



Writing a will in a tax-effective manner

When a person writes a will they usually leave their assets to their children – and usually in equal shares. And when they first write their will their children may be young – and they may also be relatively young when they later update it. However, there is a potential capital gains tax (CGT) issue lurking here.

In this increasingly globalised world, when the children do inherit the assets, they may be living overseas. In this case, if they are considered a foreign resident for tax purposes at the time they become entitled to the assets of the estate (or their share of them), instead of the roll-over applying, it will trigger an immediate CGT liability for the deceased in their final tax return. And this will usually be paid by the executor from estate assets – thereby diminishing the amount of the estate that would otherwise be available to the beneficiaries.

And in this case the amount of the capital gain (or loss) is determined by the asset's market value at the time of the deceased's death and the deceased's cost for CGT purposes.

However, there is a very important carve out from this rule. It does not apply if the bequeathed asset is Australian real estate (or other "taxable Australian property" as defined). This is because such assets always remain subject to CGT – regardless of the residency status of the taxpayer. Moreover, any dealings in them can usually be traced by the ATO (especially in the case of land).

However, the rule would, for example, apply to shares on the ASX and ordinary investment units in unit trusts.

Note that there are special rules that apply to shares in a company or units in unit trust where more than 10% of the shares or units are owned and more than 50% of the value of the assets of the company or unit trust is real property. (But these rules can be very complex.)

The upshot of all this is that when writing your will it is important to get good tax advice so that it can be structured and documented in a tax-effective way – and, broadly speaking, this will entail giving your executor a high degree of flexibility in how estate assets will be distributed among your beneficiaries.

However, if you are already locked into a will and you find yourself in this situation, there are a few things you can do to ameliorate the effect of this rule.

And by the way, in writing a will it is probably not a bad idea to give your executor the power to grant someone a right to occupy your home after your death. This is because it is another potential way to access the CGT exemption for an inherited home.

So, if you are writing your will or looking at updating one, come and have a chat to us about it first so that we can take you through some of the ins-and-outs of writing it tax-effectively. 💰

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