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# Estate planning | 10 things you need to know in 10 pages

*Information provided is general in nature; precise application depends on specific circumstances*

## 1 More than just a Will

At it's simplest form, estate planning is ensuring:


**Your assets** can be held in a variety of manners, and you should appreciate that not all assets 'owned' by you will be dealt with under your Will.

Below is a summary of how assets held differently may pass:

| ***How asset held*** | ***How asset passes on death*** |
|---|---|
| Personally | Through your Will<br>*If no Will – what the law says* |
| Superannuation | Superannuation documents and nominations<br>*If no documents – at the discretion of the superannuation fund* |
| Jointly with others | If as *joint tenants* – automatically to the other co-owners<br>If as *tenants in common* – your share through the Will |
| In a company | Assets remains in company<br>**NB:** Control of company must be understood |
| In a trust | Assets remains subject to trust<br>**NB:** Control of trust must be understood |

The **right people** will often be whoever you choose, and later tips will provide you a summary of considerations in selecting the right person.

Further, proper estate planning allows **special arrangements** to be put in place to ensure your assets pass in the most **tax effective** manner in the **most protected environment** for the benefit of your loved ones.

## 2 Trusting the right people

It is crucial to ensure the right people are involved with your estate.

Someone to administer your Will (Executor)

Someone to look after assets post administration of Will (Trustee)

Someone to care for minor children (Guardian)

You can potentially appoint up to four individual persons to act as either Executor or Trustee jointly, however, we recommend a maximum of two or three. Getting four people to agree on making all decisions unanimously can often be difficult.

Only appoint a single person to act in the above roles if you inherently trust that person. Otherwise, no oversight will exist. If you are a couple and you have minor children, consider appointing someone from each of your family if you both are deceased (such as a parent or sibling each) to act so that each family can remain involved with your minor children.

You may, alternatively, choose to appoint independent or unbiased persons to fulfil such a role, or some combination of the above. Advisors can occasionally be of use where the affairs are complicated with a long history of issues to be considered.

Guardians can be the same persons as your Executor/Trustee, if it is easiest to have the same persons involved with different matters. Alternatively, you may choose to have different persons acting as Executor/Trustee to those who may act as Guardian for any minor children.

## 3 Testamentary trusts

A testamentary trust, or testamentary discretionary trust is a trust only established after you have passed away and will last for 80 years after your death (except for South Australia which has an indefinite lifespan) unless wound up earlier.

A testamentary discretionary trust can be differentiated from a direct gift to someone as instead of giving an asset directly to an individual, you are giving an asset to someone (who will act as the legal owner of the asset and called the *Trustee*) to look after that asset (and other assets of the trust in the future) for the benefit of a range of persons (this group of people are called the *Beneficiaries*).

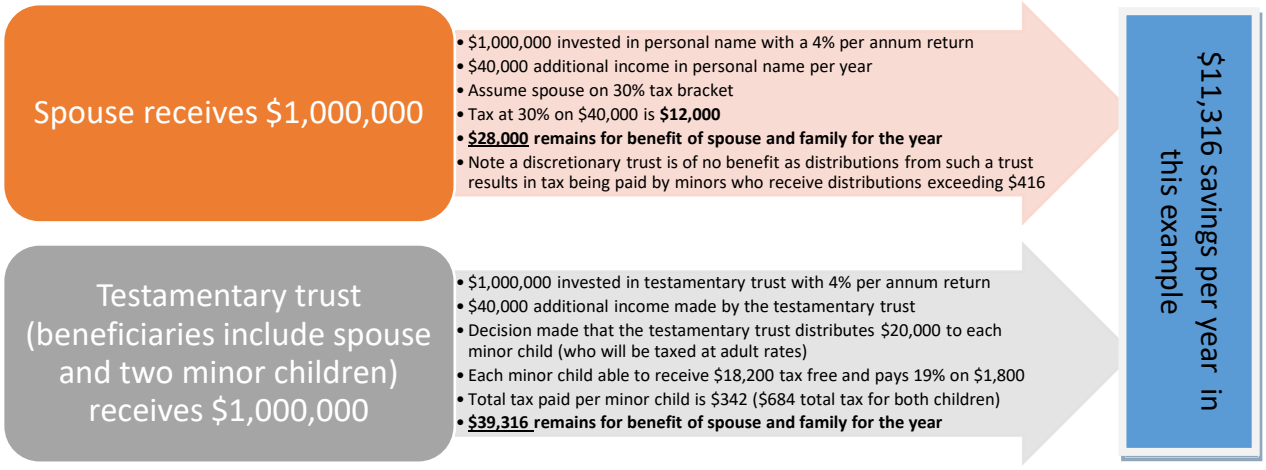
A testamentary trust can provide the following **benefits** for your recipients under your Will:

