Chapter 12

Estate Planning Issues, Process, Personalities and Instruments

Chapter Objectives

Students must be able to:

- Understand the Estate Planning Phases.
- Define what is an Estate.
- Describe the Different Types of Property in an Estate .
- Defines what is Estate Planning.
- Understand the Estate Planning Process.
- Describe the Types of Estate Planning Instruments
  - Wills
  - Trusts
  - Power of attorney
  - Business buy-sell agreements

Chapter 12

Estate Planning Issues, Process, Personalities and Instruments

Introduction

We are in a world where death and taxes is a certainty. The need for estate planning is precisely because of the problems created by death and to a lesser extent – taxes.

An individual generally moves through life in phases. The moment he starts to earning an income, he has the opportunity to keep some of his earnings and commence the accumulation of wealth in the form of savings and/or asset building. This phase may generally be termed the **accumulation phase** of a person's life. Because of the existence of competing interests, this is a very challenging phase indeed, where the individual has to decide where to place his priority – more for today's spending and immediate satisfaction, or to accumulate for tomorrow's security for the family and self. At this phase, the role of estate planning is to set up the mechanism that encourages the attainment of the later.

Assuming, that individual has gone through the first phase successfully, new problems will emerge as the individual moves into the second phase of his life. He now has to consider how to preserve his wealth while he is growing it further. Standing in his way is a host of obstacles that threaten to diminish his wealth. While he lives, he has to consider the eroding effect of inflation and taxes; and when he dies, he has to consider issues like estate duties and final expenses. The wealth has to be conserved and protected from these perils of living. Hence, we may term this phase generally as the **conservation phase**. Estate planning plays the role here by setting up financial arrangements and legal structures to ensure that the value of the estate will be preserved, or even enhanced.

And finally, when the individual has settled down with some wealth holdings, he will have to consider how his wealth is to be distributed when he dies, to whom, and in what proportion and manners. And he will have to decide and implement the plan before he dies. This last phase is generally known as the **distribution phase**. Estate planning helps to put in place the financial and legal instruments to ensure that the estate owner's wishes are honoured in the most effective and efficient manner.

It should be noted that estate planning considers the problems manifested in the three phases in a holistic manner. In this way, the client will get his problem solved in an integrated and not a piece meal fashion.

Definition of Estate

In today's context, the meaning of estate encompasses all the property and property rights that an individual owns, net of his debts.

It covers the following:

- Real (e.g. land and building), personal (jewellery, etc.),
- Tangible (car, etc.), and
- Intangible assets (copyrights, life insurance, etc.).
- The estate also includes rights, which the decedent held at the time of his death. This may include debts owed to him, royalties, rights to damages claimed in actions which survived for the benefit of the estate, even where these rights and *chose in action* is not held by the decedent at the date of his demise.

In short, everything that a deceased person leaves behind that is beneficially his belongs to his estate. In law, an estate is created when the person dies and becomes a distinct and separate legal entity that replaces the deceased.

Types of Property Ownership

Before an estate plan can be developed, the financial practitioner must be familiar with the various types of property ownership and the manner property can be transferred.

Property ownership can be generally classified on the following basis:

- **The owner's rights exercised over the property, and**
- **The duration of the owner's interests.**

Both can be in the form of **individual** or **joint ownership**:

"Individual ownership" may include the following:

a. Fee Simple or outright Ownership
b. Life Interest
c. Term Interest
d. Future Interest

"Joint ownership" may include the following:

a. Tenancy in Common
b. Joint Tenancy

Individual Ownership Property

- **Fee Simple or Outright Ownership**

  This represents the broadest ownership of a property by the individual. He holds unlimited interest in the property and hence all the rights associated with the property. This includes present proprietary rights and the right-of-transfer to anyone at any time the property's title – while alive or at death.

- **Life Interest or Estate**

  This refers to ownership of property where the individual's right to possess, use and derive income from the property is absolute but limited to the mortality of the life tenant. When the life tenant dies, the ownership rights end.

- **Term Interest**

  This type of property ownership refers to a property where the prevailing tenant has the right to possess, use and derive income form the property during a designated term. When the prescribed term ends, the rights of the tenant also end.

- **Future Interest**

  This is a vested or contingent current right of the individual to the future right to enjoy a property. If the right is contingent, it will become vested on the happening of a certain event.

