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Planning for your peace of mind in silver years

"I love my age.

Old enough to know better.

Young enough not to care.

Experienced enough to do it right."

Elephant Journal

Introduction

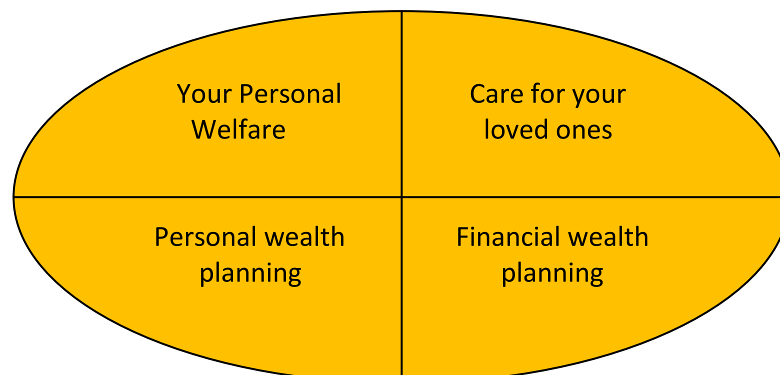
Planning for old age is the right thing to do. There can be no certainty as to how each of us will arrive there.

There are two aspects to think about; your own welfare and then how your wealth should be distributed.

This Note sets down briefly the tools that are available to you.

There are several links to related topics for you to follow, such as the actual planning of your estate, the use of mutual wills and the distribution of jointly owned assets.

But first and foremost, the purpose of this introduction is for you to start thinking about your welfare and estate plans.



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1. Your Personal Welfare

Do you find yourself asking these questions?

- How will I withdraw cash from the ATM machine when I can no longer walk to it?
- What will happen to me if I start losing my memory?
- What will happen to me if dementia sets in?
- How will I take care of myself if I become handicapped?

Then there are your loved ones who look to you for their care; your spouse, a disabled child, etc.. Who will look after them if you can't?

How will your debts be paid if you should become disabled or pass away?

It does not take much to create your personal welfare plan:

- Arm yourself with information. This note is a good place to start.
- Start having constructive conversations about your concerns with someone who is qualified to help you move forward. Your lawyer can be the sounding board that you need.
- You may choose to involve your family in the planning. Your lawyer can mediate discussions.
- Once your plans are formed, your lawyer can help you with the documents.

2. Act while you still can

It is the trend nowadays to claim to have "a senior moment" when one is forgetful or slow to catch a point. Diminishing mental ability is linked to old age. Unfortunately it could be the onset of a mental ailment.

Having the mental capacity to make decisions is essential to executing your estate plans. Once lost, you lose the chance for having control. Also, once your capacity begins to diminish, your decisions and actions become vulnerable to the challenges of disgruntled relatives.

The degree of mental alertness required varies depending on the complexity of the decisions you make. It is essential therefore to have a lawyer guide you.

Stories of the elderly being cheated out of their wealth abound. With secure and protective devices in place, both you and your wealth will be safe.

Peace of mind comes with planning.

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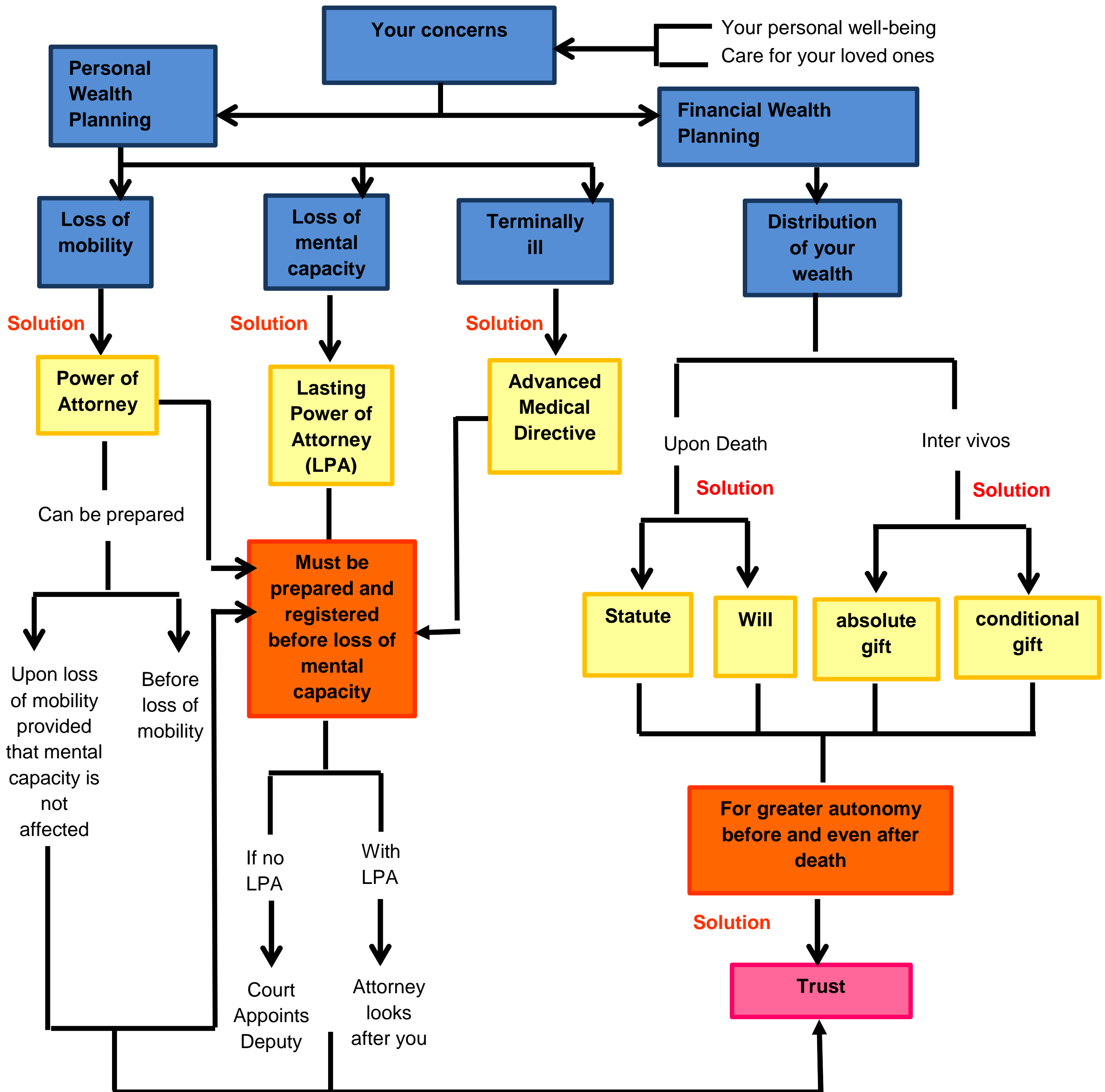
3. Things you can do quickly

