Estate Planning

An effective estate plan can enable you to protect and support your family, secure the wealth you have built up and provide directions on how your wishes are to be carried out upon your death or time of incapacity. Estate planning will only be effective if it is carried out in a timely manner and by appropriately qualified professionals. A solicitor can help you make decisions about what you want to be done with your estate and prepare your Will. There are also beneficial ways to structure your affairs under your Will - a tax professional can help guide you through these decisions.

A Will is the first step in ensuring your estate assets reach your intended beneficiaries, in a tax-effective and timely manner after your death. If you do not have a valid Will when you die, you will be intestate. This means that instead of you determining who will receive your estate, it will be divided up following a formula set out in legislation. There is different legislation in each state/territory of Australia. This can lead to unexpected and unintended results with lengthy delays and high costs.

It is essential to ensure that your Will:

- Nominates executors (and successor executors) for your estate who are likely to survive you, and who clearly understand your wishes;
- Nominates beneficiaries in relation to the whole or part of your estate, and nominates second choice beneficiaries, should your first choice predecease you;
- Adequately provides for your dependents;
- Bequeaths monetary value or a percentage of your estate rather than a specific asset, as there is the risk that an asset may not be in existence at the time of distribution of the estate;
- Nominates assets to be held in trust for beneficiaries under 18 years of age (e.g. you can provide funds for your children or grandchildren education); and
- Is reviewed and updated regularly, particularly if you have any significant changes such as a new child, divorce, marriage or the acquisition of a new sizable asset.

Advantages of establishing a Will include:

- You can choose who you wish to inherit your assets, rather than this decision being made by the laws of intestacy;
- You can choose to pass certain belongings to specific individuals;
- Timely payment made to your chosen beneficiaries;
- You can structure your Will to ensure that your family's wealth is protected against adverse outside influences - in some cases, your family may also need protecting from themselves;
- Ensure that items of sentimental value are retained in the family;
- If you are an unmarried couple, you can ensure your partner is provided for;
- You will have peace of mind that your estate will be distributed as per your wishes, and you can ensure that the people you choose will administer your estate; and
- It will also make it easier for your family to deal with your affairs when you are gone.

What assets are covered by your Will?

Estate assets are generally those assets which are held personally in your name. Only these assets form your estate upon your death, and the distribution of these assets is directed by your Will.

Estate assets may consist of:

- Real property;
- Cash investments;
- Shares;
- Personal chattels;
- Loans made to the trustee of a trust;
- Income or capital allocated to you from a trust;

- Interests in assets held as tenants in common (see below); or
- Shares held in a company.

What happens to the following types of assets upon death?

Tenants in common assets

Tenants in common each have legal ownership of a designated portion of an asset. Upon death, each person's share of the asset is dealt with in accordance with their Will.

Non-estate assets

Non-estate assets are those you control but do not own (or wholly own). If another party has an inherent interest or authority in the asset, it is a non-estate asset. The succession of these assets must be individually addressed by your estate plan (and can usually be allocated to your estate if you wish) to ensure smooth and prudent distribution. Non-estate assets include:

- Assets held with other parties as joint tenants;
- Assets held in trust;
- Unallocated assets owned by a family trust;
- Super benefits;
- Life insurance proceeds; or
- Account-based annuities or pensions that have a reversionary beneficiary.

Joint tenancy assets

Joint tenants own an asset mutually. This means that upon the death of one of the joint tenants, the other would automatically become the owner of the entire portion of the asset as if they had owned the whole asset from inception.

Super assets

Super is dealt with in accordance with the Super Industry Supervision Act (SISA). Unless a current binding death nomination exists, your super benefits will be distributed at the discretion of the trustee of the fund per the trust deed and relevant legislation. Binding death nominations must be updated every three years to remain valid. Non-lapsing binding nominations are now widely allowable by super trust deeds.

Life insurance proceeds

The party which receives the proceeds of a life insurance policy is the owner of the policy, rather than the life insured. Nominations for payment to a beneficiary or the estate can also be made. This is typically made by the owner (and payer) of the insurance policy.

The role of executors

An executor is a person or trustee you choose to carry out the terms of your Will. Your executor is responsible for the entire administration of your estate until the final distribution of the assets is made to your beneficiaries. Careful consideration is required when appointing the executor. It is recommended you discuss the appointment with that person before making the Will. In addition to estate beneficiaries, executors may also be your solicitor, accountant or a public trustee.

It may also be helpful to prepare an executors dossier which can be kept with your Will to make administering your estate easier for your executors. An executors dossier contains essential information about your assets such as purchase details, additions, capital gains, the location of title deeds and any other relevant information.