Joint Ownership Property

More than one person may hold the rights to a property, and this is known as joint ownership. The following are two types of joint ownership of property found in Malaysia.

- **Tenancy in Common**

  Tenancy in common is where property are owned by more than one individual lacking survivorship right, i.e. the survivor will not automatically be transferred the portion of the deceased owner interest in the property when the death occurs. The owners of such property are known as tenant in common. Each owner has the right to transfer his interest in the property to others at death or at any other time. The interests of the estate owner in the property are considered probate assets.

- **Joint Tenancy (with right of survivorship)**

  Where property is owned jointly by one or more individuals with right of survivorship, it is known as a **joint tenancy** and the owners are called joint tenants. There are no restrictions to the relationship between the owners. Because the death of a joint owner automatically transfers

his interest in the property to the surviving joint tenants, such property are classified as non-probate assets. A joint tenant may transfer his interest in the property without the consent of the other joint tenants and such act, if taken, will effectively obliterate the survivorship rights therein.

Estate Planning

Definition

From the introduction of this session, we have learned that an individual goes through three phases of life where estate planning is applicable. We may thus define the term 'estate planning' as follows:

"The process of managing and administrating the assets of an individual through the accumulation, conservation and distribution phase of his life in the most effective and efficient manner feasible."

By effective, we mean the degree the wishes of the estate owner are attained through the process of estate planning. And by efficient, it means those wishes can be attained at the lowest cost feasible.

Purpose

The purpose of estate planning is to ensure that when a person finally dies,

a. Assets are sufficient to meet objectives,

b. Beneficiaries receives assets in the proportion and manner desired,

c. Assets depleting expenses like taxes are minimised, and

d. The estate is sufficiently liquid to pay cost of transfer.

The Six-Step Estate Planning Process

1. The first step is to establish what the client really wants for his estate. The objectives of the clients should be set so that the estate planning process is always done in view of the desired outcomes of the client.

2. The second step would be to gather relevant information on the client in an organised manner. A detailed fact-finding sheet is usually used and this process is often cited as the fact-finding process. The information gathered includes hard and soft facts on the clients and would provide the basis for planning of the estate. If there are any existing plans, they should be examined to determine whether the contents are still current in respect of the client's present situation.

3. The third step involves the analysis of the entire facts of the client's situation. Estate planning has numerous tools at its disposal. Decisions as to whether to employ testamentary trusts or living trusts and whether to use wills or trusts have to be decided. The costs attached to the different instruments are significant. In business succession planning there are many exploratory issues. What would suit the client must be analyzed.

4. The fourth step is the preparation and presentation of the plan. Once the relevant issues and data are examined, a plan is designed and presented to the client for his initial approval. After the client's review, a final draft is made after making the necessary adjustments based on the feedback.

5. The fifth step is the implementation stage. It is here that all the legal documents and transfers of property are executed. Wills and trusts instruments are often used to meet the objectives set.

6. The final sixth step is letting the client know that a periodic review is needed to keep the estate plan current. Often, the life of client changes over time and new objectives must be established in view of this. Furthermore, tax laws and new regulations may be introduced by parliament that may affect the viability of the estate plan.

Workings of the Six-Step Estate Planning Process

Understanding the workings of the six broad steps in the estate planning process is crucial to the success of creating the estate plan. Each of these steps is discussed in detail here.

Step 1 – Establishing Objectives

The goals of the individual must be established and prioritised. The estate plan is likened to a road map which is used to guide the prospect to a certain destination. The destination is the overall goal comprising several objectives of varying priority.

Key objectives will circulate around the desires of the estate owner with regard to providing for loved ones and other heirs; the liquidation or preservation of business interests, and the making of charitable bequests.

Step 2 – Information Gathering

The foundation of a good estate plan must be based on correct and complete information on the client or as near as possible. The living concern of the estate owner aside, the ordinate considerations of estate planning involve the passing of property to the heirs.

Hence, the planning would revolve around these four key questions of:

a. *What* kind of property does the estate owner have? This helps to identify the estate owner's wealth holdings and asset-mixed.

b. *Who* should receive the assets? This deals with identifying the beneficiaries that the estate owner wishes to have his estate pass-on to.

c. *How* should the transfer be done? This determines the methods and instruments to be used in the process of planning for the estate.

d. *When* should the transfer be done? This is to set a triggering event that will activate the transfer or to set the timing for the transfer to take place.