The diagram below illustrates what you can do.



4. Personal wealth planning

Immobility

If you cannot make your way to the ATM machine, you may be tempted to give a friend or care-giver your ATM card and PIN number. Not only may the person feel uncomfortable but obliged, s/he too inadvertently becomes vulnerable to accusations of abuse. You may also be exposed to dishonesty and theft. One solution is to have a Power of Attorney done.

A Power of Attorney allows you, the donor, to empower an individual to carry out specific acts on your behalf. It legitimises his/her authority and at the same time gives clarity as to its boundaries and consequences of overstepping them. The document can be revoked by you anytime. Upon the loss of mental capacity, it is automatically revoked.

A Power of Attorney can be created any time as long as you have mental capacity. Its operation can be event-specific. You can choose to have it operational only upon a loss of mobility. For your peace of mind, you should have it drawn up early just in case.

Loss of mental capacity

Regardless of whether your physical mobility is lost, you lose the ability to make decisions yourself when you lose mental capacity. You would have to trust those around you to act in your best interest when making decisions for you. Rather than leave the choice of your care-giver to chance, one solution is to make your choice now, while you can, by creating a Lasting Power of Attorney (LPA). The LPA would allow you to grant specific person/s the power to make decisions on your behalf. The decisions would be day to day ones for your care and also for the management of your properties and affairs.

Without the LPA, it becomes difficult for your care-givers to look after you. Other people can question the legitimacy of actions in looking after you. Ultimately, for your own good, your care-givers may have to turn to the court to appoint someone to care for you; i.e. a deputy. This is expensive, tedious and time consuming. The person appointed, may not be the person you would have chosen yourself to look after you.

There are many statutory safeguards in place to ensure that the deputy and your attorney act always in "your best interest". Between the two, having selected your attorney, you are comforted that s/he knows what you would consider to be in "your best interest"; your court appointed deputy may not.

A LPA prepared now can be used only to make decisions that you can no longer make. Critical to ensuring that you are properly taken care off during this vulnerable period is to select a trustworthy and responsible attorney.

For more information, visit https://www.publicguardian.gov.sg or call 1800 226 6222.

Terminal illness

In this unfortunate event, you can decide in advance if you do not wish to receive any life sustaining medical treatment to prolong your life. The Advance Medical Directive (AMD) allows you to make this choice. The AMD does not cover palliative care, which means that any pain that you are enduring will continue to be reduced or eliminated, where possible, and your life will not be prolonged unnaturally. However, this does not translate to euthanasia; the AMD does not accelerate death but allows it to come naturally.

A useful link for more information is:
https://www.moh.gov.sg/content/moh_web/home/policies-and-issues/advance_medical_directiveamd.html
or call 6355 3000.

5. Financial wealth planning

By having a clear plan for your wealth, you can ensure that your loved ones and dependents are adequately taken care of.

Making gifts

Circumstances may prompt you to make certain gifts during your lifetime. Once made, it can be difficult to reverse it. Careful thought is required. Rather than make an outright gift, you may want to attach conditions to them. Conditions can be used as a motivating tool if properly couched and will be upheld by a court as long as the conditions are not illegal or contrary to public policy. Making an *inter vivos* gift of shares and real estate can attract stamp duty. This is often a key reason for transiting these assets through a will.