Guardianship of children

The appointment of a guardian is usually included in the Will as a safeguard in the event that both parents die before the children are 18 years old.

The appointment of a guardian also serves to avoid the possibility of disputes between members of the family. The court has an overriding discretion to appoint or remove a guardian.

It is the guardian's responsibility to make important life decisions on behalf of the children. The guardian must ensure the children are adequately housed, clothed and educated. The guardianship of minor children is a responsible task. The Will-maker should think carefully about the appointment of a guardian and attempt to appoint one or more persons who are prepared to take on the responsibility and hold similar social and cultural views of the Will-maker.

Conflicts may arise between an executor and a guardian as to how a minor beneficiary's entitlements are to be used for a beneficiary's ongoing maintenance, education advancement or benefit. To avoid such conflicts, these issues can be catered for within the Will.

Binding death benefit nominations

Binding death benefit nominations allow you to nominate who will receive your super benefits in the event of your death and ensures the trustee is legally bound by your wishes.

You can enable a lapsing or non-lapsing binding nominations. The advantage of non-lapsing is that you do not have to update it every three years for it to remain valid as you do for the lapsing nominations. If your circumstances or intentions change, you will need to make a new nomination to reflect this otherwise the outdated nomination may be upheld by the trustee of your fund.

Generally, without a binding death benefit nomination in place, the trustee of a fund must follow trust deed rules when deciding who to pay the benefits. In making a decision, the trustee will be guided by any non-binding nominations as well as many other factors including your relationship with your dependants, their level of dependency or inter-dependency on you, and the intentions in your Will. The decision may not always result in an equitable distribution of your super benefit or one that satisfies your dependants.

Reversionary pensions

Upon the death of the super pension member, you can elect for your super pension to continue to be paid to a nominated reversionary beneficiary.

A reversionary pension is similar to a joint tenancy in the family home where the asset (or in this case the pension) automatically transfers upon death. The provisions relating to reversionary pensions will be governed by the super fund trust deed and the pension agreement (if any).

Limitations of reversionary pensions:

- Reversionary pensions cannot be paid to legal personal representatives or adult children;
- You can nominate only one reversionary beneficiary to receive the reversionary pension which does not suit multiple beneficiaries such as a number of minor children;
- A reversionary nomination must be made for each pension; it is generally not possible to make a holistic nomination to cover all pensions and reversionary nominations as it will not cover accumulation interests;
- Any nomination of the reversionary will be lost if the pension is commuted; and
- Reversionary pensions will count towards the transfer balance cap of the recipient - to avoid breaching the cap unintentionally, the pension will not be added to the beneficiaries transfer balance account until 12 months post the fund member's death. This gives adequate time to roll back a portion to super or take the pension proceeds as a lump sum.

Advantages of reversionary pensions:

- A member can deal with multiple pension interests separately;

- Any life insurance proceeds added to a reversionary pension will retain the tax components of the pension (rather than being added to the taxable component), creating a tax advantage of a reversionary pension over non-reversionary death benefits; and
- Provides an ongoing income stream for a surviving dependant can be more appropriate to assist in managing their financial affairs.

Powers of attorney (POA)

A POA is a legal document that gives another person the authority to act on your behalf. The person nominated as your POA must:

- Be over the age of 18;
- Be of sound mind at the time of the grant and capable of fully understanding the nature and purpose of the document they are signing; and
- Not do anything illegal while operating under a POA.

Your nominated POA is unable to prepare a Will on your behalf or transfer POA to someone else unless specified.

Depending on the law prevailing in a particular state or territory, there are generally four types of POA.

General power of attorney

A general POA is where the donor gives another person the authority to act on a specific transaction for a limited time. For example, you can appoint another person to manage your finances while you are on holidays overseas. In the event you become mentally unable to manage your own affairs, the authority given to the donor ceases immediately. Unless there is a good reason for preparing a general POA, you should consider preparing an enduring POA.

Enduring power of attorney (financial)

An enduring POA is similar to a general POA except that it can continue even if you become mentally incapacitated (lose mental capacity). An enduring POA is an essential document, particularly for older people who are finding it increasingly difficult to tend to their personal affairs. It is therefore crucial that you only grant this power to someone you can trust.

Enduring power of attorney (medical treatment)

This enduring POA (medical treatment) is limited to medical decisions. It does not, however, extend to special health decisions which include; sterilisation, abortion, donation of body tissue, some psychiatric care and euthanasia.

Enduring power of guardianship

In certain states (e.g. Victoria), enduring power of guardianship can be prepared. An enduring power of guardianship enables a donor to appoint an attorney to make lifestyle decisions (such as where the donor lives and works) in the event of the donor losing capacity in the future. The donor can express preferences in relation to lifestyle decisions in the document.