To effectively deal with these four questions, it is crucial to have all the relevant facts. Hence, it is logical for the planner to perform a thorough fact-finding interview with the client supported with a good fact-finder sheet and a set of incisive questions. A complete listing of the client's assets should be one of the things identified in the fact-finding step.

It must be noted here that the fact-finding interview does not only concern with getting hard facts on the estate owner, but also involves getting "soft" facts in subjective areas like his attitude and feelings towards his heirs, business and his other assets – which are revealed by asking specific questions. A good fact-finding interview should comprise the following issues:

- **Hard facts on the client, such as personal particulars, property, business, etc.**
- **Feelings and attitudes**
- **His business goals and objectives in relation to family's goals and objectives**
- **Problems and obstacles that can prevent the achievement of these goals**
- **Causes and sources of these problems and obstacles and steps he has taken to resolve them.**

In summation, this second step involves assembling a complete list of all assets possessed by the estate owner; compiling a detailed record of his personal family data such as age, relationship, health conditions, etc.; his desires and the obstacles in his way, and the nature of these obstacles.

Step 3 – Analysing the Data

The data gathered along with the established objectives must be analyzed. As was mentioned in the fact finding session each area of concern needs analysis. The costs of employing the different instruments must also be taken into consideration. There are several alternatives to be considered. The clients priority must be accommodated along with the analysis of likelihood of meeting the said objectives. This step intertwines with the earlier steps and the fourth step.

Step 4 – Preparation and presentation of the plan.

The next step is where an overall plan is selected based on analysis and drafted for presentation to the estate owner for his approval. This stage normally involves a lot of groundwork and re-preparation on the part of the planner as he gets ready the final plan for review and fine-tuning with the estate owner.

The main thing at this level is to come out with a plan that will meet all the objectives of the estate owner. The plan should be tested via a process of simulating the procedure of administration so that any defects in the plan can be detected before it is implemented.

Strategic questions structured to cover all bases are rigorously asked to test the plan. The estate owner's specific needs in the area of estate accumulation, conservation and distribution identified in the earlier steps are the guideposts in the testing process.

Once the estate owner is satisfied with the simulated outcome of the plan, and the planner feels he has selected all the component methods of transfer and disposition, the plan is ready for implementation.

Step 5 – Plan Implementing

This is a crucial step where the plan is meticulously executed. This will involve the execution of the necessary legal documents and making arrangements for any current transfer of ownership as well as catering for liquidity exigencies. A checklist may be necessary to ensure that all the planned actions are carried out. Again, the objectives of the estate owner must always be in the forefront of the planner as he puts the plan into action – selecting only those mechanisms that are congruent with the aims established.

Step 6 – Periodic Plan Review

Once the estate plan is fully implemented, the estate owner should be made aware that a periodic review is required to keep the plan current in view of changing circumstances and laws.

A review procedure should be adopted. After which, the estate owner should be made aware that he has taken an active part in making the plan – and should have now greater peace of mind in the knowledge that he has provided for the financial security for himself and his loved ones.

Estate Personalities: Beneficiaries & Fiduciaries

Beneficiaries and personal representatives are central figures to the estate plan. The former being the object of the plan while the later is the official representatives of the estate owner whose job is to execute and implement the plan for the benefit of the beneficiaries.

The personal representative may or may not be a beneficiary of the estate he or she administers. In practice, it is common to find the wife or husband acting as the personal representative and also as a beneficiary. Frequently, the personal representative also acts as trustee if appointed in the will.

In this chapter, we will describe the various facets of these personalities – the roles they play and their responsibilities.

- **Beneficiaries**

Once a person dies, his estate goes through a legal process of administration or probate before it is passed on to the heirs. The heirs to the estate are known as the distributees or beneficiaries of the deceased's property.

The following fact must always be borne in mind of the practitioner when he plans an estate. The beneficiaries are the key objects of the estate plan, meaning, the ultimate purpose of having the plan is to facilitate transfer of property of the deceased in the best possible manner to them.