Will

For control over how your wealth is to be distributed once you pass on, you need to make a will. Otherwise its distribution will follow the schedule under the Intestate Succession Act. The people who you would have liked most to inherit may not be on the list.

Your will also gives you control over who gets what and how much. Making your will requires mental capacity. It is not something your attorney appointed under the LPA can do for you.

Trust

A trust allows you to transfer specific portions of your wealth to a trusted and capable third party (a trustee), to be looked after and protected for the use and enjoyment of your loved ones and you.

As its creator (settlor), the trust offers you the versatility of weaving circumstances for distribution and setting out the parameters for growing your wealth in the hands of the trustee.

A trust that is operational during your lifetime is an *inter vivos* trust. If you wish, it can be a solution (too) for your care should you lose your mobility or mental capacity.

Here are some further benefits of a trust:

- There is privacy in the distribution of your wealth. There is no registration required. Save for the trustee, the existence of the trust and its contents are secret.

- Any distribution of your trust-held wealth is not affected by your passing. There is no probate to delay the application of your assets for the benefit of your loved ones.

- Where your wealth comes from the running of a business that you own, the business may be affected if you pass away. By shifting its ownership into a trust, there is no interruption upon your passing. There is a separation between who owns the company (the trust) and who runs and manages the business (you).

- Other people cannot attack your wealth. They may be your creditors or your beneficiaries, or the in-laws.

- Your trustee can continue to generate wealth from your assets long after your passing for the continued benefit of your loved ones.

- It is a good tool for legacy planning, where each generation is able to benefit from the use and enjoyment of your wealth, and then leave it for the next generation after that.

- There is a neutral and objective third party watching over your wealth and how it is to be used and enjoyed. During your lifetime, you can continue to have some degree of control over their decisions through a properly drafted Letter of Wishes.

Will Trust/Pilot Trust

If you see the benefits of having a trust, but want to continue to have full ownership and control over your wealth during your life time, here are some other options. You can plan ahead to have your wealth (or selected portions of it) held in a trust created in your will. It is a will trust and will only become valid upon your passing and your probate being obtained. In your will itself, you set down how the trust will operate and who will benefit and upon what terms.

Alternatively, you can create a pilot trust during your lifetime and leave it empty of assets until your passing. The trustee of the pilot trust is named as a beneficiary in your will and inherits your wealth as trustee. The trustee of the pilot trust will manage and administer your wealth according to the contents that you would have set out in advance in the trust.

Both types of trusts have benefits. For example, if privacy is what you seek, the pilot trust offers confidentiality. Other than knowing of its existence (because its existence appears in your will), no one will know its contents and distribution. The identity of your ultimate beneficiaries is kept secret. The contents of a will trust, on the other hand, cannot be secret as the will itself contains details. The will must be filed and proved in court before your wealth can be distributed.

A combination

The tools above are not exclusive of one another. They can be used in combination depending on your requirements. A trust can comfortably co-exist with your LPA. While your LPA appoints your attorney as care-giver, the trust can manage your assets and investments and make necessary payouts to the care-giver. This way your trustee has oversight over the use of your wealth for your best interest.

To help you with your estate plan, refer to the following estate planning notes appended to this article.

Estate Planning Note A: Here’s a good place to start
Estate Planning Note B - A Foreigner in Singapore
Estate Planning Note C: Parents of an Adult Child Challenged Mentally and/or Physically
Estate Planning Note D: Mirror Wills and Mutual Wills
Estate Planning Note E: Jointly Owned Assets

Ultimately, the conversation that you must have will be with your trusted lawyer.

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Estate Planning Note A: Here's a good place to start

Having accumulated wealth, you want to decide how it should be given to your loved ones, and then maybe the next generations after that. You have many thoughts and ideas but need to approach them in an organised and structured manner. This Note may help.

In the creation of your estate plans, you will be mapping out what you would have your wealth do at various stages. For a start:

- Think about the *principles* by which you will be *distributing your wealth*;
- Take note of the *factors* that are *specific to your ownership, yourself and your beneficiaries* that may affect your plans;
- Think about how your *plans* can be affected by the *type of assets* you will be distributing; and
- Take note of the *factors* that may *affect your choice of the estate planning tools*

And most importantly, early in the day, select a lawyer you can feel comfortable having a full and frank discussion with to help you with your planning.

Principles for distribution

It is your values and beliefs that will ultimately guide you in deciding who gets what and when.

Fairness and equality

This is subjective and can mean different things to different people. Perhaps is it achieved when:

- everyone receives the same type of asset even if values differ e.g. everyone inherits a flat even though each will fetch a different price if sold;
- everyone receives equivalent sums in monetary terms even though the items are not uniform; eg. cash for some and shares for others;
- an autistic child who cannot earn a living receives a larger share;
- a child receives a lion's share because s/he is the apple of your eye;
- an unmarried child who is your care-giver receives more because of this;
- sons inherit more than married daughters who received their inheritance as a wedding gift; and
- while your child will be able to use and enjoy your property, your grandchildren will be the eventual owners.

