



Get Smart with Property Series!

How to Protect *Assets* in your *Personal Name* Without Triggering Taxes

DOWNLOADABLE E-BOOK



Chan & Naylor

WARNING

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General Overview

How to protect assets in your name without triggering capital gains tax or stamp duty penalties.



Protecting your assets against frivolous creditors is increasingly becoming a concern. It has been quoted that Australia is closely following the trend of USA litigation numbers – where 1 in 3 people in the USA have either sued someone or are being sued by someone – with NSW, Victoria and Queensland only just behind California.

Traditionally people have used trusts to protect their assets. A trust is useful in this regard as the individual does not own the asset; it is owned by the trust. Therefore, if the individual is sued they have no assets to lose. The individual controls the trust but has no ownership.

Typically assets were owned by either a company or trust (normally a discretionary trust or family trust).

The problem with a company is the individual usually is the shareholder so they could lose the shares in a successful lawsuit and therefore the assets. The other problems with a company is that it does not receive the 50% general Capital Gains Tax discount; it is inflexible on who can receive distributions; and if the asset is negatively geared, the individual can not take advantage of the tax credits of the negative gearing.

The use of a discretionary trust gives asset protection and the ability to claim the 50% CGT general discount, but again, it does not give any tax credits to the individual for negatively geared assets. Land tax is also a concern, for example, NSW does not receive a land tax threshold and Victoria only receives a \$25,000 threshold.

Trusts and companies, in the way they are typically used, do not allow an individual to receive the main residence tax concessions or any first home owners concessions, which would apply if the family home is held in the individual's name.

With changing views on asset protection and estate planning, many people are now re-looking at how they own assets and are seeking out strategies that give them asset protection. While most people believe they will never be sued – or if they are sued, they believe they have adequate insurance – the facts suggest a different answer in reality.

This leads people to ask, "How do I now protect my assets, which have been purchased in an individual or company name?" A simple solution is to sell them to a trust, but that is not without a substantial cost. When you sell assets you pay tax on the profits and you would also need to pay stamp duty, which again is a substantial amount. You may also need to refinance if you have debt as the "legal owner" of the asset changes, and if the finance market is tight this refinancing may not be easily completed. So what do you do?

Chan & Naylor have developed four strategies that can assist its clients who want improved asset protection and estate planning, ranging from simple solutions for assets that are low in number or value i.e. the family home and one investment property, to more complex solutions for larger asset bases where an individual wants both asset protection, estate planning and the ability to redirect who receives distributions.

Each of the four strategies do not trigger capital gains tax and in most cases, do not trigger any stamp duty on the underlying assets.

The key to these strategies is, the fundamental notion when being sued is that people want your money, not the bricks and mortar or other physical asset that you have. Therefore, you must protect your equity (net worth), not the actual assets.

1. Equity Shift™

This solution allows an individual to shift the equity as opposed to the asset, from an unsafe environment to a much safer environment. Assume the person has a family home with significant equity (market value less debt) and wishes to purchase an investment property. A properly arranged loan will allow the investment property to be purchased in a property investor trust, while still allowing the individual to claim any negative gearing, and having the debt that would have been allocated to the investment property allocated to the home. The interest on the debt, if structured correctly, is still fully tax deductible as the purpose of the loan is for investment. This leaves no equity on the home and shifts the equity into the property investor trust where it is protected. No CGT or stamp duty on the assets is triggered.

2. Equity Bank Trust™

This trust structure and relevant agreements were developed by Chan & Naylor to assist clients with a more substantial asset base including properties. The EBT takes on the role of a lender and places a second mortgage on your assets, thereby reducing your equity to nil. It is your equity that a lawsuit goes after not the asset, so the protection of your equity (net wealth) is the primary consideration. No CGT or stamp duty on the assets is triggered. Depending on the second mortgage documentation, there may be a stamp duty on the mortgage document, which is a small percentage of what would be the case on the asset.

3. Family Estate Agreement™

A will is essentially the official documenting of your wishes on how your assets are to be distributed upon your death. If you are sued, the will cannot protect your wealth. Normally people pass on their assets via a will but the will does not protect your assets. It only says that the assets will go to someone if they are there at the time of the owner's death. Therefore, if you are successfully sued before you die and you lose your assets, the will is meaningless as there are no assets to pass on.

The Family Estate Agreement is a three-part process that creates a legal binding obligation to move ownership of your assets, and therefore your net wealth, upon your death, to a specially designed trust. This ensures that your assets stay within the family and not to in-laws etc.

If you are sued prior to death, then this contractual obligation is used to protect the assets in that you effectively have passed on the ownership of the assets at the time of the contract. No CGT or stamp duty is triggered on the assets. There may be a small stamp duty on the documentation, depending on the location of the assets as different states apply stamp duty on documentation.

This strategy is more complex than the previous two and is normally used for clients with larger net asset values or more complex assets.

4. Business Restructure Trust™

A Business Restructure Trust is a more complex strategy for those with significant assets, including business assets or the shareholding in a company operating a business. This strategy allows the transfer of assets to a trust without CGT and also maintains the pre-CGT status of any assets. This is a very valuable benefit.

This strategy creates asset protection as the assets are now effectively in a trust. Once in the trust, any income or profits are capable of being directed to other individuals or trusts. Most states, other than Queensland, would have no stamp duty applied.

Appropriate documentation needs to be prepared and executed showing solvency statements and the confirmation that there are no potential litigations pending. The cost of the various strategies must also be considered against the benefits.

5. Main Residence Trust™

As an additional strategy, clients who believe they are in a high litigation risk environment can purchase their family home in a trust and still receive the normal main residence tax benefits, including nil land tax. In some instances, this would incur no additional stamp duty on the property purchase. In some states a second stamp duty may apply but this cost may be offset by the other advantages.

It is critical to note that interest deductions on money you borrow to purchase the property, being your home, would not be deductible as it is considered private/personal expenditure.

Care must be taken in the drafting and execution of these strategies and in particular the relevant claw back provisions of the bankruptcy legislations, which would require a four-year waiting period from the commencement of the strategy until asset protection is fully available. This time period is the window within which a receiver in bankruptcy can go back to unravel any strategy. Appropriate documentation should also be prepared and executed showing solvency statements and the confirmation that there are no potential litigations pending. The cost of the various strategies must also be considered against the benefits.

Not sure which strategy is right for you?

We provide a free 10-15 minute phone consultation with a Senior Partner of Chan & Naylor – they can answer your general questions and discuss what's possible and what's right for you.



**Request a FREE 10-15
minute phone call**

www.chan-naylor.com.au/free-call

Chan & Naylor is Australia's leading property accounting group, ranked in the BRW Top 100 Accounting Firms Australia.

At Chan & Naylor you can count on our knowledge and expertise in the following areas:

- Property
- Small Business
- Asset Protection
- Self Managed Superannuation Funds,
- Taxation
- Wealth Creation
- Estate Planning

Our motto is:

“To help our clients increase and protect their net worth from generation to generation”

If you want to arrange a specific consultation to discuss any of the strategies please contact Chan & Naylor via www.chan-naylor.com.au or on **1300 250 122** where you will be able to arrange a suitable time to meet with one of our team.