If you do not appoint an Enduring POA and are no longer able to manage your financial affairs, provision is made in each Australian state where a financial manager can be appointed. Unfortunately, the appointee may not necessarily be who you would have chosen, which may cause considerable conflict and anguish among family and friends.

Advantages of establishing a POA include:

- Your PoA can make financial and legal decisions for you if you lose the capacity to make your own decisions;
- It is a relatively easy and inexpensive method of financial management and
- Provides continuity of management of your financial affairs, thereby minimising immediate financial hardship if your decision-making ability is suddenly impaired.

The specific risks associated with establishing a POA include:

- The person you entrust as your POA is not trustworthy - make sure you nominate people that you know are trustworthy, if possible, financially astute, and likely to be around when you need them;
- If the donor wishes to revoke the authority given under a POA, the donor must have the capacity to do so;
- In the instance that the donor wishes to revoke the authority given under the POA and the original POA is destroyed, care needs to be exercised in this instance to retrieve all known copies of the document; and
- In the instance the donor wishes to revoke the authority given under a POA by preparing a formal revocation of the POA, then a copy of the revocation document should be registered in those states/territories where registration is applicable - all copies of a POA should also be retrieved from the attorney.

Testamentary trusts

A testamentary trust is a trust established by a Will that comes into effect upon the death of the Will maker. The most common type of testamentary trust is a discretionary Will trust. It describes a form of ownership of asset whereby a trustee holds assets on trust for the benefit of one or more beneficiaries. This means that the assets pass to a trustee who holds the estate assets on trust for the benefit of the beneficiary and a category of other discretionary beneficiaries rather than direct to a beneficiary in the situation of a Will. In order for the beneficiary to have the option of a discretionary Will trust, the Will must specifically provide for the establishment upon the death of the Will maker.

The Will usually sets out who is to have ultimate control of each discretionary Will trust established. The trust is managed by the trustee, and all decisions regarding the management of the trust are made by the trustee. Effective control of the trust rests with the person or persons who have the power to remove and appoint the trustee. This person is usually called the appointor or guardian. The power to appoint or remove a trustee is referred to as the power of appointment.

Typically, one of the beneficiaries of the estate is usually the trustee and holds the power of appointment. However, the trustee and the beneficiary can be different people. Benefit and control of a discretionary Will trust may be separated where the Will maker does not want the beneficiary to have complete control of the trust. This is often the case where the beneficiary is suffering from a legal disability or is likely to be unable to appropriately manage the trust.

In the absence of any specific restrictions imposed by the Will maker on the beneficiary, a beneficiary generally has the choice of whether to invoke the discretionary Will trust upon the Will makers death. The executor usually makes this decision in consultation with the relevant beneficiary. Typically, the default position is to establish this trust. If a beneficiary elects to establish the discretionary Will trust, the beneficiary can subsequently end the trust and take the assets of the trust personally. However, careful planning and advice should be obtained prior to the vesting of a trust that has been established.

The beneficiaries of an estate who are given the option of taking their entitlement as beneficiaries of a discretionary Will trust are usually termed as the primary beneficiaries. In addition to the primary beneficiaries of the trust, the Will provides for a class of additional discretionary beneficiaries who can receive income and capital from the discretionary Will trust. The decision to distribute income and capital to the discretionary beneficiaries rests with the trustee who is usually the primary beneficiary, or such other person or entity nominated by the primary beneficiary. To maximise flexibility, the class of discretionary beneficiaries should be drafted widely and should include immediate family and other relatives of the primary beneficiary. In addition, other potential discretionary beneficiaries such as associated trust, charitable organisations and related companies should also be included.

Once established, a discretionary Will trust has a maximum life span of 80 years. Therefore, the Will should be drafted to allow the trustee the discretion to end the trust any time prior to the expiration of the 80-year period.

Where the Will maker is leaving their estate to more than one primary beneficiary, the Will should make provision for each beneficiary to take their entitlement as the trustee and beneficiary of a separate trust. This avoids problems that may arise where on discretionary Will trust is jointly controlled by siblings and enables each beneficiary to deal with their respective entitlements in different ways.

