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Monday, 19 August 2019

James Samuel Carter
21 Harris Street
Pymont NSW 2009

PRIVATE & CONFIDENTIAL

3-Generation Testamentary Trust Will for James Samuel Carter

Dear James,

Thank you for instructing us to prepare your attached 3 Generation Testamentary Trust Will.

Please read your Will to ensure that it fully expresses your wishes. This is how to sign your Will:

Signing your Will

1. Find 2 people that are: over 18 years of age, of sound mind and have an address in Australia. The witnesses:
 - a. cannot be related to you or have any chance of being related to you (e.g. it cannot be your son's girlfriend because your son could marry that person and then you would be related to the witness).
 - b. cannot be a person where it is possible that they may get something out of the Will. Beneficiaries and executors must not witness the Will.

The best witnesses are "strangers" or the 'next door neighbour'.

2. All beneficiaries and potential beneficiaries leave the room.

3. Get your 2 witnesses and yourselves in a room with at least 2 identical blue pens. Lock all the doors so that none of you can leave the room. If either of you or either of your witnesses leave the room during the signing process then tear up the Will and print out another copy of the Will and start the Will signing process again.
4. You sign your Wills on each and every page where marked. Then both witnesses (**WITH THE SAME BLUE PEN**) sign each page of the Will. If you signed with different coloured pens (e.g. a dark blue and a light blue) then tear up the Wills. Print out new Wills. Start the process again.
5. Ensure that you date the Will with the date at which the Will is signed and witnessed.
6. If you need reading glasses, then don't sign your Will until you put on those glasses.
7. If you have issues reading English, then let me know. An interpreter may be required.

Storing Wills

An original signed Will is valuable. Keep it somewhere safe and let your Executors know where it is stored.

You can store it at home, at the bank or with the Executors. Keep it safe.

You may wish to email a copy of your Will to the Executors.

Executors

Keep your Executors up-to-date as to where your signed Will is stored. Upon your death, the Executors need to get the original signed Will and carry out your wishes and instructions in your Will.

If you have Superannuation when you die

Superannuation going to adult children and other beneficiaries suffers a non-dependency tax. The tax on your superannuation is 17% or 32% (including Medicare). It is payable immediately upon your death. However, we have put a Superannuation Testamentary Trust in your Will. Therefore, instead of paying the superannuation directly to children or other beneficiaries we want your superannuation to go into your Will.

To make sure this happens ask your superannuation fund for their Binding Death Benefit Nomination form. This is for you to complete and sign. In that form you leave everything to your '**legal personal representative – 100%**'.

The Superannuation Testamentary Trust is in your Will. It seeks to reduce the tax on your superannuation down to zero. It provides the best possibility that the capital of the Superannuation proceeds goes to 'tax dependants' as defined in the *Income Tax Assessment Act* ('**Tax Act**').

Spouses and your children under 18 years of age do not suffer the 17% or 32% tax. Nevertheless, it is still better to still leave them the superannuation via your Will.

The alternative is for your Superannuation at death to go directly to a person (rather than into your Will). There are always greater tax advantages when your superannuation goes into your Will and therefore into a Superannuation Testamentary Trust.

At death your Superannuation goes (unless you have a Reversionary Pension):

1. directly to a dependant; or
2. into your Will.

As you now have a Superannuation Testamentary Trust in your Will, we want your superannuation to go into your Will.

A 'death benefits dependant' is defined in the *Income Tax Assessment Act 1997*. It is calculated at the moment of your death. A 'death benefit dependant' includes:

1. a spouse or former spouse (includes de facto and same sex)
2. your children but only if under 18 years of age
3. any other person with whom you had an interdependency relationship just before you died (potentially, such as two sisters living together)
4. any other person who was your 'dependant' just before you died – such as people you maintain with 'substantial' financial support'

If you have no 'death benefit dependants' at death you may lose up to 32% of your superannuation to the tax office.

The fourth category - people you maintain - gives you scope to create dependants. You can then escape this non-dependency tax.

For example, if you have no spouse and your children are over 18 years of age then you may not have any dependants when you die. If this is the case then you are at liberty to “create” dependants, such as grandchildren. We are happy to work with your advisers on how to do and document this.

Where does your Super go when you die?

1. Non-binding

Most Super funds ask: “who you would like to get your Super when you die?” You complete a “nomination form”. This nomination form may be ‘binding’ or ‘not binding’. If it is not binding the superannuation fund has the discretion. It can pay your super directly to a person or into your Will. Where the Trustee has such discretion, it addresses its mind to many things. This includes tax implications of such a payment. Although not normally bound by it, the Trustee considers the wishes in your non-binding nomination form.

Subject to your adviser’s thoughts, from a tax perspective only, we hold the view that the nomination form should nominate your ‘legal personal representative’. If followed then your superannuation goes into your Will.

Alternatively, your financial planner and accountant may wish you to keep the assets in superannuation by doing a Reversionary Pension. However, a Reversionary Pension is only available if you have a spouse or young children. (See below.)

