



Estate Planning

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ESTATE PLANNING

What is estate planning?

Estate planning is a way of ensuring that a person's estate is passed onto their beneficiaries in the most financially efficient and tax effective way possible.

A successful estate plan is achieved by arranging the assets and circumstances of the client during their lifetime, so as to manage and preserve their wealth and ensure that it is distributed on their death in a way that complements their overall financial plan.

Estate planning involves **all the assets a person owns or controls**. It involves more than just a Will. A Will only governs those assets that form part of the deceased's estate (known as "estate assets"). However, there are many other types of assets that may not, or would not, form part of the deceased's estate (known as "non-estate assets"). These assets must be transferred by means other than a Will and include the following:

Assets owned as joint tenants

Life insurance proceeds (where the policy owner is someone other than the deceased, or where the proceeds are paid to a nominated beneficiary)

Superannuation death benefits (that are not paid to the deceased's estate)

Trust assets

Company assets; and

Partnership assets (held as joint tenants)

It is important that you understand the common types of estate and non-estate assets and how ownership or control of these assets is transferred upon death. These are outlined below for your information.

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1. Wills

What is a Will?

A will is a legal document that specifies how you want your assets to be distributed after your death. It also allows you to nominate an Executor who will be responsible for making sure that your wishes are carried out.

A Will can only dispose of assets to which you are entitled. Assets that can be disposed of by a Will include:

- Property held as tenants in common
- Assets owned by you personally
- Life insurance proceeds (where the owner of the policy was the deceased and the policy does not make provision for a nominated beneficiary)
- Superannuation benefits when paid into the deceased's estate

It is important that the Will be kept up-to-date to reflect your current wishes. This will ensure that your assets are distributed to the right people at the right time.

Who can make a Will?

The person making the Will is known as the testator. To make a Will the testator must have attained 18 years of age and be of sound mind, memory and understanding.

There are strict legal requirements applicable to the making of a Will. Anyone wishing to make or change a Will should therefore seek legal advice.

Why make a Will?

A Will ensures that your wishes are carried out and that your dependants, assets and finances are protected. If a person dies intestate (that is, without a valid Will), the relevant State legislation will dictate the exact manner in which the estate is to be administered.

Testamentary Trusts

The testator can use a testamentary trust to protect and maximize the assets of the estate. A testamentary trust is established by the Will and comes into existence upon the death of the testator. It is commonly used to maximize tax effectiveness and to protect estate assets from creditors, family law actions and spendthrift beneficiaries.

2. Joint Assets

Assets owned under a joint tenancy cannot be disposed of by Will. Upon the death of a joint tenant the asset passes automatically to the surviving tenant. In contrast, assets owned as tenants in common can be disposed of by Will.

3. Life Insurance Proceeds

Proceeds of life insurance policies may either be an estate asset or a non-estate asset, depending on who owns the policy.

If you take out a policy on your own life, you effectively own the policy and upon your death, the proceeds of the policy will be paid to your estate and distributed in accordance with the terms of your Will, or to any beneficiaries you may have nominated within the policy.

If you take out a policy on your own life, but nominate another person (including a superannuation fund) to benefit from the policy, the nominated person effectively owns the policy, and upon your death, the proceeds will be paid directly to the nominated person and not to your estate.

4. Superannuation Death Benefits

Superannuation is fast becoming a valuable asset to many Australians. It is therefore important that a member carefully plan how they wish their superannuation to be distributed upon their death. This will ensure that it is distributed in the most tax-effective manner possible.

Superannuation benefits are not owned by the member and do not automatically form part of his or her estate upon death.

Until recently, the trustee of a superannuation fund has had absolute discretion as to whom the deceased's superannuation benefits were paid. The trustee could distribute the member's benefits to his or her estate, or instead pay it directly to the member's dependants.

Binding death nominations have recently been introduced to remove trustee discretion regarding payment of superannuation death benefits. Even though binding death nominations are not mandatory, a trustee of the fund must abide by the nomination as long as it has not expired, has been properly executed, the beneficiaries nominated are "eligible dependants" of the deceased member, and the allocation to each beneficiary is clear.

In the absence of a binding death nomination the trustee continues to have absolute discretion.

It is important to note that a binding death nomination will automatically revoke after 3 years from the date of execution, unless renewed.

It is also important to be aware that married couples are now able to make binding agreements as to what proportion of their total superannuation is to go to each person in the event of divorce. If the couple are unable to agree on the split themselves, the Family Court has been granted the power to split the value of the superannuation as part of the property settlement.

5. Trust Assets

What is a trust?

A trust is an obligation, recognised by law, binding a person (the trustee) to legally hold and deal with property for the benefit of another person (the beneficiary). The obligation is usually in writing in the form of a deed or a Will.

The trust deed is a legal document that sets out the terms and conditions of the trust. It governs how the trust is to be managed.

How can a trust be used in estate planning?

A trust is a useful vehicle for estate planning purposes as it allows for the separation of the legal and beneficial ownership of the assets. The legal ownership resides with the trustee and the beneficial ownership resides with the beneficiary. It therefore follows that a person can:

- Transfer assets and income out of their name while still keeping control of the assets and income;
- Minimize income tax through income splitting; and
- Protect assets in the event of bankruptcy and marital breakdown.

Types of trusts?

A trust can be created either during a person's lifetime or upon death.

A **testamentary trust** is established under a Will and operates on the death of the testator.

A **discretionary (family) trust** is a form of trust that is created during one's lifetime. The trustee has a discretionary power to selectively allocate income and capital amongst the beneficiaries. This type of trust also provides flexibility in who will have control over the trust assets and provides protection from creditors and family court litigation.