- because no beneficiary of the testamentary discretionary trust owns the inheritance directly, the inheritance is **protected from the bankruptcy** of such beneficiary;
- having the ability to decide which beneficiaries can benefit and in what proportion provides the ability to **tax plan** where necessary. There is a further concession for testamentary discretionary trusts in that you can **distribute money from the testamentary trust to minor children tax free**, up to the adult tax free threshold;
- having the ability to **stagger when people take control** of the testamentary discretionary trust by appointed other trusted persons to look after the inheritance until certain beneficiaries are appropriate to take over; and
- there are some **relationship breakdown protections** in certain circumstances as the inheritance is not directly received by an individual. These protections, however, are subject to the Family

Court choosing not to effectively look through the structure and whether the Family Court chooses to do so will depend on various circumstances at the date of the relationship breakdown.

In our experience, testamentary trusts are beneficial for individuals in any of the following scenarios:

- **Beneficiary (whether child or spouse) does not want to receive assets in personal name**: an intended beneficiary considers themselves as a high-risk individual due to the nature of their work (for example, they are a surgeon, accountant or lawyer). The beneficiary wants to own as little assets as possible due to a potential claim against them personally. Giving assets to a testamentary trust allows the beneficiary to receive assets in an entity separate from them so they are not assets of the beneficiary if a lawsuit arises.
- **Parents wishing to ensure trusted family members manage money for minor children until children are considered responsible**: you want to give assets to your children, but you do not believe them to be responsible enough to receive full control of the assets. You give the relevant assets into a testamentary trust and you give control jointly between your respective children and a responsible family member (such as a sibling). This way, your children will not blow all the money as they need to liaise with another family member. This helps protect their inheritance.
- **Parents wishing to ensure inheritance for child protected against a relationship breakdown**: you want to give assets to your children, but you just don't trust the relationship they are in or the relationship they might be in in the future. You can give your assets into a testamentary trust structured appropriately to reduce the risk of a relationship breakdown.
- **Parents wishing to provide their children with a tax effective structure**: you want to give assets to your children, and you know they may have children in the future (your grandchildren). Giving assets into a testamentary trust structure provides some tax planning opportunities for your children to invest the assets transferred into the trust and having the income generated from the investment distributed to their children (your grandchildren). There is a specific tax provision that states income generated from a deceased estate may be distributed to minors, and those minors will be taxed as if they were adults (which is a much lower rate!).
- **Couple with minor children wishing to provide spouse with tax effective structure**: you have minor children and assets in your personal name that would form part of your Will. Giving such assets into a testamentary trust for the benefit of your spouse and lineal descendants will allow your spouse to be able to distribute any income generated from the inheritance to your minor children (with **each child being able to receive up to $18,200 tax free**). Example below:



## 4 Enduring power of attorney documents

In addition to considering what happens on your death, thought should be had as to **what happens to your assets on you losing the ability to make certain decisions**.

The document that can govern these decisions is called an *enduring power of attorney*.

In particular, the document looks to appoint persons to make decisions on your behalf for two types of decisions, being 'financial matters' and 'health/personal matters'.