Harmony

This could be of utmost importance. You do not want your loved ones battling for your wealth. It can happen for a myriad of reasons but there are some you can avoid by creating solid holding structures for your wealth and clear instructions. Any discretion for distribution given to a third party should be perceived to be fair and unbiased.

Harmony too can be achieved if your decisions address the expectations, personalities and values of your beneficiaries and the dynamics of their relationship.

Debt-free

Do you have existing or potential debts and liabilities? The obvious ones may be a loan from a bank or friend. The ones that may require thought and realisation before you spot them may include a potential law suit, a marital breakdown, an unsettled tax liability, a personal guarantee given, etc..

You should consider the answers to the following questions:

- how will the debt be repaid if you lose mental capacity or pass on?
- how will periodical repayments towards the debt be made before probate or letters of administration for your estate is obtained?
- which of your assets will you be giving away subject to the debt?
- which are the debts that will be cleared by your residuary estate?
- how will your funeral expenses be paid?

Your response can impact the actual value of the assets you give away; for example, a mortgaged house may have a lower residual value than an unencumbered flat. Your notions of fairness and equality may be affected.

You should incorporate as part of your planning the matching of your wealth to debts and liabilities.

Factors that are specific to your ownership, yourself and/or your beneficiaries

Do you really own the asset?

You seem to think that you do; the title deed after all bears your name. But if the money to buy the asset came from someone else, are you sure the other person does not see him/herself to be a joint owner, or worse still, a sole owner!

Could the money you borrowed from a friend to buy the asset actually be his/her contribution for a share?

Your ownership in each asset must be clear. It would be unfortunate if your beneficiary has to defend your title in your absence.

Joint ownership

If you own an asset with someone else, how much of it is yours to give away freely? You may not have the ability to give it away. For example:

- if you are a joint tenant, the distribution of the asset upon death will be according to the right of survivorship. Under the law, the survivor of the asset will obtain the asset. A distribution in your will will not matter. However if the co-owners are tenants-in-common, they will have specific shares to will away. It could be equal or unequal shares.

  If it falls in with your estate plans, conceivably, under some circumstances, a joint tenancy can be changed a tenancy-in-common and vice versa.

- you have the use and enjoyment of the asset for your lifetime, but you are not entitled to its ownership. The ownership will rest with someone else after your lifetime.

- the asset is a gift or inheritance which has been made subject to conditions which curb your ability to give it away.

Giving and the law of bankruptcy

Where an asset was given to you, how long ago was that? Was it at least 5 years ago?

Until 5 years have passed, your ownership of the gift remains open to challenge should its donor become a bankrupt. The Official Assignee in the bankruptcy can seek that the court void the gift. In turn, your beneficiary of the gift (too) is subjected to the same vulnerability during this 5-year period.

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Estate Planning Note A: Here's a good place to start (cont'd)

In making a gift of your asset, how iron clad is it? Your credit position for the next 5 years can have implications on the gift.

If nominal consideration/payment has been given for the gift, the laws of bankruptcy can still prevail to void the transfer of the ownership. This is because the transfer is seen to be made at an under value and is thus captured under this head.

Once given, a gift is difficult to take back

Having made a gift, if you change your mind, it can be difficult to take the gift back. In a recent High Court case (*Chin Kim Yon v Chin Kheng Hai*), a father paid the money for a house but put it in his children's name on the title deed. The father became the co-owner of the property when one child died intestate. When his relationship with the other child, who became his co-owner, soured, the father asked the court to find a resulting trust in his favour. The resulting trust would have given the father effective ownership of the entire property. His basis was the payment of cash for the property which had not been intended by him to be a gift to his children. The court denied his application. Because the recipients were his children, the court presumed that the father must have intended a gift. The father was unable to disprove this.

The finality of a gift should be borne in mind especially when the recipient falls within specific recognised categories where a presumption (to advance) can be made by the court.

Conditional gifts

Gifts don't have to be absolute; ie. outright. You can attach conditions to them. As long as not illegal or contrary to public policy, the conditions will be upheld as long as they are clear in their terms.

Your lawyer can help you.

Wedding gifts, inheritance and stamp duty

Making a gift close to a wedding day is a trend. In some cultures, the gift is intended as a dowry for the couple to start them off comfortably in their new lives.

Where parents do not intend to make a gift to the couple, but only to their child, this must be clear. Inheritance will not be treated as a matrimonial asset unless:

- it is subsequently used or enjoyed by the couple or their children (while they are still together) as their home, for education, recreation, social or aesthetic purposes; *and*
- their spouse or both of them "substantially improve" the asset during their marriage.

Although real estate is usually the subject of dispute in a marital breakdown, any type of property can be challenged on these grounds.

Making a gift of real estate close to a wedding is often an attraction in the transfer of ownership from parent to child as stamp duty on the transfer need not be paid. This saving comes at a price as the asset will be treated as a "matrimonial home" which your child's spouse will have a claim to. Down the road, your child may lose his/her inheritance.

Should a gift stay clear from the wedding period?

As long as the donor's intentions in making the gift is clear (and recorded), making such a gift will not affect the intentions of the donor.

