter such clients. So when such a client arrives, what strategies can be recommended?

From a practical perspective, the principles involved with this group are not dissimilar from those relating to group 2 – the only real differences are the amount involved and the timing of the provision. The options available for making this sort of provision include:

- Either vesting the capital personally in the children; or
- Holding the provision in trust for the children

For reasons already addressed, it will no doubt be apparent the very real risks to the capital should it be vested directly in the offspring. When dealing with funding of such an extent, the most certain way of achieving the planning objectives while minimising vulnerability to threat is for the funds to be held in trust from the outset.

While that strategy may forgo some of the potential short term tax savings that could be available if the investments were vested directly in the children, it is submitted that the long term asset protection advantages from the investments being held in trust will more than compensate for the loss of any short term tax savings.

CONCLUSIONS

Perhaps what the foregoing indicates is that planning techniques for offspring that offer short term advantages can not be guaranteed also to offer long term advantage. It is not disputed that vesting funds in children for their future assistance may offer tax savings. The problem is that the outright vesting of title to the assets in the children technically renders one toothless to control those assets in the future. While it is hoped that a child entering into business would seek professional counsel as to structuring their affairs so as to protect their assets, one could be haunted by the adage that you can lead a horse to water, but you can't make it drink.

Accordingly, if the child entered into business or even a relationship without appropriate planning strategies in place, then their 'inheritance' could be vulnerable.

This paper has canvassed some of the risks that can be encountered from creditors e.g. as a result of business failure, personal liability and the like. Consideration has also been given to the threats posed by potential claims under the Property Relationships Act should the child find themselves in a qualifying relationship under the Act which exceeds three years in duration.

It would no doubt be a difficult pill to swallow to see that provision made for children lost during one's lifetime because not only did the children make poor decisions –or fail to make wise choices – but also because the parents put them in the situation for that to occur.

There is perhaps one technical solution to the planning dilemma but it must be stressed that the success of the strategy can not be guaranteed for reasons that should become apparent.

- Upon the birth of the child, the parent transfers to and vests in the child, the desired capital sum. Bear in mind this process will be subject to the Estate and Gift Duties Act 1968 and will need to be structured accordingly;
- For the child's 16th birthday, the parents pay for the child to settle the investments on a trust!

In theory, the strategy is straightforward and effective.

- The transfer of funds to the child would be managed so as not to trigger any adverse implications under the estate & gift Duties Act
- The income derived from the funds would be taxed at the child's marginal tax rate and could be applied towards certain costs of the child.
- The transfer of funds to the trust when the child attains 16 years of age would be relatively straightforward although the onus of explaining the nature and extent of the transaction to the child may, depending on the child, take more time to work through than would be expected in comparison to going through the same process with a businessman.

Practically, though, there are potential shortcomings with the strategy:

- The most significant risk is if the child becomes aware of their asset base, they may be disposed to availing themselves of the resources at their disposal.
- If that were to occur and if there was any capital remaining at their 16th birthday, encouraging them to transfer their residual capital to a trust may be easier said than done

In summary therefore, it is submitted that the most effective way of providing for offspring is to transfer to a trust sooner rather than later whatever provision is intended to be made for the children. It is also submitted that the long term benefits of holding the assets in trust for the benefit of the offspring will well and truly outweigh any short term benefits that may be available from personal ownership of the assets.