The peculiar make-up of the various beneficiaries in terms of their character, age, job, hobbies and circumstances must be taken into consideration and examined to see if the plan will be compatible. For instance, it is of little point for a coffee shop business to be passed on to a son who is a highly successful doctor. A better alternative may be to pre-arrange for a sale on the death of the estate owner.

- **Fiduciaries**

This is a position of trust. A fiduciary is a person, persons or institution appointed by the estate owner to hold or manages property for the benefit of the beneficiaries. He could be an executor or a trustee appointed by the estate owner or the court.

The relationship between the appointee and the beneficiaries is known as a fiduciary relationship. Because these are positions of trust, the law imposes strict fiduciary principles and standards on all fiduciaries.

The types of fiduciaries discussed in this chapter are the trustees, guardians and personal representatives (executors and administrators).

The Responsibilities of a Fiduciary

The most basic duty of a fiduciary is to act in the best interest of the beneficiaries of the estate. In exercising his duty, a fiduciary is expected to exhibit total devotion to the estate in respect of the scope of work to be done. If he breaches this duty, he can be held liable by the beneficiaries for losses incurred due to the breach.

Here are some of the general principles concerning the conduct of a fiduciary:

1. He is not to delegate his duty in areas that are to be performed by him as a fiduciary. This is especially so in matters where he is chosen because he is the best person to do the job legally and properly.

2. He is to act impartially with the beneficiaries concerning their interests in the estate in areas where there is a conflict of interest. For instance, in selecting an investment, the trustee is under an obligation to hold a balance between the interests of the beneficiaries. He must not inordinately favour the tenant for life as against the remainder men or vice versa.

3. He should not deal with matters in the course of his duty to profit himself at the expense of the beneficiaries. For instance, he should avoid conflict-of-interest situations, where he may act to the disadvantage of the beneficiary. Where there is a possible conflict of interest, he should declare all the important facts to all the beneficiaries and get their approval (provided they are legally competent) to conduct the business. Otherwise, the permission of the court may be needed before the person acting as a fiduciary can act and stay within the boundary of his legal duties.

4. He should act to preserve the estate property under his charge, such as to get them properly insured.

5. He should keep property in productive states so that the beneficiary may gain from the income produced by investing the property. For instance, a sum of money may be invested in a fixed-deposit account in a bank to earn interests.

The other more specific duties of the various fiduciaries are discussed below.

- Trustees

The legislation governing the powers of the trustees are found in the Trustee Act. The job of the trustee is similar to the personal representative, who sometimes also acts as a trustee. More on the role of the personal representative acting as a trustee will be discussed later.

Depending on the size and nature of property in the estate, the responsibilities of the trustees can be a heavy one. If the trustee(s) fails to perform his duty, as a last resort, the court may step in and decide how the property shall be distributed, and the desires of the settlor as set out in the trust deed will be borne in mind.

It must be appreciated that the powers of appointment exist within trusts and it may be that the trustee(s) who is/are given the ability to decide on the destination of the property stated in the deed. Just because a person is a trustee does not mean that his duties with regard to a property is a trust and not a power. Because of its importance to financial planning, a detailed discussion on the concept of a trustee is in order.

- **Appointment of Trustees**

  Any individual who has the capacity to hold property can be appointed as trustee. In practice, we can generally assume that the creator of the trust appoints the first trustee or trustees to the trust.

For settlements and dispositions on trust property, whether movable or immovable, the Trustee Act of Malaysia limits the number of trustees to be appointed at maximum four. This restriction is removed in the case of property vested in the trustees for charitable, religious and public purposes.

The following are some of the instances where there may be a need for the appointment of trustees:

a. Where land is vested in trusts for charitable or public purposes or where the net proceeds of the sale of such land are held for those purposes;

b. In cases where any trusts for sale and settlements of land are vested to the trustees involving a term of years that is limited by settlements or trusts for raising money.

c. Statutory trusts for life insurance created by naming the spouse and/or children as provided for under Sec 166 life policy.

d. Non-statutory life insurance trusts where the funds are managed to produce income.

e. For cases where the beneficiary of a testate or intestate estate is a minor or suffering from disability.

- **Implications of Various Appointments**

The selection and finally appointment of trustees are no easy decisions for the grantor. As a general rule, the manner of appointing trustees must fit the objective of the trust so created. The question of, *"What is the purpose of the trust?"* must be answered and used as a guide.