2. Binding Nominations (for 3 years)

As stated above, your superannuation fund decides where your super goes when you die. You may not be happy with that. Most superannuation funds allow you to make a “Superannuation binding nomination”. Binding nominations cannot be challenged if you:

1. signed and witnessed the binding nomination correctly
2. were of sound mind when the binding nomination was last signed
3. were not pressured into signing the binding nomination
4. freshened up the binding nomination within 3 years from the date of death

As far as a Self-Managed Superannuation Fund is concerned, the Superannuation Complaints Tribunal can't challenge the deceased superannuation payments. This is good if you have put in place exact measures as to where your Self-Managed Super will go. For example, you trust the trustee, have binding nominations or have amended the trust deed to say what you want.

3. Non-lapsing nominations – never expires

If you have a valid non-lapsing nomination, your super fund trustee is required to pay your death benefit to your nominated beneficiaries. You do not need to renew a non-lapsing nomination. For those persons that have a Self-Managed Superannuation Fund then the strongest position is to amend the SMSF trust deed to say where you want your super to go when you die. This is non-lapsing. It never needs to be updated. It carries on to your death (much like a Will, in that regard). You don't need to re-sign them every 3 years.

Contact your superannuation fund to see if they provide Non-lapsing Death Benefit Nomination forms. If they do put in '**legal personal representative – 100%**'.

Marriage damages nominations

All nominations are at risk if:

- you re-marry
- enter a defacto relationship
- separate on a permanent basis; or
- have had a child with a person other than your spouse or partner.

This is since making your nomination. Immediately contact me, your accountant or financial adviser if any of the above apply.

Can superannuation in a Will be challenged?

If your superannuation does find its way into the Will can the Will be challenged? Yes, certain people can challenge your Will. If your superannuation gets into your Will, then it can be challenged.

Reversionary Pensions

Your superannuation fund may allow for Reversionary Pensions, but they are not automatic. They need to be set up before you die. They also need to be set up for each pension. They are not part of a binding death benefit nomination. Rather they are part of a pension within the superannuation fund.

A matter of concern about the use of Reversionary Pensions is the Transfer Balance Cap (**TBC**) for each pensioner. We believe that modelling is required regarding the impact on the beneficiary potentially receiving a Reversionary Pension. Would this cause the recipient to go over the TBC? Is the recipient already receiving a pension? Is there the capacity to commute any existing pension to manage the TBC? Would a death benefit pension created using a BDBN be more appropriate? These are issues for your financial adviser and accountant to consider.

If you have Life Insurance when you die

There are a number of insurances available to give your family protection. These include Life Insurance, Trauma and Total and Permanent Disability. After all debts are paid how much income will the remainder of your estate generate? While 3-Generation Testamentary Trusts reduce tax you still need sufficient assets to generate the required income for a period of time that you choose. Your adviser can calculate this figure for you. You may need to top up your life insurance cover to achieve the desired goals for your family when you are gone.

You can structure (non-business) insurance policies a number of ways. A common form of payout is based on "cross-ownership". Cross-ownership is where a person dies and their partner gets the insurance directly. You can nominate up to 10 beneficiaries - in any percentages you like (totalling 100%). In this instance, the insurance goes straight to the beneficiaries and not via any of their 3-Generation Testamentary Trusts in their Wills.

Alternatively, the insurance can be payable to the estate. In this case when a person dies the proceeds go into their Will. For estate planning the ownership of the insurance is not as important as who receives the payout.

Your Will is drafted so that from a tax perspective the best place for any life insurance is in your Will and therefore into your 3-Generation Testamentary Trust. From a tax point of view, a payout to the Estate is better than a payout directly to a beneficiary. Next time you talk to your adviser you may want to discuss which method of owning

the insurance is best for you. The situation to watch out for is if someone is likely to challenge your Will.

How do you purchase and hold Real Estate?

Back before 1981, Death and Probate Duties existed. At that time it was popular for couples to hold assets as Joint Tenants. This meant that when one person died the survivor got the real estate irrespective of what the Will said. The Joint Tenancy property didn't go into the Will and therefore Probate Duties were avoided on that real estate.

Death and Probate Duties were abolished by 1981. In 1985, the Treasurer Paul Keating introduced Capital Gains Tax (CGT). CGT works very differently to Death and Probate Duties. For example, the CGT regime doesn't recognise Joint Tenancy. For the payment of CGT it treats all property as though it was Tenants in Common. If you own property as Tenants in Common (instead of as Joint Tenants) then when you die your interest in the Real Estate doesn't go to the survivor. It goes into your Estate. This has additional benefits particularly as your Will has been drafted with tax effective 3-Generation Testamentary Trusts.

From a tax point of view (only) holding any asset in Joint Tenancy is old fashioned and dangerous. It is best to hold all investment real estate as Tenants in Common.

I suggest that you speak with your advisers about whether you need to transfer any real estate from Joint Tenants to Tenants in Common. It is prudent to own Investment properties (these are properties that you may rent out, rather than your family home) as Tenants in Common.

If you decide to purchase any real estate in the future then you are welcome to ring me, or any of the solicitors at this firm, to discuss whether you should purchase that property as Tenants in Common or Joint Tenants. I would be happy to speak with your advisers on this point should you wish me to do so.

Own assets in a foreign country?

Generally, your Will is valid in most countries because it is valid under Australian law: *1961 Hague Convention*. However, don't rely on this rule if you own real-estate out of Australia. Make separate Wills for each country in which you have real-estate.

What if I have a Family Trust when I die?

