

ESTATE PLANNING

ADVICE BOOKLET



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What is Estate Planning?

Estate Planning is a process which addresses every aspect of your legal and financial affairs. This includes a properly drawn Will which will ensure that your money and assets are distributed according to your wishes. Estate Planning ensures that complex family situations, business partnerships, taxation requirements, and other legal or financial matters are carefully considered. In this way, your beneficiaries will receive the benefits of your estate with a minimum of legal or emotional problems.

The importance of an up-to-date Will

The preparation of your Will, or the review of an existing Will, is an important part of your Estate planning. Having a valid and up-to-date Will is the safest way of ensuring your money goes where you want it to go when you die. Wills must be signed in the presence of two witnesses (excluding any Beneficiary or spouse of a Beneficiary, or any interpreter who may have been used). Certain formalities must be strictly followed. Any amendments to the Will must be signed with the same formalities.

Wills can vary greatly in their degree of complexity and can be used to achieve a wide range of family, business and tax objectives described in this booklet.

Dying without a Will

If you die without a Will, you are said to have died intestate. Your assets will be distributed according to a statutory scheme (the intestacy rules) which makes no allowance for your wishes.

Intestacy rules vary from state to state. Typically, however, the division of the estate of an intestate person would be between their spouse and their natural (or adopted) children.

A spouse includes a de facto spouse who has lived with the deceased for a minimum of 2 years and is living with the deceased at the time of death. If there is a spouse and no children, the spouse is entitled to the whole estate. When there are children, the spouse receives the first \$150,000.00 and one half or one third of the balance of the estate, depending on the number of children. While the spouse may use the inheritance of a minor (under 18) child for the child's maintenance and support, this ordinarily must be done under the supervision of an administrator of the estate, and sometimes the Court.

Family Provision Application

Under the *Succession Act* (the legislation dealing with the distribution of estates), if a person dies (whether there is a Will or not), and adequate provision has not been made from the estate for the proper maintenance and support of the deceased person's spouse, child or dependant, the Court has a wide discretion to order that some provision be made from the estate for that person.

Whether or not the application is successful, it may be many months before administration of the estate can be completed.

In some cases it is the intent of the Will-maker to exclude one or more children from benefiting under the Will. However, this omission is often the cause of emotional trauma to family members and can cause expense to the estate. You should be aware that stepchildren may have a right to make an application for provision out of a deceased estate.

Divorce or de facto relationships

People who are separated, divorced, re-married or living in de facto relationships should have a recent and competently drafted Will for a number of reasons:

1. Divorce cancels any provision in a Will made before the divorce which benefits the divorced spouse (including his or her appointment as executor);
2. Inadequacies in the rules of intestacy may be overcome;
3. Family Provision claims may be prevented or discouraged.

Disposing of property by Will

Only those assets actually owned by you can be disposed of by your Will. This includes your share of property held as tenants in common with another person at the time of your death. You should seek advice from us where some assets have been transferred to a Trust or a company, as you may not be able to provide for the division of these assets in your Will.

Jointly owned property

Your Will does not affect property which is jointly owned. Under property law, the rule of survivorship applies to a "joint tenancy". This means that upon death, the property (except in exceptional circumstances) automatically passes to the surviving joint owner or owners, regardless of the terms of your Will.

Superannuation

You may be entitled to receive a superannuation benefit through a retirement plan offered by your employer or a personal plan. Many Will-makers, in calculating their assets, automatically include the superannuation benefit they expect to be paid on their death.

It is important to realise that the Trustees of the superannuation fund may have a discretion concerning payment of the benefit. Depending on the provisions of the deed governing the Trustees, the superannuation might be paid in one of three ways:

1. To a person (or persons) who, according to the Trustee, was financially dependent on the deceased at the time of death;
2. To a nominated Beneficiary (and there is a danger here because a nomination is commonly made when first joining a fund and is not reviewed);
3. To the executors and Trustees of the deceased estate with the intention that it forms part of the estate.

You should ensure that you clearly understand the terms of your superannuation arrangements, as they are often a major financial safeguard for your family and dependants. Tax considerations also arise in this context.

Life insurance

Life insurance should be an important part of Estate Planning. Carefully consider who should own the policy because on the insured person's death the proceeds will be paid to the policy owner. If the policy owner is deceased, the proceeds will be paid to their estate.

If you want a particular person or entity – such as a company or Trust – to receive the proceeds of life insurance held on your life, consider having the policy in the name of that person, company or Trust, or ensure that your Will states that the proceeds will be distributed with the rest of your estate.

Debt protection insurance

It is an increasingly common practice for home buyers to take out a life policy to cover the debt of the mortgage. This is generally referred to as “mortgage protection insurance” and in many cases is essential before a home loan will be approved. The insurance would generally expire on payment of the debt. This type of insurance can be used to cover other liabilities.

Assets held in companies, Trusts and partnerships

Many people make the mistake of assuming that a Will also affects assets which are legally held by family companies and family Trusts.

Assets held in this way are the property of the company or the Trust, as the case may be, and the Will-maker can only give away their shares in the company or their units in the unit Trust.

Other special provisions may be included in your Will, for example:

1. The Will-maker may be the permanent governing director of a private company and entitled to appoint, by Will, a successor to that office;
2. Powers of “Appointor” or “Trustee” under Trusts may be exercisable under a Will;
3. The Will-maker may hold shares in a private company. Unless that company has been specially set up with one director and one shareholder, then consideration needs to be given to the disposal of those shares as, usually, a private company must have at least two shareholders. This is a requirement of the Corporations Law. Where a private company has two shareholders, it is important to ensure that the person receiving a share or shares under a Will is not going to become the sole shareholder.