For large funds in the estate where special funds management skills are needed, the appointment of corporate trustee takes precedence over individual trustees.

- **Responsibilities of Trustees**

When a trustee is appointed to a trust fund, he assumes full responsibility for the property that is placed under his care. Where there are more than one trustee, a trustee will be held jointly liable if he negligently left the management of the trust in the hands of his co-trustees, which resulted in a loss to the trust.

It is also the responsibility of the trustee to ensure that there is proper recording of the asset inventory of the trust. In cases where the surviving spouse is bequeathed with the right to stay on the trust property, which hold assets that form part of the trust, it is the duty of the trustee to make sure that the beneficial occupant acknowledges those assets on the property. This is to safeguard the assets of the trusts, which may be passed on to other beneficiaries in the future.

- **Scope of Powers of Trustees**

  While the statutory powers of a trustee are granted under the Trustee Act, he may obtain additional powers from the trust deed or the will appointing him. For instance, the grantor or the will-maker may empower the trustee to carry on his business when he dies or to vary the distribution period.

- **General Liabilities of Trustees**

  Since beneficiaries to a trust fund have certain enforceable rights, the trustee appointed to manage the trust property must exercise care in handling those property. For instance, it is imperative that the trustee carries out his duties in accordance with the provisions stated in the will or trust instrument.

  Any neglect to carry out his duties or not acting in accordance with the provisions of the trust instrument would constitute a breach of trust – which is legally actionable by the beneficiaries. It should also be noted that the liability is for actual loss of each transaction and may not be compensated by profits in another.

- **Legal Provisions affecting Trustees**

  Where a will appoints a trustee, who could also be the executor, his role begins as soon as all administration formalities have been completed. In the case of intestacies, the personal representative, in the position of an administrator, automatically assumes the role of a trustee on his appointment by the court.

  Legally, the process of administration is considered complete when the personal representative has compiled the estate and paid or made provision for the payment of the expenses, debts, liabilities of the deceased estate owner including whatever inheritance taxes is to be paid.

- **Personal Liabilities of Trustees in Contract**

  Once an individual has taken on the role of a trustee, it is one of his jobs to ensure that contracts legally entered into by the deceased estate owner is honoured by the estate. The exception would be the contracts of a personal nature entered into by the deceased, which are brought to an end on his death. If the trustee is required to advance moneys to the estate from his personal funds to settle contractual damages or compensation, he is entitled to receive a refund.

- **Power to Request Discharge form Duties**Once a trustee has completed his trusteeship in dealing with the trust property handled by him, he can have his accounts examined, settled and be given a formal discharge. Otherwise, if expressly provided for in the will, a trustee may voluntarily retire from the trust if he chooses to do so.

  With some exceptions, a trustee generally has no right to demand a release under seal. To free himself from further obligations, a trustee must obtain a proper discharge from the beneficiaries and the creditors of the estate. He can get this done by getting the form of properly signed

receipts or acknowledgements from both the beneficiaries and the creditors of the estate. The document must state that the beneficiaries and/or creditors have fully obtained their due share or debt and that they have no further claims whatsoever, against the estate.

In the case, *King v. Mullins,* it was held that a release by deed may be demanded if there is no writing to show the following:

⇒ What the trust funds were, or

⇒ The actual amount of the trust fund, and

⇒ "Where the trustee has been asked to do that which is not in accordance with the tenor of the trust."

A trustee must administer separate and distinct trust funds independent of each other with regard to the beneficiaries. He may not mix the two and refuse to pay over one fund until questions relating to the other have been settled.

Where the trust funds have been resettled, the trustees of the original settlement are entitled to release under seal from the beneficiaries.

The trustees have a right to a receipt for any funds paid over.

– Guardians

A guardian is simply someone appointed by the court to take care of someone who is either a minor or incapable of looking after oneself.

The duration of guardianship will only last for the period of minority or incompetency. Once the person under the care of the guardian reached 21 or had recovered from his or her incapability, the guardianship ends.

In the case of caring for individuals who are incompetent due to some form of disability, the term of guardianship could last a lifetime.

– Legal Personal Representatives

While the due process is in progress, the legal title of the estate is in the hands of the personal representatives or trustees of the deceased individual. These are the legal guardians of the estate of the deceased estate owner.

