

Understanding estate planning

Client Fact Sheet - July 2012



It is important to understand the magnitude of estate planning. Estate planning includes preparing a Will for when you die, but also other documents to ensure your affairs are in order when you die or are unable to look after them yourself.

Wills

A will is a critical aspect of any estate plan. Although most people understand how a Will operates, not everyone has one, and many Wills are not up to date.

A will is a legally binding document that allows you to state how you want your assets, including financial and personal effects, to be distributed when you die.

A will can help to diffuse potential disagreements that may arise following your death. Surviving family members/associates may dispute the ownership and distribution of assets. Although a Will can be contested, your final wishes will be known and this may resolve any disagreements that may arise.

When preparing your Will, you will need to ensure it is legally binding. We recommend that you consult a lawyer or professional trustee company. Some questions you should ask or consider include:

- What happens if you and your partner die simultaneously?
- Who will be the legal guardian of your children if you die?
- Do you want any assets to be given as specific items, or are you happy for everything to be sold and the cash distributed?
- Have you thought that your assets may have different values when you die or may not be available?
- Did you know that capital gains tax may apply on the sale of certain assets?
- Have you considered that assets like superannuation and joint assets do not form a part of your estate and may impact on how equally your estate is divided?
- Who will be the executor of your Will?

The executor is responsible for carrying out your wishes as expressed in your Will. The person you select must be capable of not only performing the role but also working with competent specialists. The administration of an estate can be time consuming and is likely to need investment, taxation, accounting and legal advice.

Assets not included in your Will

The distribution of assets can usually be determined by a Will, however there are a few exceptions:

- Jointly owned assets (held in joint tenancy) are passed directly to the surviving owner(s)
- Superannuation benefits may pass directly to an individual under a binding nomination or via trustee discretion
- Income streams (such as account-based pensions) may continue to a reversionary pensioner or pass directly to an individual under a binding nomination or via trustee discretion, or
- Insurance proceeds may pass directly to a nominated beneficiary.

Joint tenancy

Assets held in joint tenancy cannot be disposed of through a Will – a common example is the family home. However, many investment funds and other assets can also be held in joint tenancy. When one owner dies in a joint tenancy, the asset passes automatically to the surviving owner(s).

In contrast, assets held as tenants-in-common are considered assets of your estate. It is possible to hold property as tenants-in-common in unequal shares.

Superannuation

Generally, superannuation does not form a part of your estate, unless you specifically nominate that your death benefit is paid to your estate. The proceeds of your superannuation would generally be paid to your beneficiaries under your binding nomination or at the direction of the superannuation fund trustee with the guidance of your non-binding nomination. To ensure your death benefit is paid to the correct person, you must keep your binding nomination up to date and valid. These must usually be updated with your superannuation fund every three years.

What happens if you die without a Will?

When you die without a Will, the Will cannot be found, or the Will is invalid, a person dies intestate.

If you do not have a Will, one of your beneficiaries would apply for Letters of Administration from the court. Your estate would then be administered under the law relating to intestacy.

Your estate (which also may include some or all of your superannuation benefit), would be distributed according to these intestacy rules. The rules vary from State to State, but generally the distribution is firstly to the spouse and children, and then other next of kin, such as brothers, sisters, parents, etc. Most states now recognise de facto spouses.

If you do not have a Will, we recommend that you consult with your estate planning lawyer immediately to have a Will drafted. Once you have a valid Will in place, we recommend that you review with your lawyer at least every three years or whenever your circumstances change.

Power of attorney

A power of attorney allows someone to represent you or perform an act on your behalf in relation to financial and legal matters. It gives you peace of mind knowing that there is someone who will look after your affairs if you are unable to do so.

The main benefit of a power of attorney is to ensure that your financial affairs can be managed at all times, under any circumstances. Accessing funds from investments in your name, (i.e. rollovers and changes to income payments of account-based pensions) can only be made by the owner. If you are incapacitated in some way, it is essential that you are able to meet your financial obligations and that someone you trust manages your affairs.

Your attorney's signature on a document has the same legal force as your own signature. Therefore, you should take great care when deciding who to appoint as your attorney. You should also obtain legal advice as to who an appropriate attorney would be and to ensure that the correct paperwork is completed and recorded.

There are three main types of power of attorney:

- General power of attorney
- Enduring power of attorney
- Enduring power of attorney for personal/health matters (medical).