Certain assets do not go to beneficiaries via your Will. There may be a good reason for wanting this. Your Will can be challenged and completely re-written by a Court. A Court has even the power to replace your Executor.

As mentioned above, joint tenancy assets don't go into your Will. Similarly, if you die, the assets in your Family Trust are not transmitted via your Will.

The Rule:

A Family Trust and a Will are separate. They are not related. A Family Trust should not try and deal with assets in a Will. Similarly, a Will should not mention or try and deal with Family Trust assets.

A Family Trust lasts, generally for 80 years. However, your Family Trust can be 'corrupted' by the Will. The way in which a Family Trust Deed is worded means that your Will may affect your Family Trust. Family Trust Deeds are often wrongly drafted to state that the Appointor of the Trust, after the death of the current Appointor (usually Mum or Dad) is the person or persons who are their Executor. Our view is that this method can cause unwanted outcomes.

For example: You state that your Executor is to also be the Appointor in your Will. You then make your daughter the Executor. You want her to get the hair salon business which is in the Family Trust. You die. Your two sons challenge the Will. They get to be sole Executors named in your Will. Your sons now get to be the Appointors in your Family Trust and take everything in the Family Trust for themselves.

Quarantine your Family Trust from the *Family Provision Acts*. We suggest that Family Trust deeds be reviewed so that the Family Trust is operated by the persons you nominate.

Update your Backup Appointor/Guardian/Principal in your Family Trust via a Deed of Variation. Do not use your Will to appoint your replacement Appointor.

I have stated that the general rule is that Family Trust assets do not form part of your estate. One exception to this rule is "unpaid present entitlements" (sometimes incorrectly called 'loan accounts'). This is when the trust distributes to you, as a beneficiary, but doesn't pay you anything. You have an unpaid but presently owing entitlement. You can often see these 'UPEs' in the trust's financials. Such 'UPEs'

belong to your estate, or worse creditors and people that challenge your Will, when you die.

Can someone challenge your Will?

Yes, your Will can be challenged. There are two ways to challenge a Will. Your family and dependants may be able to say that the split of your assets isn't fair and they want more. They argue 'sure the Will may be valid, but it needs amending by the Court'.

Secondly, they may argue your Will is not valid at all. Is there any question of testamentary capacity? Senility, suffered a stroke or been seriously ill? Were you wearing your reading glasses? Can you understand and read English fluently? Was someone unfairly influencing or pressuring you: 'poisoning your mind'? Always, get a written medical letter from your Doctors. After you die the question of capacity may be called in question. The people whose evidence is of most value are your medical attendants and your witnesses to the Will.

You are able to validly sign a Will if you (here I am quoting court cases):

1. understand the nature of the act and its effects (i.e. you understand that you are signing a Will that gives away what you own)
2. understand the extent of the property of which you are disposing of (you know what assets you own)
3. are able to comprehend and appreciate the claims [i.e. the moral claims] to which you ought to give effect (e.g. while you don't have to, many people leave everything to their spouse, in the first instance, and then everything to the children equally)
4. suffered no disorder of the mind which poisons your affections, perverts your sense of right, or prevents the exercise of your natural faculties - that no insane delusion influences your Will in disposing of your property and bring about a disposal of it which, if the mind had been sound, would not have been made (e.g. you didn't have a 'loved one' putting pressure on you to leave everything to them 'otherwise they will put you out on the street').

If any one of these aspects of capacity is defective the Will may be wholly void.

For example, if you have cut a child out of the Will, then expect your Will to be challenged. Did the other children put pressure on you? Did they seek to poison your

mind? Did they threaten you? Having a Will challenged is a bit like a divorce – messy and expensive.

Get a Doctor's note to say you are of sound mind

Under all circumstances, get a doctor's note to say you are of sound mind. Keep that note with your original Wills.

Obtain a note from the doctor to the effect that: *"I have today examined James Samuel Carter. I believe that this person has the ability to understand the nature of a Will. I believe that this person is mentally competent to make a Will."*

Joint Tenancy

Let's revisit the issue of Joint Tenancy. Holding bank accountants and property is quite useful if someone is going to challenge your Will. If you own an asset as Joint Tenants then, generally, when you die that asset goes directly to the survivor (or survivors). Joint Tenancy assets do not generally pass through the estate – and therefore can't be challenged through the Will. I have not given you advice or checked to see if any particular asset is owned as Joint Tenants. If you are in doubt, then please instruct me and I will conduct searches to see if any particular assets are owned as Joint Tenants.

What happens if a beneficiary moves to another location?

You, your beneficiaries and executors move from time to time. That is fine. You do not need to update your Will if anyone moves to a new home.

What if a beneficiary divorce? Divorce Protection Trusts

The trusts available in your Wills include:

1. **3-Generation Testamentary Trusts** – to reduce Capital Gain Tax, Transfer duty (stamp duty) and income tax
2. **Superannuation Testamentary Trusts** – to seek to remove the 15% or 30% (plus Medicare) tax on your Superannuation when your Superannuation goes to adults such as children
3. **Protective and Maintenance Trusts** – in case your children, grandchildren or a beneficiary are under the Age of Majority
4. **Bankruptcy Trusts** – in case a beneficiary goes bankrupt
5. **Divorce Protection Trusts** – if a beneficiary separates

The Divorce Protection Trust seeks to delay or stop any capital or income going to the beneficiary who is suffering divorce or separation proceedings. It is designed to reduce the opportunity for the Family Court to get its hands on your money.