This is particularly useful where:

- You require someone to execute financial documentation on your behalf whilst you are unable to (such as you being overseas or too unwell as well as when you lose capacity).
- You require someone to make personal and health decisions once you have lost capacity.

| Appointing a person to make financial decisions for you | Appointing a person to make personal/health decisions for you |
|---|---|
| •Power to do any financial transaction you can do in your personal name<br>•Power recommended to be broad if attorney is your spouse or trusted family members - failure to to do so may mean that your financial attorney may be limited in the actions they can undertake on your behalf<br>•Power can be given either before or after you lose capacity | •Power to make day-to-day personal decisions such as where and who you live, or when and where you obtain health care<br>•Power to make serious health decisions dealt with under an advance care directive<br>•Power can only be given after you lose capacity |

You can appoint multiple persons to act as attorney for you, whether jointly, by simple majority or severally (any attorney may act). Further, different persons may be able to act as your financial attorney and personal/health attorney.

Given the powers granted to your attorney, you should only appoint persons that you can trust. Although the law will impose obligations on your attorney (in that breaches of an attorney's obligation to act in your interest will result in legal consequences against your attorney), your attorney will still be in a position where an abuse of power is possible.

## 5 Memo of directions

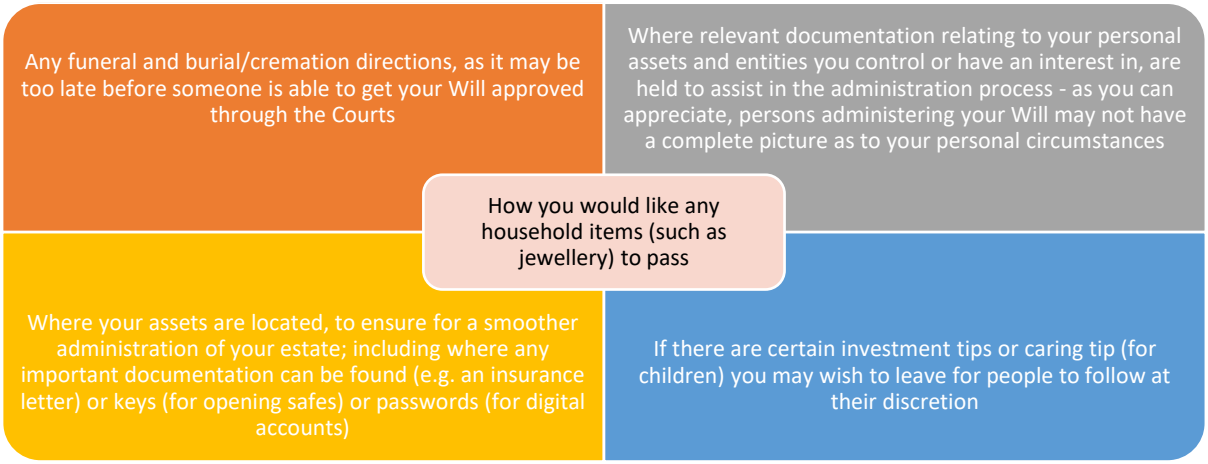
Whilst having appropriate documentation may be useful in ensuring the right people are involved, such documents often do not go into detail about any specific wishes, hopes and dreams.

For example, your Will may not include a comprehensive list on who gets what of your personal items (such as any clothes, jewellery, kitchenware etc.) as such a list would be cumbersome and require an updating of your Will every few years when you change your mind.

Your Will would also not include comments about how you would like to see your children (if any) raised; nor would your Will specify your assets and where such assets are held or associated important information (this is to reduce the need to update your Will should you sell or purchase assets, whilst having your intentions remain the same).

Instead, a non-binding document could be prepared providing such guidance and directions.