Trusts

The term “Trust” describes the holding of property by a “Trustee” (which may be one or more persons or a company) in accordance with the provisions of a written Trust document for the benefit of one or more persons who are called “Beneficiaries”.

A person may be both a Trustee and a Beneficiary of the same Trust. A Trust is only as effective as its Trustee, so Will-makers should be careful when choosing a Trustee.

It is the provisions of the Trust document, and not a Will or any State law, which determines what happens to the property of the Trust on death.

Trusts can be created during your lifetime or separately in your Will. Trusts created in a Will are called "Testamentary Trusts" and their terms are set out in your Will. These may provide not only substantial tax advantages but may protect the assets of the estate from claims by "outsiders". In simple terms, Testamentary Trusts give control of estate assets "beyond the grave".

Because the terms of the Testamentary Trust must be contained in the Will itself, Wills incorporating these Trusts are inevitably complex and therefore expensive.

Companies

Since a company is a separate legal entity in its own right, when assets are held in the name of a company, the company is the legal owner of those assets and not you (even though you may be a major shareholder of the company).

Partnership interests

The degree of complexity in dealing with partnership interests, to a large extent, depends on:

1. Whether a written Partnership Agreement exists;
2. If a Partnership Agreement exists, the terms of the agreement.

If no agreement exists, or if there is not term to the contrary in the agreement, the death of one partner will dissolve the partnership.

A problem can occur where the agreement provides that the deceased partner's interest will be converted to a monetary value. This may take the form of an option given to the surviving partner to purchase the deceased partner's share.

It is important to co-ordinate the Partnership Agreement and the Will so that the partnership business continues to operate after the death of one partner, to maximise the amount received by the estate.

While property can be distributed after the death of a partner without the necessity of a Will, a properly drawn Will ensures that this process will be relatively simple and stress free.

Tax considerations

By including powers and discretions in the Will – such as power of sale, power to postpone conversion, power to carry on business, power of investment – Will-makers can provide flexibility to allow their business and personal financial matters to continue operating efficiently following their death, and until the estate is finalised.

We will generally suggest that wide Trustee powers be included in your Will to enable the legal personal representative to re-evaluate the position when administering the estate, rather than be bound by inflexible requirements imposed years earlier in the Will. The existence of adequate powers will also facilitate the administration of the estate and avoid the need, in some cases, to seek additional powers from the Supreme Court.

Estate Planning includes the use of exemptions, deductions, and other planning opportunities legally provided in the tax laws. An asset you acquired prior to 20 September 1985 will not be subject to capital gains tax when you dispose of it. However, when the Beneficiary acquires such an asset by the operation of your Will the future disposal of the asset may be subject to capital gains tax.

Calculation of the gain will depend on when the asset was acquired by the Beneficiary and whether it has been held by the Beneficiary for longer than 12 months.

It is important to realise that a capital gain to beneficiaries under your Will will not arise on the transfer of assets which you bought after 19 September 1985. The future disposal of the asset may be subject to capital gains tax.

It is wise to seek expert Estate Planning advice to take advantage of opportunities for minimising tax. Issues which need to be considered include:

1. Cash, life insurance policies, superannuation and motor vehicles are usually tax-exempt to beneficiaries under a Will. Life insurance policies are generally exempt to the original beneficial owner of the policy;
2. Seek advice about the possible exemption of some assets, such as your principal residence and non-listed personal-use assets, eg boats, white goods;
3. Gifts made to tax-exempt bodies may incur an immediate tax liability for the estate. Cash or other tax-exempt assets should be used;
4. Always consider changes in circumstances which may occur between the date the Will is made and the date of death of the Will-maker. Those changes may affect the estate's tax position, and some flexibility should be provided in the Will to enable the legal personal representative to distribute the actual assets (called "in specie") to a Beneficiary, rather than converting all assets to cash;
5. Important exemptions (full and partial) exist when a dwelling, which was the sole or principal residence of the taxpayer, is sold by a Beneficiary or by the legal personal representative of the deceased's estate;
6. The cost base includes the initial cost of purchase plus the costs related to the acquisition of the property.

Family considerations

Young children often ask their parents "what will you leave me when you die?" As children mature the subjects of death, dying, and inheritance become less easy to discuss with parents. Many counsellors advise parents to seek the opinions of their children when they are determining these important inheritance issues.

Wills should be reviewed when any important change occurs to family circumstances (eg births, deaths, marriages and changes in financial circumstances).

Marriage or re-marriage

Marriage revokes the whole Will unless it is made in contemplation of that particular marriage. A person making a Will prior to marriage who wants his or her intended spouse to benefit under the Will, should clearly state this in the Will.

People living in de facto or other relationships often make Wills in each other's favour with no intention of marrying. If marriage between these people occurs, their Wills are revoked and new Wills must be made even though their intentions about the distribution of their estate on death have not changed.

Divorce

Dissolution of marriage has an immediate impact on existing Wills, although in Queensland, as well as in some other States, the whole Will is not revoked. However, any gift or appointment in favour of a spouse will be revoked immediately after the divorce takes place. Divorcing spouses should seek professional advice on making new Wills following dissolution of marriage.

Complex family situations

Certain problems may arise with second marriages, de facto partners, step-children, etc. Some of the most difficult situations include:

1. Where one partner has children from a previous marriage or relationship and the other has not;
2. Where both partners have children from previous marriages or relationships;
3. Where both partners have children from previous marriages or relationships and also have children from their present marriage or relationship;
4. Where both partners have children from previous relationships, and a major part of their separate investments has been used to purchase their present family home which they own as joint tenants.

A properly drawn Will can take account of these family situations and overcome potential problems before they arise.

Summary

This document has been prepared by us with a view of raising some of the issues you should consider when giving us instructions. We stress that it is not legal advice but information.

You should feel free to discuss any of the issues raised with us.