The word personal representative is a generic term that covers the executor or administrator of an estate. He is the rightful legal representative of the estate with certain powers conferred by law or the legal documents such as a will or a trust deed.

Persons applying to be legal representatives of the estate are usually close relatives and commonly, the person is the spouse of the deceased. When the personal representative is named in the will, he is known as an executor, or executrix, if she is a female. Otherwise, in the case of intestacy or where the executor is not named in the will, the appointee of the court is known as an administrator.

Both the executor and the administrator have similar responsibilities when administering the estate. Their general duties would be to identify and gather all the assets, to settle all debts and financial obligations, and finally, to distribute the residual estate to the beneficiaries.

Powers of Personal Representatives

It is possible that an appointee of a will or the court is both a trustee and a personal representative. In such cases, the question may arise as to when one role ends and the other emerges. According to legal principles established in various court cases, the role of the personal representative ends when he has completed administration, settled all the estate's liabilities and ascertained the residue estate for distribution. Thereafter, the trustee role begins.

In both cases, whether testacy or intestacy – before the estate is fully administered – the personal representative holds the estate vested in him for the purpose of carrying out the functions and duties as an administrator. In other words, he holds the legal title to the property. During this period of administration, the estate beneficiaries and creditors may exert on the personal representative's function and responsibility on their rights.

This puts the personal representative in a fiduciary position concerning assets placed in his hands during this period. In some respects, where the case demands, the court may functionally treat the personal representative as a trustee instead of an executor or an administrator in the ordinary sense.

Hence, in addition to the powers conferred by a will, a personal representative may derive powers from the Malaysian Trustee Act. The trustee's responsibility is to organise the assets, convert them into cash and distribute them to the beneficiaries. If the trustee carries on the business left by the deceased estate owner, he does it at his own risk – even when there are instructions allowing him to do so.

The ranking of payments as provided by the law concerning an insolvent and solvent estate should be noted. The rules impose a personal accountability on the trustee who disburses the assets recklessly. For instance, where he paid the beneficiaries ahead of the estate creditors, he may be held personally liable for the amount in question.

As a guard against personal liability, a personal representative who acts as a trustee must manage the affairs of the estate by taking precautions as an ordinary prudent man of business would have taken in managing his own affairs. If he has done so accordingly to satisfy this rule in the eyes of the law, he would have been considered having discharged his duty sufficiently.

In the case of a hired trustee where remuneration is meted out to him to administer the estate, a higher level of diligence and knowledge is imposed on such a trustee as compared to someone

acting the role who is not paid. A good example is where a private Trust Corporation is appointed to administer an estate.

Estate Planning Instruments

- **Wills**

Basically a will is a written instrument by which an individual signifies his wishes as to the distribution of his estate after his demise. Since it takes effect only after death, a will, by its very nature, is revocable and can be modified at any time before the will-maker dies.

The Malaysian Wills Act, 1959 defines a "will" as a "declaration intended to have legal effect of the intentions of a testator with respect to the property or other matters which he desires to be carried into effect after his death and includes a testament, a codicil and an appointment by will or by writing in the nature of a will in exercise of a power and also a disposition by will or testament of the guardianship, custody and tuition of any child."

So, from the above definition, a will is in essence:

a. a written declaration of the will-maker's intention on the disposition of his property or any matters that becomes legally effective after his death;

b. a document or set of documents that includes any of his written testaments, codicils and appointment or any writing in the nature of a will in exercise of a power; and

c. a document that effect a disposition by will or testament of the guardianship, custody and tuition of any child

- **Trust**

Essentially, a trust is a legal arrangement or relationship whereby an individual transfers assets to a third party called a trustee who are bound to follow a set of directives, rules and regulations for the benefit of others known as the beneficiary or distributee.

In estate planning, the trust instrument is a very important and useful instrument. The trustee may be an individual, a professional advisor or a corporation.

A trust creates an equitable obligation, either expressly undertaken or strictly imposed by the court of law. The trustee is duty bound to handle the trust property for the benefit of the beneficiaries.