The *Family Law Act* gives the Family Court power over third parties. This is evidenced by the Federal Court case in the West Point collapse.

However, in a divorce the Family Court looks at how the assets came to be in a trust. It considers who gave the money to the trust in the first place.

If assets come from one of the separating couple during the relationship and are then put into a trust, the assets are considered part of the marriage. The Court is free to order that the assets in the trust be transferred to your in-law.

However, this may not apply where the money comes via a Will. Instead of your divorcing child putting money into a trust, it is you who is putting the money into the trust (via a Divorce Protection Trust). It is arguably different where the married person's parents gift their assets into a Divorce Protection Trust.

The Divorce Protection Trust sits dormant in the Will until needed. The Divorce Protection Trust activates for the benefit of the married person and that person's children and grandchildren. (This is your divorcing child, then their children and their grandchildren). The assets in the Divorce Protection Trust is provided by the parents (being you), not the married person (e.g. your child). The parents' assets are more likely to be protected from the Family Court.

Your descendants (children, grandchildren and great grandchildren) are beneficiaries of the Divorce Protection Trust but not owners of the assets.

If any of the descendants controlled the trust through being the sole trustee or appointor (the person having the power to appoint and remove the trustee) then that person may be considered to have an ownership interest in the assets. This is in the eyes of the Family Court.

In these circumstances, a court may decide that it has power to make an order affecting assets held by the trust. For example, an order that trust assets be transferred to a former spouse of the controller or to a trustee in bankruptcy.

However, the Divorce Protection Trust removes that person's power to control the trust while separating. This removes control.

The Divorce Protection Trust benefits the current and succeeding generations. This helps protect the assets from the Family Court.

Special Disability Trusts

If a beneficiary can benefit from a Special Disability Trust, then the Executors are empowered to set them up under the Will. We have drafted the Special Disability Trust clause with great flexibility in the Will. This is because Special Disability Trust deeds and rules may change after you sign your Will. There are also ongoing changes in the reporting and audit rules. In the Will you have built these changes are accommodated.

How do I bind or staple a Will?

A Will is a stand-alone document. It is **not** attached to anything such as another Will or covering letter.

You can either bind or staple the Will. This should be done before you start signing the Will. (This is just in case you make a mistake in the binding or stapling.)

While stapling the Will is common and acceptable, it is important to never remove the staple. (For example, you cannot undo the staple to copy the Will.) If you remove the staple you get left with a staple hole. A staple hole suggests that you had another document with the Wills, such as a codicil or some other information. Staple holes cause problems.

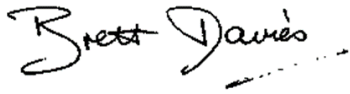
Similarly, binding the Will is also common and acceptable. However, it is important to never remove the binding. This leaves holes in the document. Such holes suggest that other documents were attached to your Will.

Can I print the documents in duplex (back to back)?

You should print your Wills single sided.

If you need any help with the signing or any more legal advice, please telephone me or any of my lawyers.

Yours sincerely,



Adjunct Professor, Dr Brett Davies, CTA, AIAMA, BJuris, LLB, LLM, MBA, SJD
National Taxation Partner
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If you wish, upload your logo at **Your Profile** page.

YOUR
LOGO
HERE

Your logo will then appear above.



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You can build this document here:

<https://www.legalconsolidated.com.au/single-will-tax-effective-with-choice-of-beneficiaries-intro/>

For a full list of documents you can build on our law firm's website see here:

<https://www.legalconsolidated.com.au/areas-of-law/>

The last Will and 3 Generation Testamentary Trusts and Superannuation Trusts of James Samuel Carter

Containing:

- Last Will
- 3-Generation Testamentary Trusts

There are 8 types of Wills to build on our website:

Tax Effective – 3 Generation Testamentary Trust, Superannuation Trusts and Bankruptcy Trusts

1. Mutual Wills – mum & dad, then to children
2. Single Will – to children equally, no choice
3. Mutual Wills – mum & dad with many choices
4. Single Will – with many choices

No tax planning (but cost less to build)

1. Mutual Wills – mum & dad, then to children
2. Single Will – to children equally, no choice
3. Mutual Wills – mum & dad with many choices
4. Single Will – with many choices

Legal Consolidated's Reference: bkd:78874
Your Reference: Carter Will

This Will is made by me, James Samuel Carter of 21 Harris Street, Pymont, New South Wales 2009 Australia. My date of birth is 03/08/1944.

If you have assets in another name, then put in that extra or alias name.

1. Revoking Previous Wills and testaments

I revoke all previous Wills, testamentary trusts (including Wills requiring revocation in writing). This is

For example, your name may be 'Margaret Smith'. But if you have a bank account also in a 'Maggie Smith' then put in the second name here.

2. Appointment of Executor

I appoint:

- Michael Carter of 259 George Street Sydney New South Wales 2000 Australia (but not until they reach the age of 18)

as my **Executor**.

