



 THE TAX INSTITUTE

What if your client doesn't die? Planning for loss of capacity

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What if your client doesn't die

The Tools


- Enduring Powers
- Corporate power of attorney
- Substitute Directors
- Trustee and Appointor provisions

Winery example

- Lear the founder, the owner, the controller and your client
- Kingdom Pty Ltd
- The Kingdom Family Trust
- The daughters

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Planning for Loss of Capacity


Risk

- Estimated 447,115 Australians living with dementia
- Just under 2% of the population
- Expected increase to estimated 589,807 by 2028
- Currently about 250 new diagnoses of dementia daily
- Expected 318 daily by 2025

- This is going to affect some of our clients

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Kingdom Wines Example

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    graph TD
        KPTL[Kingdom Pty Ltd  
Operates businesses] -- Share --> Person[Person  
Land Shares]
        Person -- Sole Director --> KPTL
        Person -- Shares --> KPTL
        Person -- Sole Trustee --> KFTrust[Kingdom Family Trust  
Land and 1 share]
    
```

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What if your client doesn't die

Capacity – legal capacity


- Contextual test
 - "in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation"

Gibbons v Wright
- Decision Making Capacity
 - Understanding, retaining, using, communicating

Mental Health Act 2009 (SA)

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Planning for Loss of Capacity

Capacity – legal capacity

- Presumption of capacity
 - Freedom to make 'unwise' decisions
- Capacity may fluctuate
 - From day to day and at times of day
- Determination of capacity is medical
 - Experienced advisor's opinion is evidentiary

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What if your client doesn't die

The Key Tool

- Power of Attorney
 - General Power v Enduring Power
 - Not a standard form
 - Powers of Attorney and Agency Act 1984
 - A deed
 - read the deed!
 - capacity to enter into the deed

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Planning for Loss of Capacity

Enduring Power of Attorney

- Extent of authority
 - Read the deed
 - Strictly interpreted
- Filing – currently \$163.00
- Ends
 - on its terms
 - at death or dissolution

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What if your client doesn't die

Enduring Power of Attorney

- Attorney may not resign after loss of capacity
- Supreme Court can:
 - Require records and accounts
 - Require accounts be audited
 - Revoke or vary the power
 - Appoint a substitute attorney
 - Give an attorney advice and directions
 - Make any other order regarding the power or its exercise

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Planning for Loss of Capacity

Attorney

- One or more
 - joint or several
- Fiduciary position
 - *Klotz v Neubauer*
- Keep accounts
 - Section 8 South Australia
- Exclusions
 - Personal roles

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What if your client doesn't die

Advisor

- Does not determine capacity
- Trust and confidence
- Planning
 - Advisor as attorney
- Liability of advisor
 - Duty to donor
 - *McFee v Reilly*

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Planning for Loss of Capacity

Corporates

- Attorney may not stand in for an incapacitated director
- Attorney may vote at general meeting to appoint a director
- Should personal attorney control the company?
 - Appointment of alternate director
 - Company power of attorney
 - Restrictions in enduring attorney deed

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Inter vivos Trusts

- Positions
 - Trustee
 - Appointor
 - Guardian/ protector
- Deed
 - Amend the deed
 - Supreme Court

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The Bank

- Original document or certified copy
- Identification of attorney
- Evidence of activation

- Passwords for electronic banking

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Australian Taxation Office

- Business Activity Statement
- Income Tax Return
 - Individuals – a validly appointed attorney will be accepted as a primary contact for the individual
 - Provide evidence of appointment