Trust Property

Trust properties are those properties that have been transferred to the trustee to be held for the benefit of other persons. As long as the trust persists, the trustees are looked upon as a single and

continuing body that administers the trust. As for the trust property, the trustee holds the legal title, which allows him to manage the property of the settlor, while the distributee holds the beneficial interest to the property, which entitles them to receive benefits from the trusts.

The word trust would have conveyed implicitly that the trustee is a person on whom faith and confidence have been placed, and that he has to act out his duties for the sole benefit of the beneficiary. Legally, the appointed trustee has a fiduciary obligation to act in conformity with the law and the provisions as set out in the trust deed. In the absence of a trust deed or where the duties are not defined in the deed, the powers and duties of the trustees shall be in accordance to the Trustee Ac. The beneficiaries of a trusts hold the right to enforce that the trustees perform their duty in accordance with what is set out in the trust deed.

Components of Trusts

There may be many types of trust, but all of them share some common components. The following are five components that are common to all trusts;

1. The Grantor or Settlor
2. The Property or Trust Corpus
3. The Trustee
4. The Beneficiary
5. The Trust Deed

- **The Grantor or Settlor**

  The grantor or settlor is basically the creator of the trust property. The trust is created when the grantor transfers the title of his personal property to the trust. After which he appoints the trustee(s) to handle the property and name the beneficiary or beneficiaries who will benefit from the trust.

- **The Property or Trust Corpus**

  This is anything of value that can be owned and the title transferred to a trust. It may be any real or personal property, or rights. An example of trust property is a life insurance policy assigned to a trustee for the benefit of a class of person.

- **The Trustee**

  The character of a trustee has already been thoroughly discussed in an earlier chapter.

  To recap, a trustee is either a person or a trust corporation who acts in a fiduciary capacity to look after the trust property for the benefit of the beneficiary. It should be noted that the fiduciary

relationship exists between the trustee and the beneficiary and not between the grantor and the trustee – even though it is the grantor who creates the trust.

The Trustees Act governs the appointment, roles and responsibilities of trustees. In Malaysia, it is the Trustees Act that governs the activities of trustees.

- **The Beneficiary**

  As the word "beneficiary" would have suggested these individuals own the beneficial interest of the property and are the object of the trust. They have legally enforceable rights that enable them to defend and protect their interest in the trust.

- **The Trust Deed**

  This is the document that sets out the terms of the trust that the trustees must follow in carrying out their duties. For life insurance created through statutory or non-statutory means, the trust deed can provide instructions to the trustees to manage and distribute the property in accordance with the wishes of the grantor.

Power of Attorney

A will only takes effect, after the death of the will-maker and when it has been successfully probated in the court of laws. Hence, for instance, where illness or accident incapacitates a person, the will is of no use while he still lives on. Under these circumstances, the "durable" *power of attorney* which authorises a trusted person to handle the financial affairs of a person is a useful tool that can be invoked to meet the need. It is a simple and inexpensive way to arrange for someone to make financial decisions for an individual should the person become unable to do so himself.

The person appointed in the power of attorney is called an *attorney-in-fact*, who is basically an agent of the donor of the power. The appointee or *attorney-in-fact* need not be a lawyer or be legally trained. The word "attorney" here means anyone authorised to act on another's behalf. To authenticate the document, it must bear the words "true copy" marked by the relevant authority.

Generally, a *simple* power of attorney can be revoked under the following circumstances as provided in the Act:

i. Written revocation by the donor of the power;

ii. Renunciation by the donee (attorney-in-fact);

iii. Death or legal incapacity (e.g. of unsound mind) of the donor; or

iv. Death or legal incapacity (e.g. of unsound mind and bankruptcy) of the donee.

For items (i) and (ii), the relevant documents must be lodged with every office in which an office or true copy has been previously deposited.

There are two ways in which a power of attorney can be made irrevocable or durable:

i. Where there is valuable consideration given and is expressed to be irrevocable; and

ii. Where the power of attorney is expressed to be irrevocable for a fixed time.

The attorney-in-fact may be conferred some or all of the following duties:

- Apply assets to pay the everyday expenses of the donor and his family;
- Buy, sell, maintain, settle taxes on and mortgage real estate and other property;
- Make investment decisions on shares, bonds, commodities and mutual funds;
- Handle all the donor's insurance needs and claims;
- File tax returns and make payments;
- Manage the business;
- Represent the donor in court or to make arrangements with a third party to perform the role; and
- Handle the retirement accounts.