3. Definitions and Interpretation

In this Will, except where the context otherwise requires:

"Appointor" (provided that the Appointor has reached the Age of Majority and does not Lack Capacity) the first appointor or appointors are the Primary Beneficiaries. While the Appointor Lacks Capacity the Executor is the Appointor and the Executor holds that position in trust for that Primary Beneficiary until that Primary Beneficiary no longer Lacks Capacity. The Appointor may then for their specific trust, appoint a new Appointor by Will, deed or notice in writing to the current Trustee of that specific trust. If the Appointor dies without appointing a new Appointor, the legal personal representative of the Appointor is the new Appointor. The Appointor can remove or replace the Trustee of any of the Appointor's trusts for whatever reason at any time.

"Age of Majority" 18 years of age

"Capital of the Superannuation Death Benefit" only the capital of the Superannuation Death Benefit and does not include any income derived from the Superannuation Death Benefit

"Superannuation Death Benefit" any part of the estate (including any superannuation death benefit) comprised of payments and assets within

The Age of Majority is the age at which your beneficiary, child (or grandchild, if your child is dead and has living children) receives what you have allocated them in your Will.

"Death Benefit" as that term is used and referred to in Division 302 of the *Income Tax Assessment Act 1997*

"Dependant" a person who falls within the category of "death benefit dependants" as referred to in subdivision 302-D of the *Income Tax Assessment Act 1997*

"Divorce Proceedings" includes any period where a person is, or is likely to be, no longer residing with their spouse or partner in a marriage, de facto relationship or any

(usual signature) James Samuel Carter

First Witness (use same blue pen):

Second Witness (use same blue pen):

other relationship including under the *Family Law Act 1975* or *Family Court Act 1997* or any such similar legislation; or during any time that a financial dispute is threatened, or actual, after the breakdown of a marriage (including under 79(4) and 75(2)) or a de facto relationship (including under 90SM(4) and 90SF(3) under the *Family Law Act 1975* or *Family Court Act 1997* (or similar legislation)

“Executor” the executor and executors named in my Will and from time to time appointed

“General Beneficiaries” means:

⇒ the deceased and the grandparents, parents, brothers, sisters, spouses, partners, defactos, widows, widowers, children, grandchildren and great grandchildren, uncles, and aunts, Primary Beneficiary and of James Samuel Carter, brothers, sisters, spouses, partners, defactos, widows, widowers, children, adopted children, grandchildren and great grandchildren, nephews and nieces of each of those grandparents, spouses, partners, defactos, widows, widowers, children, grandchildren and great grandchildren, nieces

The best Executors are generally the people getting everything in your Will.

For example, if you are leaving everything to your 7 children then they are the best Executors. If your children all hate each other they are still the best Executors. Executors, contrary to popular belief, are nothing but servants to the beneficiaries. The beneficiaries boss the Executors around.

⇒ the trustee of any trust:

- under which all interests vest within 80 years, minus 1 day, from the date of death of James Samuel Carter and under which any general beneficiary has a vested or contingent interest, or is eligible to receive a distribution of income or capital; and
- which has been nominated by the Trustee to be a general beneficiary

⇒ any company:

- of which a general beneficiary is a member (equitable, legal or otherwise), director or secretary; and
- which has been nominated by the Trustee as a general beneficiary

⇒ any other person whom the Trustee nominates to be a general beneficiary, in writing or by oral statement, within 80 years, minus 1 day, from the date of death of James Samuel Carter

- ⇒ all registered charities (whether incorporated or unincorporated)
- ⇒ all Dependants

“Primary Beneficiary” the person or persons who are or who become so nominated in this Will from time to time

“Tax Act” the *Income Tax Assessment Act 1936* and *1997* as appropriate

“Trust Fund” the residue of my estate both real and personal, any income or capital accretions arising from time to time from such residue, any capital and income added from time to time and all property from time to time contained in the above sub-clauses

“Trust Property” any property comprised in the Trust Fund

“Trustee” is the trustee, from time to time, of each trust, testamentary trust and Trust Fund as appointed by the Appointor (and until such appointment the Primary Beneficiary is the Trustee unless the Primary Beneficiary Lacks Capacity in which case the Executor holds the position of Trustee on trust). If the Appointor Lacks Capacity then (unless the Appointor has already nominated a person before the Appointor started to Lack Capacity) the Trustee is as appointed by the Executor, unless the Will otherwise directs.

⇒ Headings do not interpret this Will

⇒ All statutes and regulations are as amended from time to time

4. Executor Activities

My Executor holds all my estate on trust for:

Payment of Tax and other Debts of James Samuel Carter

I suggest that my Executor obtain advice concerning the administration of my estate, at the expense of my estate, from one or more of a lawyer, accountant and financial planner. I then direct that my Executor pay and discharge all of my estate debts, taxes, funeral and testamentary expenses and then distribute the Trust Fund as follows.

Specific Gifting

To give the following that I own at the date of my death as follows to each of the person or persons named in the sub-clause (or sub-clauses) below (for the purposes of this clause each of the persons below is a “Primary Beneficiary”) in trust to hold and to pay all or part of the income, all or part of the capital and all or part of the capital accretions of the asset to the Primary Beneficiary and the General Beneficiaries of that particular Primary Beneficiary from such part of the capital and income of the asset named in the respective sub-clause below, in the shares and amounts and at such times that particular Primary Beneficiary thinks fit (the Primary

Beneficiary is not obliged to make equal (or any of the above):

- Silver 2004 Porche Carrera GT to Michael

Testamentary Gifts for Primary Beneficiaries

To give the Trust Fund to:

- Michael Carter of 259 George Street Australia - amount of 50%
- Lucy Carter of 235 Jones Street Ultimo NSW - amount of 50%

(for the purposes of this clause each of the above shares (each share is referred to in this clause as "respective share") to be held by the Beneficiary from the Age of Majority.