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Estate Planning Note A: Here's a good place to start (cont'd)

However parents must know that their ability to ensure that a child's spouse will not have a claim is limited as they do not have control over what happens to the gift during the marriage. Parents cannot stop the couple from using a gift of residential property as their home. Neither can they stop "substantial improvements" from being made.

If protecting a child's inheritance from a spouse is critical, placing the asset in a trust presents a solution.

The age of a beneficiary and circumstances

The ownership of certain assets cannot be transferred until its recipient is at least 21 years old. Real estate is an example of this. Until then, a protector of the asset, who can be a guardian or trustee, can be appointed to look after it. Guidelines for a protector can be stipulated.

If the age for ownership to vest lies beyond 21 years of age, this too can be stipulated.

The entitlement for the use and enjoyment of wealth can be a powerful and influential tool in motivating and moulding a beneficiary. For example, the conditions for distribution can be:

- purpose oriented; e.g. the beneficiary can obtain start up money if he lays out a well-thought through business plan.
- achievement based; e.g. the beneficiary can obtain an advancement if s/he wants to do a PhD.
- a reward upon achieving a milestone.

In providing for a mentally and/or physically challenged beneficiary, Estate Planning Note C – Parents of an Adult Child Challenged Mentally and/or Physically contains some ideas.

Your beneficiary's life plans

Quite apart from your plans for your beneficiary, his/her future plans should be considered as they may ultimately derail your best intention.

For example,
Re: your distribution plans for No. 5 Robin Road, your family home:-

- will your beneficiary be migrating? Once his/her Singapore citizenship is renounced, the residential land must be sold within 2 years.
- s/he is no longer a citizen when the distribution under your will or intestate laws is to be made. The transfer of ownership cannot be made. Instead your personal representative or administrator must sell the land within 5 years. Only the sale proceeds can be given to your beneficiary.

If keeping an asset within the family matters, the circumstances and plans of your beneficiary must feature in your plans.

If your gift is not to become a burden, his/her future plans are relevant.

If you are transferring an encumbered asset, the obligations of the encumbrance may not be something your beneficiary would accept. And it could well interfere with his/her personal plans. For example, a debt secured by a mortgage over a gift of real estate would affect the debt to income ratio for the next borrowing endeavour of your beneficiary.

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The role of religion

Depending on your religion, a different set of inheritance laws may apply.

Depending too on the religion of your beneficiary, his/her use and enjoyment of an asset and succession plans could be affected.

Domicile and preferred distribution

Will Singapore be the country you will settle down in during your old age?

The answer would be a factor in deciding your county of domicile, which may be different from the country of your birth, citizenship, residency for work, etc.

Why is this relevant?

For the distribution of your Singapore based non-real estate assets, the law of your domicile will apply.

For your Singapore real estate assets, its distribution will be according to Singapore law. This means that if, for example, you have a valid Singapore will, the distribution of your real estate will be according to its terms.

If not domiciled in Singapore, the distribution of non-real estate assets made in your will can be challenged by third parties on the grounds that it is not in accordance with the laws of your domicile.

For example, many civil law countries have forced heirship laws. These laws will be upheld by the Singapore court even if the distribution is contrary to a Singapore-made will.

If you are a foreigner with assets in Singapore, you may find "Estate Planning Note B - A Foreigner in Singapore" useful.

Your plans and the types of assets

Life insurance policies

A life policy can be a useful and forward-thinking estate planning tool that can offer you versatility. If you have named you nominees under the policy, the insurance monies can be given to your nominees quickly without having to go through probate. Where liquidity cannot wait until probate is obtained, the insurance monies can be used for a myriad of purposes such as:

- settling fully or making the periodic payments for your debts; and
- paying for the day-to-day living expenses of your dependents.

CPF savings

Your CPF nominations must be made directly at the CPF Board, and not through your will.

In the absence of any nomination, the distribution will follow the default mode contained in the Intestate Succession Act. The recipients may not be who you intended.

Where a nomination has been made, the pay-out is fast and smooth. Like insurance monies, CPF monies can give liquidity to your dependents while your will is being proved in court.

Also, your CPF nomination is confidential.

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Estate Planning Note A: Here's a good place to start (cont'd)

Some assets just cannot be split up

It may be their physical characteristics that make it impossible. A good example is land. Its small size or geological impediments may obstruct a fair split.

There may be legal obstacles. For example, the strata title of a flat may not be divided.

Where equality of distribution is key, alternatives for distribution need to be considered.

For example:

- the asset can be sold and the proceeds of sale divided; and
- where the beneficiaries have a wide age gap, give the older party the use and enjoyment of the asset for his/her lifetime, and the younger one ownership after that.

Residential land

The statutory prohibitions against the ownership of residential land in Singapore by non-citizens (mentioned earlier) may influence your choice of beneficiary.

The future plans of your beneficiaries are relevant if the land is one of significance to you and is not to be sold.

If a non-citizen is to inherit, he can only receive the proceeds of a sale.

If citizenship is given up, the beneficiary has 2 years to sell the land.

