

# Understanding estate planning

## Version 5.2

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*As legislation may change, you should ensure you have the most recent version of this document.*

### How to read this document

Managing your finances to meet your day to day requirements as well as your long-term goals can be a complex task. There are all sorts of issues you need to consider such as taxation, legislation, protecting your wealth and assets, associated costs and the inherent risks of investment. When undertaking a financial plan it is important you understand how these issues will impact you and what you should expect over time.

Your financial adviser will provide you with a Statement of Advice (SOA) which sets out the details of the advice and how it will meet your goals and objectives.

This document provides some additional information to help you understand the financial planning concepts discussed in the SOA in relation to **estate planning**.

It is very important you read this document to help you understand the benefits of the strategies recommended to you and the associated costs and risks.

Please contact your adviser if you do not understand anything, or need further information or clarification.

### Estate planning

An effective estate plan includes tax effective Wills to protect your estate and the interests of your beneficiaries in the event of your death.

Jointly held assets, trust assets and superannuation however, are not necessarily dealt with by the terms of the Will. These are usually considered 'non-estate' assets for estate planning purposes. Note there may be specific State legislation that classifies non-estate assets as 'notional estate' for the purposes of a family provision challenge.

It is therefore important to have considered a comprehensive estate plan to ensure all assets are transferred according to your wishes in the most effective and efficient manner.

Outlined below are some factors to consider when developing your estate plan.

### Your Will

Dying without a Will or with an invalid Will is known as dying intestate. In such an event, laws are in place in each State and Territory to determine how your estate will be administered. This may result in your estate assets being distributed against your wishes as well as incurring unnecessary tax liabilities for your beneficiaries.

Your Will is the document that directs how your estate is to be distributed amongst your nominated beneficiaries.

Most people wrongly believe their Will covers all their assets, so special care should be taken to ensure the ownership and control of all your assets including 'non-estate' assets, pass to beneficiaries in the way you intend.

You are required to nominate an executor in your Will. The executor has the duty of carrying out your wishes in the Will and is granted power to administer the estate. This is likely to include collecting assets, paying off any debts and distributing the benefits to those entitled.

Careful consideration is required when appointing the executor. It is recommended you discuss the appointment with that person prior to making the Will. In addition to estate beneficiaries, executors may also be your solicitor, accountant or a public trustee.

## Your superannuation

Generally, your superannuation is an asset *excluded* from your Will. If you do not have a valid binding beneficiary nomination in place at the time you pass away, any benefit payable upon death is distributed by the superannuation trustee in accordance with the Trust Deed. This usually gives the trustee the discretion to decide who should receive your superannuation entitlements. Alternatively, you are able to put a binding nomination in place to remove trustee discretion. You must follow some important steps to make sure that your beneficiary nomination is valid (see below). This includes making sure that the person you nominate is an eligible beneficiary. Eligible beneficiaries are detailed in superannuation legislation and include your legal personal representative and your 'dependents'. A dependent for this purpose includes your spouse, your children, any financial dependent or a person in an interdependency relationship with you.

Your superannuation may be paid to your estate. This may arise if:

- you have a valid binding nomination in place directing payment to your estate, or
- the trustee uses discretion to pay to the estate because you don't have a valid binding nomination in place, or
- the rules of the superannuation fund automatically directs the payment in certain circumstances.

Therefore, even if your intention is to direct your superannuation directly to a beneficiary, you should include a provision to deal with superannuation in case it is paid to your estate.

## Death benefit nominations

Subject to the rules of the fund, there are a number of different types of beneficiary nominations that you may be able to put in place.

*A non-binding death benefit nomination* is used only as a guide by the trustee when deciding who should receive your death benefit. This means that although the trustee can take your direction into account, they are not bound by your nomination and may choose to pay the benefit to another individual or to your estate.

*A lapsing binding death benefit nomination* allows you to nominate who will receive your superannuation benefits in the event of your death and ensures the trustee is legally bound by your wishes (provided that your nomination is valid). The nomination is able to be amended or cancelled at any time and generally is required to be renewed every three years, or periodically (depending on the rules of the specific superannuation fund). The validity of your binding nomination is usually only reviewed when you pass away. If your binding

nomination is not valid, the trustee will distribute the superannuation death benefit in accordance with the Trust Deed.