 - Complete personal identification check
 - Specific authority needed to change authorised contacts
 - Company – several individuals may be authorised contacts to sign documents and access ATO account

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Australian Taxation Office

- Section 388-75 Schedule 1 TAA 1953
 - You (the taxpayer) must sign a return notice etc you provide in paper form
 - ATO accept return signed by attorney - evidence of power
 - Agent's signature required for electronic lodgement
 - Agent must have declaration
 - Agent needs declaration 388-70
 - In practice declaration signed by attorney is accepted

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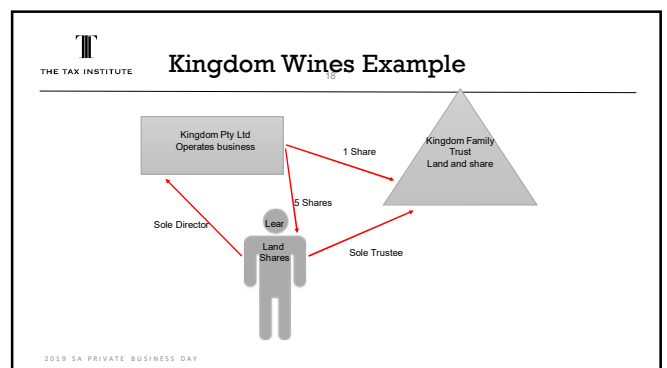
THE TAX INSTITUTE **Planning for Loss of Capacity**

Digital Assets


- Protections
 - Copyright
 - Trademark
 - Registered Design
 - Patent
- Attorney access
 - Lists - include suppliers /customers dealing electronically
 - Passwords
 - Specific powers

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 THE TAX INSTITUTE **Kingdom Wines Example**

The loss of capacity plan for Lear

- Personal assets
 - Vehicles
 - Boat
 - Home
 - Holiday home
- De Facto
 - Currently or possibly in the future
- Family outside the business
 - Siblings, grandchildren, etc

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Two questions

- Who should control which assets?
 - Lear must make appropriate choice
 - Personal
 - business
- How can this be achieved?

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 THE TAX INSTITUTE **Kingdom Wines Example**

Lear's choice

- Goneril and Regan control of the business
- Not ability to sell land – in the family 3 generations
- Cordelia control of personal assets
 - He wants her to buy birthday and Christmas presents for his grandchildren
 - He relies on her to keep helping out his sister/de facto / other person used to receiving assistance

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 THE TAX INSTITUTE **Kingdom Wines Example**

Kingdom Pty Ltd

- Constitution is amended:
 - Specific provision for appointment of corporate attorney
- Appointment of Goneril and Regan jointly and severally corporate attorney
 - States
 - appointment commences on loss capacity of director
 - one signature needed up to \$X value transaction both if higher value
 - does not give authority to sell the business
- Digital asset passwords corporate accounts made available

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 THE TAX INSTITUTE **Kingdom Wines Example**

Kingdom Family Trust

- Deed amended (variation provision adequate to the purpose)
- Variation provides:
 - As appointor Lear appoints 3 daughters jointly to be trustee on death loss of capacity current trustee
 - On loss of capacity Appointor is 3 daughters jointly
 - Automatic replacement under the terms of the deed

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 THE TAX INSTITUTE **Kingdom Wines Example**

Power of attorney

- All 3 jointly and severally Lear's personal attorney
- from
 - date medical professional assesses losses of capacity - in writing
- to
 - date medical professional assesses capacity regained - in writing; or
 - date of death

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Kingdom Wines Example

Power of attorney

- Restrictions on the power
- All 3 must consent to:
 - Dealings in shares of Kingdom Pty Ltd
 - Exercise of votes in members meeting of Kingdom Pty Ltd on a motion to add, remove or replace a director during Lear's life time
- Cannot sell land
- Must renew lease of land to Company at market during Lear's life time

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Kingdom Wines Example

Power of attorney

- Cordelia only has specific powers to act singly:
 - To deal with personal assets
 - To give gifts to grandchildren
 - To give gifts/ allowance to Lear's sibling
 - To access Ethereum wallet (password must be accessible)
 - To deal with Australian Taxation Office
 - To use his funds for preparation of accounting records to show her expenditure and receipts as his attorney

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Thank you

Please complete your evaluation forms and return them to the registration desk.

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