For example, a **memo of directions** can include information on the following:




Although non-binding in nature, it is useful in ensuring your Will does not contain extra pages of specific gifts that may be deemed redundant in a few years' time, and allows you to convey wishes and directions that are not ordinarily enforceable under a Will or may be too restrictive to put in your Will.

Those looking after your affairs will at least then have a document they can refer to when looking after your affairs.

## 6 Jointly held assets

There are two different ways you can own an asset jointly (joint tenants and tenants in common) with a co-owner and depending how you own such asset will impact who may receive the asset should you pass away.

Owning an asset as **joint tenants** means all owners have a 100% interest in the asset in the event you pass away. What this means is that once you pass away, your co-tenant retain their 100% interest in the asset. You do not get to pass your share to anyone under your Will.

In contrast, owning an asset as **tenants in common** means each owner has a distinct interest in the asset, and all owners of the property will have all of their interest equalling 100%. This means that if you pass away, you can distribute your share in the property to people under your Will, as your co-tenant does not have an interest in your discrete share.

The question you must ask if you own your asset as joint tenants is – do you want your co-owners to receive the property if you pass away. If yes, then you might not need to do anything. If no, then you need to take steps to make your ownership to be held as tenants in common. This, of course, means discussing this with your co-owners.

You need to appreciate this as you may need to take steps to separately ensure your jointly held assets pass as you intend.

Unrelated to estate planning, people may prefer one way of owning an asset compared to another as it reduces the risk of the relevant owner. For example, if you own an asset as joint tenants with another person, if the other co-owner is sued, then because the co-owner 100% owns the asset jointly with you, the entire asset may be at risk if sold as a result of a litigation.

## 7 Superannuation

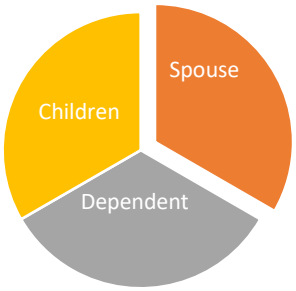
Your superannuation benefits may not necessarily form part of your Will.

This is because it is held in a superannuation fund. You are not the legal owner of your superannuation, although you may be entitled to it upon certain conditions being met.

Death is one such condition, which means your estate may be able to receive the superannuation. The transfer, however, is not automatic.

There are many ways you can get your superannuation paid, but firstly, you need to appreciate the following.

Only certain people can receive your superannuation directly. That means they receive your superannuation from the superannuation fund and not through your estate.




If none of the above people are around, then the only other person able to receive your superannuation benefit is your legal personal representative (your executor).

The tax on the superannuation payout will also change depending on who benefits, and we are happy to work with your advisors (accountant and financial planner) to deliver the best result for you.

How your superannuation payment can be distributed will also change depending on who benefits. That is, some people can receive it in a lump sum whilst others can have it paid as an income stream. Again, we are happy to work with your advisors in this regard.

## 8 Challenges against your Will

Contrary to popular belief, a Will does not prevent certain people from challenging your estate through a legal process called 'family provision applications'.