*A non-lapsing death benefit nomination* is a binding death benefit nomination that does not lapse. A non-lapsing nomination will remain in force until such time it is amended or revoked by you. As is the case with a lapsing binding nomination, the validity of your binding nomination is usually only reviewed when you pass away. If your binding nomination is not valid, the trustee will distribute the superannuation death benefit in accordance with the Trust Deed.

Regardless of the type of nomination you make, it is important to review on an ongoing basis to ensure it continues to reflect your estate planning wishes and goals.

## **Testamentary trusts**

A testamentary trust is a trust created pursuant to your Will and may have several significant advantages. There are different types of testamentary trusts, including discretionary trusts and special disability trusts.

As with any trust, the trustee must act according to the terms of a trust deed and has the duty and responsibility to look after trust property for the benefit of others. Appointing a trustee may involve a financial cost and as the trustee will have discretion over the assets, you should carefully consider who you appoint as trustee.

The terms of the trust deed of a testamentary trust are contained in the Will.

As with most trusts, a testamentary trust will normally give the trustee:

- the discretion to allocate income and capital among any of the beneficiaries
- wide powers of investment, and
- the power to wind up the trust at any time.

If the earnings, including capital gains, derived by a trust are allocated to the beneficiaries, those beneficiaries are liable to pay tax on that income at their normal marginal tax rates. It is therefore a common practice for the trustees of a discretionary trust to distribute any derived gains to those beneficiaries who have the lowest marginal tax rate in the distribution year. This is one of the main advantages of using testamentary trusts.

Normally if a beneficiary of a trust is under 18 years of age, the trust income that is distributed to that person is taxed at penalty tax rates. Under these rates, the child only has a limited tax-free threshold. However if the income derived by the trust was generated from inherited assets then the child will be taxed at normal adult tax rates.

A testamentary trust may also provide asset protection for beneficiaries of your estate who may face certain legal claims on their assets, divorce or bankruptcy. Until such time as the trustee exercises their discretion to pay an income or asset entitlement to a beneficiary, all trust assets and income remain the property of the trustee. However, if the trust is established in contemplation of frustrating the claims of, for example, legitimate creditors, the courts may effectively unwind the arrangement.

These and other factors require careful consideration by your solicitor in conjunction with your financial adviser.

## **Power of Attorney**

Granting a Power of Attorney means you legally appoint a person or an organisation to make decisions, sign documents and act on your behalf in various matters.

When you grant a Power of Attorney you may choose to limit the actions which the attorney can perform on your behalf (Limited Power of Attorney) or give the attorney wide powers to undertake actions on your behalf (General Power of Attorney).

Specific details as to the powers under a Power of Attorney are determined by the state legislation to which the Power of Attorney relates. This may present difficulties if, for example, you have property in more than one state.

## **Enduring Power of Attorney**

One of the limitations of a Power of Attorney is it generally ceases when the person suffers a loss of mental capacity. This may include cases where a person develops dementia, or is left with significant disability and mental impairment as a result of an accident. This can be overcome with the use of an Enduring Power of Attorney. This type of Power of Attorney does not cease on mental incapacity and can therefore provide an important tool in estate planning.

## **Medical treatment and lifestyle decisions**

It is important to note different states have different ways of dealing with medical and lifestyle decisions for a person who is mentally incapable of making such decisions.

Such methods may include:

- Power of Attorney (medical treatment) – attorney has the power to give and in certain circumstances, withhold consent to medical treatment on your behalf
- Enduring Guardianship – guardian has the power to make personal and lifestyle decisions for you should you lose mental capacity, including decisions as to where you live and who with
- Enduring Power of Attorney – attorney has the power to act on your behalf during your life, in relation to your investments and other financial matters
- Advance Health Directive – a document in which you can express your wishes about medical treatment and how you would like your body to be dealt with in the event that you are unable to make these decisions for yourself.

As state based requirements differ, it is important to seek advice from an appropriately qualified legal professional on these and other issues when putting together your estate plan.