In a **fixed trust** the trustee has no discretion as to the manner in which the beneficiaries will receive their distributions. However unlike a family trust, the beneficiaries are entitled to enforce their interest in the trust property. A unit trust is a form of fixed trust.

Issues in establishing a trust?

Trusts are complex structures that require a thorough understanding of the accounting and legal requirements that govern them. The costs involved in establishing and maintaining a trust can therefore be quite considerable and can sometimes outweigh the actual benefits.

Furthermore, all trust income and capital gains must be distributed annually to the beneficiaries. Otherwise the trustee will pay tax on those amounts at the top marginal tax rate of 47%

6. Company Assets

A company is a separate legal entity distinct from its shareholders. Consequently, upon the death of a shareholder, any assets owned by the company will not form part of the shareholder's estate. The deceased shareholder's shares in the company will, however, form part of the estate.

7. Partnership Assets

On the death of a partner the partnership is dissolved and the assets are distributed in accordance with the respective ownership of the assets (or in accordance with an agreement between the partners).

A partnership cannot legally hold assets in its own name. Assets are therefore either owned as tenants in common or as joint tenants.

Accordingly, where an asset is owned by partners as tenants in common, the interest of the deceased partner becomes an estate asset and subject to the terms of the Will. In contrast, where the asset is owned by partners as joint tenants, the asset will pass to the surviving partner and will not form part of the estate.

There are still a number of other important issues that one must consider during their lifetime.

Everyone likes to be in control of the decisions they make. However sometimes events happen that mean we lose the amount of control we previously had. These can be simple problems such as being overseas and being unable to attend to your financial affairs, or serious problems such as losing the ability to manage your own affairs as a result of an accident or illness.

Arrangements can be put in place to enable another person to make these decisions on your behalf. Such arrangements are addressed below and include the following:

- Enduring Powers of Attorney
- Advance Health Directives; and
- Funeral Plans

Enduring Powers of Attorney

What is an enduring power of attorney?

An enduring power of attorney is a formal agreement whereby a person (the principal) gives another person (the attorney) the power to make decisions on his/her behalf. For the power to be valid the principal must have legal and mental capacity at the time of executing the agreement.

What decisions can an attorney make?

There are some circumstances in which you may be unable to make decisions about matters that concern you. An enduring power of attorney allows you to appoint someone to make financial and/or personal/health decisions for you, should there ever be a time when you are not able to make decisions for yourself.

Examples of personal/health matters include decisions about where and with whom you live, whether you work or undertake education or training, day-to-day issues like diet and dress, and whether to consent, refuse to consent or withdraw consent to particular types of health care for you, such as an operation.

Examples of financial matters include the payment of bills, taxation, investments, financial planning, legal actions and contractual issues.

Can you limit the powers of an attorney?

The powers of an attorney can be limited. You can specify decisions that you do not want your attorney to make. You can also include particular instructions about what you would like your attorney to do. Your attorney must act in accordance with your instructions.

When does the attorney's power begin?

With personal/health matters, your attorney's power to make decisions does not begin until (if ever) you are incapable of understanding the nature and foreseeing the effects of a decision, and of communicating that decision.

With financial matters, you may nominate when your attorney's power is to begin. If you do not name a date or an occasion, it begins immediately. However, if you lose the capacity to make such decisions before the date or occasion you name, the power begins at that point.

When does the attorney's power cease?

The power ceases to be effective if it is revoked or upon the death of the principal.

Rules for Special Health Matters

An enduring power of attorney can provide your attorney with the power to make health care decisions on your behalf. However this power does not extend to:

- matters of 'special health', or
- medical conditions that require the execution of an Advance Health Directive.

Matters of 'special health' include decisions about the following:

- Donation of body tissue
- Sterilisation

- Pregnancy termination
- Research or experimental health care; and
- Certain psychiatric or other health care as specified in the regulations

Important: The requirements as to form, content and execution may vary between each State and Territory of Australia. We therefore recommend that you seek legal advice as to the relevant legislation and its application to your personal circumstances.

Advance Health Directives

An Advance Health Directive is a legal document that allows you to give directions about your future health care with respect to particular medical conditions and the types of treatment that you do or do not wish to receive.

The types of medical conditions covered by the directive must be life threatening in nature and include conditions where the principal:

- Has a terminal illness;
- Is in a persistent vegetative state; or
- Is permanently unconscious

Provided that the medical condition is life threatening in nature, you can direct that your attorney withdraw or withhold life sustaining medical treatment. These instructions will override any other powers of your attorney, general or specific.

The directive only comes into affect once you have lost the capacity to make your health care decisions, such as being in a coma.

Important: The requirements as to form, content and execution may vary between each State and Territory of Australia. We therefore recommend that you seek legal advice as to the relevant legislation and its application to your personal circumstances.

Funeral Plans

A funeral bond allows you to set aside money to help meet your funeral expenses. At the time of your death the money saved can be paid to your estate or to a funeral director as part of a pre-arranged funeral plan.

An investment of up to \$5,000 per person in a funeral bond will be excluded from the Centrelink assets and income tests.

Conclusion

The estate planning process is a key component of the overall financial plan. However, for estate planning to be effective it must be addressed well before death. This will ensure that there are sufficient assets on your death to be distributed to the appropriate people at the appropriate time and in the appropriate manner, as chosen by you. Your estate planning needs should be reviewed regularly to ensure that your plan accurately reflects your current circumstances.