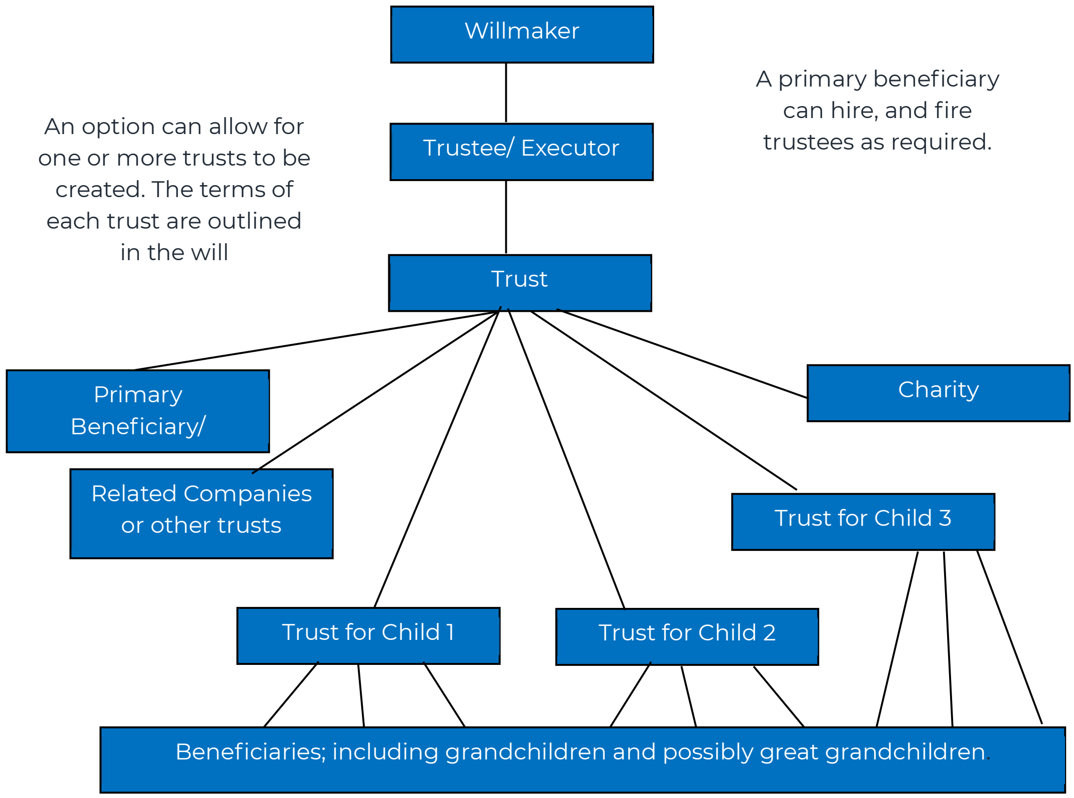
For example, one beneficiary may choose to leave the discretionary Will trust in place, while another may terminate the trust and take the entitlement personally, while a third primary beneficiary may elect not to invoke the trust at all. No consultation is required between the beneficiaries.

As a discretionary Will trust has the capacity to run for an 80-year period, it will generally outlive the primary beneficiary. It is, therefore, necessary for the primary beneficiary as part of their estate planning, to provide for the succession of control the discretionary Will trust. This can be provided for in the primary beneficiaries Will or by a separate deed prepared during the lifetime of the primary beneficiary.

The advantages of testamentary trusts include:

- The ability to protect assets from potential creditors and unforeseen relationship breakdowns. For example, should your spouse or child form a relationship in the future which breaks down over time, if you have left assets to them in the form of a trust, the partner cannot directly access these assets. An inheritance held within a testamentary trust is less likely to be the subject of a family court order in the case of a marriage breakup. It may be regarded as a financial resource and have some effect on the terms of a property settlement, but this is a preferable outcome to the property being at the disposal of a family court order;
- The ability to share assets with family members with reduced transfer costs and ease of access;
- Income tax minimisation, particularly for minor children who are taxed at adult rates. The trustee of a non-fixed trust is able to stream the income to specific beneficiaries;
- The trust is able to earn investment and business income;
- Flexibility - crisis provisions can be included in the Will to trigger alternatives where a beneficiary becomes incapacitated, bankrupt or experiences a family breakdown;
- The ability to allow you to rule from the grave by setting guidelines, such as age, education for children and grandchildren, income streams versus lump sums for spendthrift individuals etc.;
- Releasing certain beneficiaries from asset management responsibilities (e.g. minors, the elderly, the incapacitated or the financially unsophisticated or gullible). The flexibility of a testamentary trust, especially if combined with a ‘memorandum of wishes’ as to how the trust should be administered, may be an appropriate arrangement; and
- The trustee has total flexibility to invest in whatever assets they wish (subject to the trust deed) and can draw on capital or income at any time.

This diagram demonstrates an example of how a testamentary trust may be set up to distribute estate assets for current and future generations:



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