⇒ Each of the above Primary Beneficiaries holds

'Specific Gifts' in a Will are not a good idea.

Better to have all beneficiaries getting a percentage of the entire estate (which is the next group of questions). So better to answer 'no' to this question and move to the next question, which is about Residuary Gifts.

"But I want to give a house to each child"

Such an approach usually ends up leaving a mess behind. You don't know what you will own when you die. You may be sitting with a stroke for 10 years in a retirement home. The Children will sell down your assets to pay for your accommodation. One house may be sold, but not the other. Think ahead.

The children will carve up your Estate.

To hold and to pay all or part of the income, all or part of the capital and all or part of the capital accretions of that respective share of the Trust Fund to any one or more of:

- the above Primary Beneficiaries
- the deceased James Samuel Carter and the General Beneficiaries of the deceased James Samuel Carter
- the General Beneficiaries of each of the following people: all Primary Beneficiaries named in this Will and James Samuel Carter

from such part of the capital and income of the Trust Fund, in the shares and amounts and at such times as each Primary Beneficiary (exercising their own absolute discretion) thinks fit. The Primary Beneficiary has the discretion to set up as many testamentary trusts as that person requires or set up no testamentary trust.

⇒ Each Primary Beneficiary in relation to their respective entitlement is not obliged to make equal (or any) payment to any or all of the persons named above.

5. The Children of the Primary Beneficiaries

Unless my Will otherwise directs, if any Primary Beneficiary dies before reaching the Age of Majority, leaving children (and those children reach the Age of Majority) take what share of the Trust Fund those children then maintain the trusts their parent had set up. If no children reached the Age of Majority, equally as tenants in c

The beneficiary may be mentally disabled or an alcoholic so you may dial up the Age of Majority to 99 years of age. In that instance, type in '99'.

The Executors, which may include this person (they all have to act together) will drip feed this Beneficiary money they need throughout their life.

If all the above residuary gifts fail, only then I give the Trust Fund to (as follows):

- Tracy Wallis of 65 Martin Place Sydney New S amount of 100%

For the purposes of this clause all the beneficiaries named in this clause are the Residuary Beneficiaries.

Everything is divided up between the Residuary Beneficiaries. The Residuary Beneficiaries divide up your assets as per the percentages that you leave them. If you leave someone '1/3rd' then they get one-third of your assets. This is after the payment of your debts, taxes and any Specific Gifts.

6. Maintenance Trusts, Child Trusts, Bankruptcy Divorce Protection Trusts and Protective

A Primary Beneficiary is unable to take control or have influence over any gifts or the Trust Fund or act as trustee or appointor of any trusts relating to (or established by or under) this Will if they:

- ⇒ have not attained the Age of Majority; or
- ⇒ lack the requisite mental capacity; or
- ⇒ are an undischarged bankrupt; or
- ⇒ are suffering Divorce Proceedings (collectively "**Lacks Capacity**")

When (if ever) the applicable above sub-clause no longer applies then, as directed by the relevant Primary Beneficiary, the Executor or Trustee (as the case may be) relinquishes control of the gifts and trusts applicable to the relevant Primary Beneficiary in favour of that Primary Beneficiary (or the person or persons nominated by that Primary Beneficiary). In the meantime, the gifts and trusts relating to that Primary Beneficiary are retained in the trusts and only applied for the maintenance, education, advancement, support and benefit of that Primary Beneficiary. The Executor's powers include the powers in this Will. The Executor has absolute discretion.

7. Executor and Primary Beneficiary Discretionary Powers

I, James Samuel Carter, give my Executor, Trustee, Appointor and each Primary Beneficiary (in respect of their gifts and any testamentary trusts) the following powers (in addition to those given by law, equity and statute):

- ⇒ To accumulate income
- ⇒ To sell, lease, exchange, postpone the sale of my estate
- ⇒ To borrow money secured by my estate
- ⇒ To accept any property as an addition to the Trust Fund

The Residuary Beneficiaries will work out how to divide up the Estate. Based on the advice of their Accountant, Financial Planner and Lawyer, one child may take mostly shares, the other real-estate and the other cash. It is all about what is most tax