For estate planning purposes, the durable power of attorney should be drafted to terminate at the donor's death. If the donor wishes person to carry on dealing with his duties conferred by the power of attorney originally, he should name that person in the will as an executor or trustee or both.

Business Buy-Sell Contracts

Estate owners with business set-ups may require additional planning and the inclusion of instruments like contractual buy-sell agreements. The basic purposes of these contracts are to ensure that the heirs can sell the business to a ready buyer(s) at a prefixed price.

The agreement is usually between the estate owner and his business partners or fellow shareholders, but for the sole proprietorship, a third party such as an employee may be the other contracting party.

Selecting the right funding mechanism is also important. The absence of effective funding arrangements often forces the buyer into financial disarray at the time of fulfilling the contractual obligation to buy. The seller too may be forced into a difficult position as the buyer is in no financial position to take up the offer as promised.

There are various funding mechanisms, but the most effective one preferred by the majority of the planning professionals is life insurance. The reason is mainly it cheapness and speed in creating the required funds to support the purchase as required in the buy-sell contract.

Self-Assessment

1. Estate Planning is the process of

    a. making proper investments in real estates with planning to maximise return of capital

    b. making proper preservation of all estates likely to be liquidated by creditors

    c. making proper arrangements for the protection, preservation and provision of a person's total assets for the benefit of his/her family and loved ones

    d. drafting a full-proof will which minimises the dissatisfaction of family members at the point of receiving the assets

2. Which one of the following is **NOT** a basic step in the estate planning process?

    a. Establish the client's objectives/goals

    b. Analyse and evaluate the client's current financial situation and reality

    c. Formulate practical strategies by selecting proper estate planning tools

    d. Source out best investment advisers

3. Choose the best answer for common estate planning objectives:

    i. Provide adequate income to dependants to maintain their standard of living

    ii. Preserve sentimental assets for future generations

    iii. Make provision for adequate retirement funds

    iv. Make special provision for less fortunate heirs

    a. i and ii only

    b. iii only

    c. i, ii and iii only

    d. i, ii and iv only

4. The main advantage in holding properties in trust is to

   a. avoid all forms of tax
   b. keep them in secret, not to be known by the government
   c. avoid long delays in settlement, legal hassles or creditors' claims
   d. prevent untrusteed parties to lay claims on the properties

5. When immovable assets are given to a beneficiary for absolute rights to possess, to enjoy and to receive the current income from the property until the demise of the beneficiary, this form of ownership right is termed as

   a. Outright ownership
   b. Life interest ownership
   c. Term interest ownership
   d. Future interest ownership

6. Two or more individuals may hold an undivided or divided share in the property. Upon the demise of any one individual, his/her share will be transferred according to his/her will. This form of ownership right is termed as

   a. Joint Tenancy
   b. Tenancy in Common
   c. Term Interest Ownership
   d. Outright Ownership

7. The following are some statements about wills:

   i. The testator must sign the will at the end of the document
   ii. The testator need not sign the will if there are at least two witnesses attesting to his/her will
   iii. The witnesses to the will must not be beneficiaries of the will
   iv. The testator can be a minor

   a. i and ii only
   b. i and iii only
   c. ii and iv only
   d. i only

8. There are many advantages in creating a living trust. Which one of the following is NOT an advantage?

   a. There are no legal hassles or long delays in settlement

   b. Beneficiaries must be active in the settlement of the estates

   c. It is one of the best ways of protecting minors' interests.

   d. It can be used to preserve special family property for future generations.

9. A competent financial planner must be conversant with the tax regimes pertaining to the various estate planning tools. Of the following, which one is NO longer considered important in Malaysia?

   a. Service Tax

   b. Income Tax

   c. Real Property Gains Tax

   d. Stamp Duty

   e. Estate Duty

10. The following are factors affecting the choice of different estate planning tools:

    i. Cost of setting up

    ii. Cost of transferring the assets

    iii. Yearly administration charges

    iv. Tax implications

    v. Ease of management

    a. iv is the most important

    b. v is the least important

    c. All are important

    d. None is important

Answers: 1-C, 2-D, 3-D, 4-C, 5-B, 6-B, 7-B, 8-B, 9-C, 10-C.