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### **HOLD ON TO YOUR ASSETS ... through death, divorce or financial ruin – HOW TO HOLD ON TO WHAT YOU'VE GOT By Gayle Bryant**

#### COVER STORY

Making your fortune is not enough, you need to ensure that you can keep it, writes Gayle Bryant

WHILE it can take many years to build assets, unless steps are taken to protect them, they can be lost very quickly.

Getting sued, going bankrupt or getting divorced are all realities of modern life. Any of these events can have a serious impact on assets.

Solutions-focused investors should look for structures to manage and protect assets, but choosing the most appropriate ones will depend on your individual circumstances.

Senior partner at The Argyle Partnership **Peter Bobbin** says that wealth is not only about making it -- but also working out how to keep it.

“Just making it is no longer enough,” Bobbin says. “You need to secure it for retirement and you need a clear understanding of the risks that can come from creditors -- especially if you are a professional or business person -- but also from relationship breakdowns,” he says.

Bobbin says assets can be held in a variety of ways, either jointly, individually, in a trust or company, or in any mix of these.

“The single most practical way to protect your assets is to put them in the name of a non-exposed spouse,” he says.

“You will often find the family home will be in the name of a spouse.

“Trusts are the second most common structure because they can hold investments and the at-risk person can exert day-to-day control but not ownership.”

Family discretionary trusts offer discretion with regard to where income is distributed and hence are very tax efficient. “Trusts are also useful from an estate-planning point of view if there is a fear that an ex-spouse may make a claim.

“Trusts survive and the assets aren't owned. Therefore they are outside the claims of a deceased's estate.

“Given the high number of Australia's blended family relationships, this is pertinent for today.”

Head of technical services with Deutsche Bank Asset Management Peter Haggstrom warns that trusts have limitations.

“If you have been found to be negligent, for example, you may need to use the assets in your trust to pay your legal fees, Haggstrom says. “Trusts have their limits and people need to know this.”

Superannuation is the next most common structure, largely because the Government has initiated specific bankruptcy protection that states superannuation and life insurance up to a

person's pension reasonable benefit limit (RBL) cannot be taken away by a trustee of bankruptcy.

But here, too, there are no guarantees.

``The troubling aspect of superannuation is that few nominations about where the proceeds are to go are binding," Bobbin says.

``Trustees are still able to make the decision about where the proceeds are directed and this can be bad for the deceased -- as they don't have certainty -- and bad for the beneficiaries, as they may not receive the superannuation money."

Where people have fears about their superannuation being challenged, Bobbin says, they should transfer their funds into a binding superannuation fund (see story overpage) or set up a self-managed super fund.

He warns, however, that if someone is moving assets with an intention to defeat creditors, it will fail. He refers to a particular case -- the Cummins case -- to illustrate this.

Sydney barrister John Cummins filed for bankruptcy in December 2000.

He had not lodged any tax returns between 1955 and 2000 and owed the Australian Taxation Office nearly \$1 million.

In 1987, he transferred half of his home -- in Sydney's Hunters Hill -- to his wife, and his barrister's rooms in Wentworth Chambers to a family trust. Then, last December, a Federal Court judge concluded that it was possible the transfers were undertaken to defeat creditors, despite 13 years having passed between the transfers and bankruptcy.

``If you undertake the most basic form of asset protection, which is usually to transfer the family home into your spouse's name, and if the transfer was found to be to avoid creditors, then it is a waste of time," Bobbin says.

``It can also then taint much of what else you have done to protect your assets."

A director of financial planning firm Guest McLeod, Tim Rossell, says one of the main issues with wealth management is anticipating future liability and therefore to put assets in the most appropriate person's or entity's name.

``A simple example is for a professional person in a litigious industry to put their family house in the spouse's name," Rossell says.

``We find that many people who in the past haven't been concerned about litigation, are becoming more concerned as Australia becomes a more litigious society.

``These people may have previously had their house in joint names or their own but are now going through the pain of paying stamp duty to transfer it into their spouse's."

Another way to manage your wealth is to set up a testamentary trust.

The testamentary trust is provided for in a will and comes into existence upon the benefactor's death.

Such trusts generally distribute to beneficiaries the income that is produced by trust-held assets. The assets are protected because no individual legally owns them.

``Parents may die and leave adult children money through their estate," Rossell says.

``If the money was simply left to the children, then it becomes an asset of theirs. If it is left to them through a testamentary trust then generally the creditors can't get it."

The head of technical services at Ipac Securities, Colin Lewis, says if you have not set up a testamentary trust when you die, an estate-proceeds trust can be set up, which effectively

has the same effect as a testamentary trust.

`` However, it has to be set up within three years of your death," Lewis says. Rossell says assets can also be put into a company structure but while this might be good for asset protection, from a tax point of view it can be ineffective.

`` At some point you might want the money out of the company and you would have all the associated tax implications of this process," he says.

`` Also, assets held in a company don't qualify for the concessional capital gains tax rate." Another issue to be aware of is that although a professional person may have done the right thing and put an asset in the non-working spouse's name, what happens if that spouse dies?

`` Usually the assets automatically revert back to into the spouse's name and they may find they have to pay stamp duty to transfer them," Rossell says.

Other options with property assets are to consider either having a ``tenants in common" or ``joint tenancy" arrangement. Ipac's Lewis says from an estate-planning point of view, joint tenancy is good because the asset does not form part of the estate: it goes automatically to the other person.

`` Tenants in common is good for asset protection while you are alive," he says.

`` For example, if you are a professional and a sole practitioner your creditors can attack your assets.

`` However, if you have a tenants-in-common arrangement, creditors can only attack your share of your property.

`` If you own your house through a joint tenancy arrangement, creditors can attack 100 per cent of the property, even if you own it as husband and wife."

Lewis's final advice is to set up appropriate structures early on in your career because of bankruptcy clawback provisions.

`` Many young people go into business without thinking of issues that may affect them later in life if they become a director or partner of a firm," he says.

`` It is far better to structure the assets properly early on."  
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**Caption:** Secure it: Understand the risks, says Peter Bobbin  
Devil in detail: Peter Haggstrom warns that trusts have limitations

**Illus:** Photo

**Column:** Wealth

**Section:** FINANCE

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