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Why do I need a Will and a Trust for my Loved Ones?

Life is full of challenges and uncertainties! Do you want to protect yourself, your families and loved ones and make sure that they are well provided for at all times and in all places?

You may not see the need for succession planning or asset protection as you are still "young" or you may not have time to think about such issues during your hectic life. However, because of the impact of Covid-19, global businesses had slowed down which had given you an opportunity to pause and contemplate what/who really matters to you. In any event, you should take the appropriate action for your loved ones now:

(1) make a Will and (2) if you want to achieve more, start planning to set up a Trust for the benefit of yourself, your family members, descendants, loved ones and/or charitable bodies!

This article aims at giving you some preliminary thoughts about the use of Will and Trust for succession planning. With the assistance of your legal, tax and other advisors, you can design the most suitable strategy and structure for you and your family.

I. Relevant People and Matters for Wills

Some people have hesitation in making a Will because of various reasons and/or misunderstanding. However, you may have a new perspective if you realize that it will be in the best interest of you and your family to have a Will.

You do not have to gather very detailed information about all your assets before you can consider preparing a Will. There are only a few major issues to be considered at the outset: (1) the choice of Executor(s) (person(s) chosen by you to manage and distribute the assets after your lifetime), (2) the list of Beneficiaries (people/companies/charitable bodies that will receive gifts from you) and (3) the proportion of properties or specific properties to be given to each beneficiary.

The complexity of a Will really depends on the individual's needs, wishes, family background and dynamics.

If assets are located in different countries (e.g. shares in BVI or Cayman companies), it is necessary to consider the pros and cons of a single global Will and multiple Wills.

Tax implications would have to be canvassed if assets are located in high tax jurisdictions or some of the beneficiaries are tax residents of those countries.

II. Major advantages of having a Will:

Having a Will has a number of advantages:

(1) Control and Certainty

A well-drafted Will shall clearly set out the wishes and directions of the Testator (the person who made the Will). As such, the Executor will know exactly what to do with the Testator's assets after the lifetime of the Testator. The disposal of properties are very much under the control of the Testator.

More and more people would like to donate part or most of their properties to charitable bodies so that more people in need will be benefited. If a person has such philanthropic intention, it is necessary to make a Will, set out the names of the chosen charitable bodies, the amount or proportion of the assets to be given to each of them. Moreover, if assets are to be given to a dear friend, the Will must have named that person as a beneficiary.

If a person does not have a Will, his properties will have to be distributed according to the relevant law of intestacy when he passes away. Under the laws of Hong Kong, if a person passes away without making a Will, his assets will first be given to his spouse and children (if any) in the proportions as prescribed by the law. If that person does not have a spouse or children, his assets will be passed on to his parents, siblings, nieces and nephews etc. (as the case may be). That way of distribution may not be the deceased person's wishes at all!

(2) Straight Forward Procedures

Having a Will also makes life easier for the Executor and the Beneficiaries as the legal procedures for the Executor to obtain Probate of the Will (i.e. formal authority from the court to deal with the deceased's assets) will be faster and less cumbersome. As such, the beneficiaries will be able to receive the gifts swiftly.

If a person passed away without a Will, his spouse, children, parents, siblings or nieces/nephews (as the case may be) will have to prove his/her relationship with the deceased before he/she can obtain the court's authority to deal with the deceased's assets. Under such circumstances, many hurdles will have to be overcome, especially if the deceased or his relatives were not born in Hong Kong, the relevant documents had been misplaced or lost; or the documents were written in a foreign language.

(3) Change of Mind after Making a Will?

Some people believe that they are not yet ready to make a Will as they are concerned that they may change their mind later on. Actually, they do not have to worry because a person may revise the terms of the Will or make another Will to supersede the previous Will as and when he deems fit.

In fact, it is always prudent to review the Will from time to time especially when there are changes in circumstances or family members.

III. A Trust Can Achieve More For You

A Will shall be effective only when the Testator passed away. However, a Trust will be effective once it is set up and may continue to operate indefinitely (under the laws of Hong Kong) or until it is terminated according to the terms of the trust deed. So, a Trust can achieve more for you!

A Trust is a 3-party relationship: (1) the person who set up a Trust is the Settlor, (2) the person/company/organization that will receive distribution or benefits from the Trust are the Beneficiaries, (3) the person or corporation that holds the properties for the benefit of the Beneficiaries is the Trustee.

Setting up a Trust gives rise to many benefits:

(1) Duration and Continuation

A Trustee will hold the assets for the use and enjoyment by the Beneficiaries (of different generations) until the Trust is terminated. This is practically possible because most people will engage professional trust corporation to act as the Trustee.

(2) The Settlor can be one of the Beneficiaries of the Trust

There is no doubt that a Settlor would like his loved ones to enjoy the fruit of his success by setting up a Trust for their benefits. He can also provide for himself by means of the Trust as the Settlor can be one of the beneficiaries of the Trust set up by himself.

(3) Assets Protection

Assets injected into the Trust will not be the Settlor's assets anymore. Therefore, the financial position of the Settlor will not have any impact on the assets held by the Trustee. It may be difficult for creditors of the Settlor to encroach upon or "attack" the assets held by the Trustee unless there are special reasons such as the injection of properties into the Trust involves fraudulent transactions.

(4) No Probate is Required

As the Settlor does not own the assets held by the Trustee, no probate or equivalent legal procedures will be required concerning the assets held by the Trustee when the Settlor passes away.

(5) Tax Planning

Most people will have investments in different countries as a matter of diversification. Therefore, tax issues in the high tax jurisdictions cannot be ignored. In fact, a well-planned trust structure may give rise to certain tax benefits for the Trust underlying companies.

(6) Confidentiality

While the beneficiaries of a Will may know the contents of the Will during the course of administration of the deceased's estate, the Trust set up and the related documents do not have to be disclosed to the beneficiaries of the Trust unless the Trustee is ordered by the Court to do so.

IV. Family Office

If beneficiaries of the Trust consist of many family members from different branches of the family, residing in different countries and the trust assets are located in various jurisdictions, it is desirable to set up a family office to co-ordinate and manage the trust assets and maintain the good relationship and communication between the Settlor and the Beneficiaries, the Trustee as well as the professional management teams of the trust underlying companies. This will

enable the trust assets to be invested and used in ways which are acceptable to most if not all the beneficiaries and at the same time, family harmony can be maintained.

V. Conclusion

As a matter of risk management and making sufficient provisions for our loved ones at all times, making a Will is the first step. As to the way forward, long-term succession plans shall be formulated, a Trust may be set up to implement such plans. It is also desirable to have a family office to manage the family assets, unite the family members and maintain family harmony for many generations to come!

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