There is an avenue to seek approval to keep the land, but this creates uncertainty in your plans. Also there are stringent conditions attached to approval such as having the owner occupy the land, the land size not being more than 15,000 square feet or the land not being located in a "good class bungalow" area.

Assets that you cannot give away separately - fixtures

The assets that under law have become part of the real estate it rests on cannot be given away separately. A transfer of ownership of a fixture on its own will fail. Examples of fixtures are:

- heavy machinery
- large art pieces
- chandeliers

If having these assets merge with the real estate is not your intention, your plans should address their careful severance.

Assets which are less obvious

Often missed out are one's rights and entitlements under a contract. Depending on what they are, there can be value which is worth transferring. Whether this can be done would depend on the nature of contract and its contents.

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Estate Planning Note A: Here's a good place to start (cont'd)

Factors that may affect your choice of tools

Protection and peace of mind

If it is important that you have peace and quiet in your silver years, you may want to reduce the assets that you own directly. By transferring the ownership of your most significant (and perhaps sentimental) assets to a trusted third party, you may no longer have to concern yourself with things such as:

- having to second guess the good intentions of your loved ones;
- carrying the burden of ensuring their investment returns; and
- becoming the prey of unscrupulous third parties in times of vulnerability.

A trust can do this for you.

Least exposure to taxes and stamp duty

Some assets are vulnerable to being whittled away by taxes and stamp duty. When, to whom and how they are distributed does matter.

For example:

- where a beneficiary is a US tax resident, proper prior advice on the tax implications is critical.

- the transfer of ownership in real estate is subject to stamp duty. There are avenues to reduce this exposure. For example,

  > a transfer by way of assent to beneficiaries under a will, the Intestate Succession Act or the Muslim Law of Inheritance is free of stamp duty. Transiting real estate through a will make sense.

If you are thinking about acquiring real estate, think about acquiring it:

- at the outset in your beneficiary's name;

- as a joint tenant with your beneficiary. There is no stamp duty when the property is transferred through the right of survivorship; or

- in the name of the trust and have your trustee look after it while your beneficiary lives in it or enjoys the income derived from it.

This Note offers thoughts and ideas. It is recommended that you should have several conversations with your lawyer to work on a bespoke plan for your estate and you.

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Estate Planning Note B: A Foreigner in Singapore

Do you have assets in Singapore?

It can be money in a bank account, shares in a Singapore incorporated company, real estate, etc.

If you do, you should think about what will happen to them if you pass on. If you have your estate plans drawn up, do incorporate your Singapore assets into them.

The legal position

In Singapore, estate planning involves a category of laws broadly referred to as "personal law". The laws vary from country to country and hence the estate-related personal laws in France, for example, are different from Singapore's.

In Singapore, real estate assets are treated differently from all other assets, like the money in a bank account, shares, a car, etc.. Only Singapore laws can apply to the transition of Singapore real estate. If you own real estate, your plans for it will be influenced by these laws. For all other Singapore based assets, it is the law of your domicile that will apply. If Singapore is *not your domicile*, it is conceivable for the laws of 2 countries to apply to the distribution of your Singapore assets. However, if you are domiciled in Singapore, Singapore law will apply to *all* your Singapore assets.

How can the law of your domicile affect the distribution of your Singapore non-real estate assets?

If you have a Singapore will to distribute all your assets, the distribution of your non-real estate assets can be set aside by the Singapore courts if the distribution is challenged by a disgruntled third party because it runs contrary to the estate laws in the country of your domicile. Forced heirship laws that exist in many civil law countries is an example of estate laws in a foreign country that may influence the distribution in your Singapore will. Once the existence and contents of these laws are proved in court, the Singapore court will interpret and apply them to the distribution of assets. To reiterate, the redistribution will affect only your non-real estate assets.

Your domicile is therefore an important consideration.

What is "domicile"?

It is the country that you are most connected with at any point of time. It would be the country which is for all intents and purposes your home. It can be different from your country of birth, citizenship, residency for work, etc. Generally many factors will be considered like the country of residence of your immediate family members, and perhaps even closest friends, the country where you have deep roots within the community, where you spend most time in, etc.. In an era of great mobility, ascertaining domicile can be tricky.

Unless one's domicile is changed, by default one's domicile at birth remains one's domicile. A person acquires the domicile of his father if he is a legitimate child, and that of his mother's otherwise.

If you are planning your domicile so that it falls in with your estate plans, a lawyer should be alongside to help you. It is not easy to change one's domicile. Changing one's citizenship or obtaining permanent residency status alone will not suffice. Clear and unequivocal evidence of intention is needed.

Can you be domiciled in Singapore even without being a citizen or a permanent resident?

Yes, you can, but the facts must unequivocally show that it is. Stating that it is so alone is not enough.

Your estate plans for Singapore real estate

The devices and tools used to transit your real estate will be governed by Singapore law. This can affect your estate plans.