The general power of attorney allows your attorney to act on your behalf, usually for a specific purpose or fixed period of time such as allowing another person to handle your affairs whilst you are temporarily overseas. This is revoked automatically if you become mentally incapacitated. It is also revoked if you die or become bankrupt.

An enduring power of attorney remains valid even if you lose your mental capacity. It is appropriate for all adults to have an enduring power of attorney. The attorney should be someone you can trust to look after your financial interests in a professional manner.

You can also appoint an enduring power of attorney to look after personal health matters. This allows the attorney to make only medical decisions on your behalf.

Each state has separate legislation in relation to enduring, general and medical powers of attorney. Therefore, if you have real property investments interstate, you should arrange for an enduring power of attorney in each State in which you have investments.

You should review your enduring power of attorney periodically to ensure that your nominated attorney(s) is still capable of acting on your behalf. If your attorney(s) dies or becomes incapacitated, you will need to arrange for your legal adviser to change your documents and register a new attorney.

Testamentary trusts

A testamentary trust is a discretionary trust that is created under your Will when you die. The primary purpose of a testamentary trust is to manage your estate assets to produce income for beneficiaries. A trustee (who can be the same person as the executor of your Will), administers the trust on behalf of beneficiaries.

Testamentary trusts have several advantages:

- Minor children can be taxed at adult rates.
- Bankrupts and spendthrifts can be protected.
- The Trustee can direct different classes of income to beneficiaries by income streaming.

Where testamentary trusts are activated, the surviving spouse may receive assets and income of the trust (i.e. means tested) if:

- the surviving spouse directly controls the trust (irrespective of whether they are a beneficiary), or
- an associate has control and the surviving spouse is a potential beneficiary.

The rationale for the rules is that if a surviving spouse has direct control of a trust, they can exercise their discretion as trustee to benefit themselves. Further, if an associate (eg. family member or professional adviser) has control and the surviving spouse is a potential beneficiary it is reasonable to expect that the surviving spouse will share in the benefits of the trust.

Superannuation

When you die, your superannuation may be paid as a:

- a) lump sum to a dependant or non-dependant;
- b) lump sum to your estate; or
- c) pension to a dependant (a dependent child must be under 18, 18-25 and financially dependent, or disabled).

A pension may continue to a reversionary pensioner if this was set up when you started the pension.

The most important thing to note is that while superannuation law allows for all of these options, some superannuation funds only allow for a lump sum to be paid under their trust deed.

If you die intestate, without a legal representative and without any dependants, the trustee may make a death benefit payment directly to a non-dependant (as a lump sum only).



Superannuation dependants

Under superannuation legislation a dependant includes the following:

Dependants	Description
Spouse	Husband, wife or defacto spouse (including same-sex)
Child	Child of any age
Financial dependant	A person who was partially or wholly financially dependent on you (at time of death)
A person with whom you have an interdependency relationship just prior to your death	<p>A relationship between two people where:</p> <ul style="list-style-type: none"> ● they have a close personal relationship ● they have lived together ● one or each of them provides the other with financial support, and he domestic support and personal care. <p>Some people who do not live together can still meet the interdependency relationship definition if the separation is temporary, or if one person has a disability.</p>

Notes:

- The Trustee will consider a range of factors when determining whether an interdependency relationship exists.
- Two people do not have an interdependency relationship if one of them provided domestic support and personal care to the other:
 - under an employment contract or contract for services; or
 - on behalf of another person or organisation such as a government agency, a body corporate or charitable organisation.
- The legislative definition is not exhaustive and the Trustee may choose to take into account other circumstances (for example, emotional or financial dependency) when determining your dependants for the purpose of paying a death benefit.

Superannuation payments

The following table summarises how superannuation is paid when you die.

Phase	Lump sum			Income stream		
	Dependant	Non-dependant	Estate	Dependant	Non-dependant	Estate
Accumulation	Yes	Yes	Yes	Yes*	No	No
Pension	Yes	Yes	Yes	Yes*	No	No

* An income stream can only be paid to a spouse, child (under age 18, 18 – 25 and financially dependant, or disabled), financial dependant, or person who was in an interdependency relationship with you.

This does not discuss the taxation implications of superannuation death benefits. Please refer to the Fact sheet: Understanding superannuation.

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