- ⇒ To carry on any business in any business structure such as a trust, company and partnership
- ⇒ To determine whether receipts and outgoings are capital or income notwithstanding that the receipts are from a company that has made a decision on the matter
- ⇒ To open in the trustee name current and cheque accounts with full power to operate such accounts
- ⇒ To apply for the maintenance, education (including travel to broaden the mind), advancement, support and benefit of a beneficiary the whole or part of any income and capital to which that beneficiary is or may become entitled
- ⇒ To pay the income or capital of any beneficiary to the parent or guardian of the beneficiary and accepting that person's receipt as a good discharge
- ⇒ To make payments to a minor beneficiary's parent or guardian or a person with whom the beneficiary lives and accept the receipt of that payee as an absolute discharge
- ⇒ To open, operate, invest or reinvest in or acquire for the purpose of receiving income, interest, profit or capital gain in any country of the world, any of the following (and freely change such investments, without reference to any trustees acts):
 - shares, stock units, trusts, property trusts, common funds debentures, debenture stock, bonds, notes including convertible notes, or other securities of any company or of any statutory authority
 - land of any tenure including leasehold and land held by company title and land subject to any mortgage or charge
 - mortgages, including contributory mortgages
 - the units or interest of or in a trust including a fixed or flexible trust
 - mutual funds
 - friendly society investments
 - antiques, works of art, coins, stamps or other collectibles
 - insurance bonds and policies of life insurance
 - bank accepted or endorsed bills of exchange
 - deposits with any public company, bank, credit union, building society, co-operative society, trust or public body

- ⇒ To make loans to any beneficiary or any person or any beneficiary whether:
- secured or unsecured
 - on interest or interest free
 - alone or jointly
 - on whatever terms
- ⇒ To acquire and keep up a residence or any person or persons
- ⇒ To acquire or lease assets for occupation or enjoyment (alone or with some other person or persons)
- ⇒ To sell to (or buy from) any beneficiary any assets
- ⇒ To divide assets and Trust Funds *in specie* among the beneficiaries
- ⇒ To mix investments with investments of other persons
- ⇒ To vary, replace, encumber and deal with the investments in its own property
- ⇒ To appoint nominees to hold or operate investments
- ⇒ To pay those executors who are accountants, auditors, etc. on a basis as if employed to act on behalf of my executors and trustees in that capacity. Such professionals are entitled to be paid fees for work done by themselves or the professional's firm on the same basis as if the professional was not an Executor or trustee but employed by my Executor or trustee
- ⇒ To reimburse the executors for their reasonable out of pocket expenses
- ⇒ To engage or dismiss agents and staff
- ⇒ To vote in and exercise all rights, of whatsoever nature for voting in any company or trust in which my estate or any fund arising from my estate may be interested or concerned
- ⇒ To apply for and accept directorship of any company in which my estate or any fund arising from my estate may be interested or concerned
- ⇒ To apply for and accept bonus shares and units and other benefits made available by a company or unit trust in which my estate is concerned
- ⇒ To have the power to seek reimbursement from a beneficiary (including a charity) for any income tax liability payable on my estate or any testamentary trust arising under the *Income Tax Assessment Act* as a consequence of a gift to that beneficiary before the gift is given to the beneficiary

Whatever you have left is divided up between the Residuary Beneficiaries. This is after the payment of your debts, taxes and any Specific Gifts.

For example, you leave everything to your only child. You name your child here and put in '100%'

You may have two children and, as is most common, benefit them both equally in that instance:

1. Put in the first child and type in '50%'
2. Type in the second child and put in '50%'

They then get your estate equally.

- ⇒ To accept a receipt from an authorised officer of a beneficiary that is a charity or incorporated entity as sufficient discharge to my Executor and trustees who shall not be obliged to see the application of such gifts
- ⇒ The Executor and Trustee of any specific trust can vest any trust at any time
- ⇒ Upon 80 years, minus one day, from the date of death of James Samuel Carter all trusts created under this Will and all testamentary trusts relating to any of the estate assets and assets that later form part of this estate in the Primary Beneficiary of the relevant trusts must vest, however, this clause and the other references to the law of perpetuity in this Will does not apply if there is no legal requirement for a vesting date or the law of perpetuity is abolished by the time of my death, or if the law so allows, it is abolished by the expiration of the 80 years minus one day
- ⇒ To borrow money or raise money for any purpose connected with these trusts either with or without giving security and enter into any mortgage, charge, bill of sale, lien or security over any part of the property arising from my estate
- ⇒ To distinguish between income as defined by the a particular nature or from a particular source in other nature or from any other source in a different
- ⇒ To classify and create a separate account (and income (including under the Tax Act), including net (with or without imputation credit), interest, primary income or whatever other categories that are determined may be paid into a separate account, however and retains the character it had in the hands of the trustee
- ⇒ To determine the particular type of income or account against which the losses and outgoings incurred in deriving the income as allowed under the Tax Act are set off
- ⇒ To request the trustee or person in control of any Superannuation Death Benefit to exercise its discretion and:
- purchase either an annuity or an allocated pension or any combination (subject to the law or the relevant Superannuation deed)
 - make payment of any part of the Superannuation Death Benefit to form part of my estate
 - cause any annuity or allocated pension to vest

Why don't I just build a non-tax effective Will?

This information alerts you to some of the pitfalls of preparing a 'Simple Will'. A 'Simple' Will seems to fulfil your needs on the surface, but they cause extra tax.

You are building a tax effective 3 Generation Testamentary Trust Will.

Your 3-Generation Testamentary helps give you what you own to your family and not the tax man.