For example:

- stamp duty is imposed on all transfers of ownership. However where it is made by assent to beneficiaries under a will, the Intestate Succession Act or the Muslim Law of Inheritance, it is free from stamp duty;
- you must have the required testamentary capacity to make a valid will under the Wills Act;
- for a trust, the minimum mental capacity threshold is under the Mental Capacity Act;
- if your Singapore will is not valid, or you have not made one, your real estate will be distributed according to the Intestate Succession Act;
- your Singapore will is revoked by your marriage;
- a divorce will not automatically have revoked your existing will; and
- a settlement of the real estate into a trust will not be valid if it has not satisfied the required formalities.

If you are not domiciled in Singapore, should you have a Singapore will for your non-real estate assets?

Having a will makes the distribution of assets fast, smooth and less expensive.

If the distribution is not challenged by third parties, or a third party's challenge is not upheld by the Singapore courts, your Singapore will be enforced according to its terms. This means that your distribution will be carried out.

In the absence of a will, a distribution under the Intestate Succession Act in Singapore *will not apply*. Your assets will be distributed according to the laws of your country of domicile.

If you are domiciled in Singapore, you should think about your distribution plans for *all* your Singapore-based assets.

Singapore law will apply.

Although there are no forced heirship laws in Singapore (save for that under the Administration of Muslim Law Act), you have a statutory obligation to make reasonable provisions for the maintenance of specific categories of persons under the Inheritance (Family Provision) Act. They are:

- your spouse;
- your children who are under 21 years of age;
- your unmarried adult daughter; and
- any child who is disabled.

In drawing up your estate plans for your Singapore wealth, refer to "Estate Planning Note A: Here's a good place to start".

Note: This article is only intended for general reading. Under no circumstances is it to be relied upon in substitution for specific advice on any issue(s) that may arise relating to its subject matter.

Estate Planning Note C: Parents of an Adult Child Challenged Mentally and/or Physically

Every parent worries about the well-being of a child. For the parent of a mentally and/or physically challenged child, the worry can only be more. Who will take care of him/her? Who can be trusted to manage and administer the assets that have been set aside for his/her well-being?

Mental capacity

As one ages, the need to answer these questions and put in place networks and structures for a child becomes more urgent. These are not easy questions. Time to plan, understand and select what is best for your child requires a clear mind. Once the ability to make decisions starts wavering, even the best laid plans become vulnerable to challenge. The grounds would be the parent's failing mental capacity.

The default position – a deputy

Where there is no one to care for a mentally challenged person, upon application, the court can appoint a deputy to do so. The court will decide the powers to be given to the deputy. They tend to be specific and given only on a "need-to" basis. While this offers a degree of oversight and protection by the courts, unnecessary expenses are incurred. Taking care of the child can be expensive and tedious too for a deputy or care-giver who is required to apply to court for more powers when needed.

Without a deputy

A child can be looked after by a care-giver in the absence of a deputy. However the authority for doing so may be challenged by third parties and this is a stumbling block.

A care-giver must always act in the child's best interest. While s/he will not incur any personal liability while acting on behalf of the child, s/he remains exposed to civil liability for loss and damage and criminal liability, resulting from his/her own negligence. This risk can deter many a well-meaning soul.

Plan

Rather than leave things to chance, planning for the care of your child will give you time to create a network of trusted persons to care for your child and play different roles for his/her well-being.

Here are some thoughts:

- The trigger to mobilise your plans must be clear. Will it be your passing or upon the occurrence of an event before that? If it should be upon your loss of mental capacity, then the stage at which this happens must be identified. Will the stage be based on a test/s or the opinion of specific experts?

- Would you want to set the stages at which you will be relieved of certain duties and have someone else take them over, while still retaining oversight?

- To have a system of checks and balances in place, separate the group that is responsible for the care for your child from that which manages and administers the assets to do so. To avoid a stalemate, there should be a third person/entity having a final say.

- A trust can be a useful tool. It can be both a holding structure for the assets for your child while your appointed trustee/s can have oversight of your child's care and well-being. Your trustee/s can be combination of corporate entities (which are regulated by stringent laws and will be there for the entire duration) and individuals whom you trust. They can be advised by a panel of doctors or specialists appointed by you.

- The Special Needs Trust Company Limited (SNTC) is worth exploring if you are minded to take the trust route. The organisation specialises in looking after persons with special needs like dementia, autism, Down Syndrome and other mental disabilities. It offers Case Managers trained in social work to work with your appointed care-givers. It can also offer trustee services to manage and administer the assets that you have set aside for your child, albeit through your will, a nomination for your CPF savings, insurance pay out, etc.. You have the comfort of knowing too that the principal value of the asset placed in a SNTC trust fund that you create for your child is guaranteed by the Singapore Government and that the fees payable to SNTC is 90 to 100 percent subsidised by the Ministry of Social and Family Development. For more information, visit their website at http://www.sntc.org.sg/ or call them at 62789598.

- When unsure about the minimum threshold of assets to leave aside for your child, the Inheritance (Family Provision) Act requires that a parent make reasonable provision for an adult disabled child's maintenance. Where there is sufficient wealth for distribution upon a parent's passing, the amount should last until the disability ceases or for the child's lifetime. This obligation however does not extend to an illegitimate child.

- If you have monies with the CPF Board, you should make a nomination for the distribution of funds to your beneficiaries. For your child with special needs, the Board has a scheme called a "Special Needs Savings Scheme (SNSS) Nomination" that you can apply for. Under the scheme, your special needs child can receive the share of your savings you have bequeathed to him/her *on a monthly basis*. For more information, you can visit the CPF Board at any of its service centres or call them at 1800 227 1188.

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Estate Planning Note D: Mirror Wills and Mutual Wills

Mirror wills

Commonly, married couples make wills that mirror each other. For example, a husband may leave his entire estate to his wife, but if she predeceases him, the estate is to be divided between their children equally. The wife's will mirroring this sees her leaving her entire estate to her husband, but if he predeceases her, the estate is to be divided between their children equally. Significantly, because there is no mutual promise or agreement between the couple, either party can at any time change their will, with or without the knowledge of the other. Also, the survivor of the two can revoke the will and make a new one with different distributions after inheriting everything.

While this gives flexibility to the survivor to address the changing circumstances, especially of the ultimate beneficiaries, it may not accord with the understanding when the mirror wills were made.

Mirror wills, while having their contents identical, can be altered unilaterally and revoked by either party at any time, including by the survivor after inheriting the deceased partner's assets.

This freedom to make distributions in your will as you wish and to revoke your will as you please is fundamental to will making. The mutual will however is the exception.

Mutual wills

Like a mirror will, mutual wills are two separate wills, the contents of which are identical or substantially so. The crucial difference is that the wills are made pursuant to an agreement between the testators not to revoke the will without the consent of the other. For it to be binding, it must be a contract, rather than a mere promise. The usual elements of a contract like offer, intention to create a legal relationship and consideration is necessary. A family agreement may not suffice unless it bears all these elements.

Usually the will itself identifies the agreement and states that the testator is bound by the contents of his/her will and:

- cannot change it without the consent of the other;
- cannot revoke it without the consent of the other; or
- cannot revoke upon the demise of the other.

If one party reneges on the agreement, he/she can be sued for a breach of contract or a breach of trust. Upon the death of one party, a trust arises in favour of the ultimate beneficiaries.

Where the mutual wills distribute real estate, the agreement must be in writing and signed by the parties. This is a statutory requirement under Singapore law: section 6(d) of the Civil Law Act.

Where the mutual wills seek to dispose of jointly owned property, it may be intended that the agreement severs the joint tenancy. If this is not intended, then it must be addressed.

However, the distribution under mutual wills is by no means confined to jointly owned property. One party may inherit property solely owned by the other party, as well as his/her share in jointly held ones.

Where one party revokes the will prior to his/her demise, the other surviving party is no longer bound by his/her will and can alter it. Having received notice of the revocation and having been given the opportunity to change his/her will, s/he cannot challenge the revocation.

Though popular with married couples, the mutual will is a tool that can be used by more than two persons and outside the marital union. Hence siblings, parents and adult children, partners may consider making mutual wills. However because of its binding nature, careful thought and planning is necessary.

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Estate Planning Note E: Jointly Owned Assets

For some, nothing is to be shared unless it belongs to someone else.

If you have put all your money into a joint bank account, it can belong to the other person entirely upon your passing. You probably have several such joint bank accounts, always with the same mandate to allow each holder to operate the account freely. The Bank is able to release its full contents to the surviving holder. This is because the right of survivorship operates to transfer full ownership to a survivor. This is the case too with other jointly owned assets.

Co-owned real estate however allows one to make a choice as to whether the owners will own it as joint tenants (with a right of survivorship) or tenants-in-common, where each owner obtains a specific share. As a tenant-in-common, you can choose who will inherit your share. It need not be your co-owner. Your will will see to the distribution of your share to your beneficiary of choice.

Unless you elect to be tenants-in-common, all jointly owned assets will be held as joint tenants. A surviving owner acquires full ownership.

Ownership

"Ownership" has two aspects to it: legal and beneficial ownership.

Usually both will lie in the same person, but this need not always be the case. For example, a trustee of a trust is legal owner but must manage and administer it for the benefit of persons identified in the trust to be the beneficial owners.

For jointly owned assets and money in a joint bank account, this dual ownership is possible.

Law

The law says that when a person pays for an asset, a resulting trust arises in her/his favour, unless contrary evidence is provided. Thus the payor is the beneficial owner unless it can be proved that s/he intended it as a gift. But all this changes where the recipient is a husband or a wife, a parent or a child. For such persons, there is an immediate presumption that works in favour of the recipient that a gift was intended. To rebut this presumption, the payor, or her/his heirs, must have solid proof that this was not the case.

Intention

The payor's intention is critical when joint owners fall within the special relationship category. To avoid unnecessary misunderstanding and dispute, one should make one's intentions clear to all concerned at the outset when the asset is acquired or the account opened.

For a bank account, it is the Bank and joint account holder who should know your intentions.

The contents of your will can serve as an additional document to corroborate your intention. It is not uncommon for joint owner to stipulate:

- The respective contributions made by each; and
- The shares that are owned by each.

The purpose is to create certainty as to who you intend to benefit.

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