- ⇒ The Executors act unanimously at all times. The Executors, Appointors, and Trustees may be (for each specific trust): one or more companies; one or more individuals or a combination of both companies and individuals.
- ⇒ A Trustee ceases to hold office, for that specific trust, when:
- the Trustee resigns by written notice to the Appointor
 - the Appointor states that the Trustee ceases to hold office (whether the Trustee is so advised or not)
 - being an individual becomes bankrupt, makes an assignment or similar with creditors; becomes mentally ill or incapable of carrying out the responsibilities or dies
 - being a company, is liquidated, enters into receivership or similar or is wound up
- ⇒ To establish a Testamentary Trust or Testamentary Trusts for each Primary Beneficiary as may or may not be required from time to time. Each Testamentary Trust is named after the Primary Beneficiary of that Testamentary Trust if no other name is chosen
- ⇒ To elect not to have a Testamentary Trust established relating to that Primary Beneficiary in which each Primary Beneficiary holds such assets absolutely
- ⇒ The Primary Beneficiary (and until the Primary Beneficiary dies, the Executor of the Testamentary Trust, then the Executor) of each Testamentary Trust ensures that its Testamentary Trust is a separate legal entity. It follows:
- by deed or Will appoint from time to time one or more Trustees of the Testamentary Trust either as additional or retiring trustee
 - by deed or Will appoint one or more Successors of the Trustee on their death
 - the trustee may declare the Testamentary Trust to be wound up and distribute the assets contained in the Testamentary Trust
- ⇒ To establish disability trusts including special disability trusts that qualify under the *Social Security Act 1991* and the *Social Security Act 1986*
- ⇒ While my Executor and trustees act honestly and in accordance with and under the terms of this will, they are:
- not liable for loss

Will the Tax Man smile when I die?

Imagine \$1.5 trillion of deceased estate assets up for grabs! That is the projected total value of estates from Australians who die in the next 20 years. The question is, who gets that money: The Tax Man, Trustee Companies or your family?

It all depends on your accountant, adviser and tax lawyer coming together to carry out Estate Planning before you die.

Careful planning can reduce the Capital Gains Tax, Stamp Duty and other death taxes. The most basic protection is to include a Testamentary Trust in your Will. Most Wills made before 1998 don't have even this protection.

A 3-Generation Testamentary Trust and Superannuation Testamentary Trust provides the best protection for your family.

- entitled to be indemnified out of the estate for any loss suffered
- ⇒ To vary all or any of the trusts, terms and conditions and to amend any trust under this Will to add or vary the terms of the trusts, including all the powers under *Dion Investments Pty Ltd* [2014] NSWCA 67 and *Mercanti v Mercanti* [2015] WASC 297
- ⇒ Any obligations under any trustees acts are read down and do not apply to this Will

However, no power can be used to create a delegation of testamentary power that would invalidate the Will or any trust arising under this Will or offend any perpetuity period.

8. Severing Unenforceable Parts of the Will of James Samuel Carter

At times powers under this Will may become void if severed from this Will to the extent that all powers remain in full force and unaffected by any severance.

9. Superannuation Testamentary Trust

The Executor gives to the trustees and to the Beneficiary detailing the amount of any Superannuation Death Benefit payable to James Samuel Carter then:

Notwithstanding anything else for the operation of this Will, the Beneficiary and trustee of those trusts holds the Capital of the Trust for the Benefit on trust for only the Dependants in such state and in such conditions and in such manner as the trustee may think fit. The **income** of the Superannuation Death Benefit is to be paid to the **Beneficiaries**. This clause does not apply if there is

The Government has already made a Will for you?

In each state of Australia, you have a government Will. If you die without a valid Will then the government 'Will' operates to divide up your assets. This statutory Will is rarely tax-effective.

Unfortunately, you are never consulted over your Government default Wills.

Does it coincide with your wishes? Who benefits from your property when you die? A Government imposed Will rarely corresponds with your wishes as to how much you leave the Tax Man!

10. Contemplation of Marriage

This Will is made in contemplation of my marriage with [Name] and shall not be void if the marriage does not take place.

11. Contemplation of Divorce

This Will is made in contemplation of my divorce with [Name] and shall not be void if the divorce does not take place.

12. Testamentary Guardian of infant children of Samuel Carter

I appoint:

- Michael Carter of 259 George Street Sydney New South Wales 2000 Australia as **Guardian** of my infant orphan children. I express the wish that my Executor and trustees exercise such power as to ensure that the persons caring for any of my children suffer a minimal financial burden or loss as a result of caring for them.

If you get married, then your Will is revoked. However, if you put in this clause then the Will is not revoked if you actually marry that person.

You need to name the actual person that you may or may not marry.

Therefore, to protect your Will you can put in the name of the person that you 'may' marry. If you don't marry them by the time of your death, your Will is not revoked. If you do end up marrying them then your Will is not revoked.

This is no loss situation.

If you do get divorced that Will is not revoked. If you don't get a divorce, then the Will is not revoked. It is a no loss situation.

This clause protects the validity of your Will.

Signed the day day of month 20 __
by James Samuel Carter in our presence and
witnessed by us in the presence of James Samuel
Carter and of each other. All three of us being
present together throughout the entire signing of
this Will. We attested the signature of James
Samuel Carter in the presence of James Samuel
Carter and of each other.

James Samuel Carter (*usual signature*)

First Witness	
First Witness Signature: <i>(Use same blue pen)</i>	
Full Name <i>(Print)</i>	
Address	
Occupation	

Second Witness	
Second Witness Signature: <i>(Use same blue pen)</i>	
Full Name <i>(Print)</i>	
Address	
Occupation	

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Adjunct Professor, Dr Brett Davies - Partner