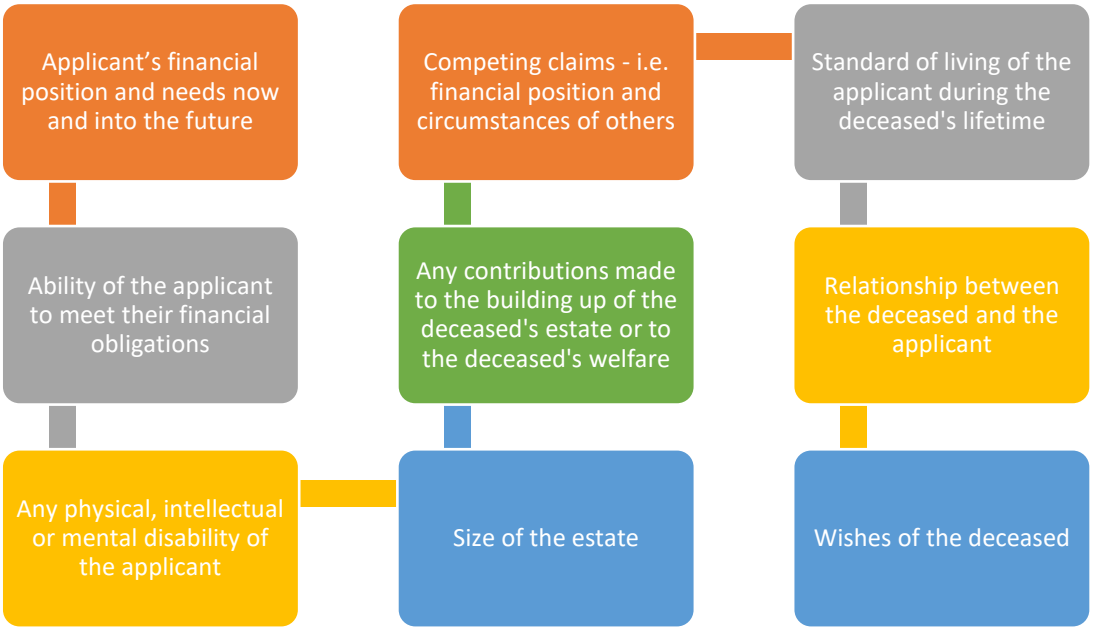
Although the laws may change from State by State, generally the following people can have a claim against your estate if they are unhappy about the provision under your Will:

- spouses (including de facto and potentially ex-partners);
- children (including step-children); or
- people who have been dependent on you.

The definitions can be complex, but you have to be aware that, if there are unhappy people who fall into any of the above categories, then your Will can be challenged.

Further, in order for an estate challenge to be successful, the person challenging your Will (the applicant) must prove that they have not been properly provided for.

Some factors that the Court will often consider in determining whether an eligible person is able to successfully challenge your Will and claim provision will include:




There is no one answer in determining if someone is successful, and the likelihood of a successful challenge will depend on your circumstances.

As such, additional complexities may arise and thought should be had as whether any structuring can be undertaken to reduce the risk.

Other ways your Will can be challenged can include:

- having an invalid Will - due to it not being in the proper format or being signed correctly;
- you having insufficient capacity to make a Will - whether due to questionable mental capacity, or if it is potential to argue that you were forced to enter into your Will under duress; and

if you fail to make your Will in a manner consistent with promises that you may have made during your lifetime - this is common where a child has assisted in the family business during their life in consideration for the family business being gifted to the child upon a person's death.

## 9 'Wills' for trusts and companies

Assets held in trusts and companies are not dealt with under your Will.

This is because:

- Companies are considered as separate legal entities to you are will continue to 'live' even after you pass away or lose capacity.
- Trusts are effectively a relationship which dictates who (the **trustee**) will look after assets for a group of beneficiaries. On the death of a trustee, the relationship will commonly continue with different persons looking after the asset.

Therefore, steps need to be taken to review the relevant governing rules of the trust or company to **ensure the right people look after the assets**; and if not, changes must be made accordingly.

Steps will often require a detailed review of the structure and rules (the rules can often be set out in a 20+ page document) and the consideration of various alternative scenarios.

| Simple successions considerations for assets held in a company | Simple succession considerations for assets held in a trust |
|---|---|
| •The governing rules for the company (company constitution) will need to be reviewed to determine who may be appointed a replacement director.<br>•The shareholder will need to consider their own estate plan to understand what happens to their shares in the company.<br>•Given assets remain in the company, you are generally only able to pass control in the company under your estate plan to intended beneficiaries (either by gifting the shares or nominating directors). | •The governing rules for the trust (trust deed) will need to be reviewed to determine who will be the replacement trustee or appointor of the trust (i.e. who manages and indirectly controls the trust).<br>•Given assets remain in the trust relationship, you are generally only able to pass control in the trust under your estate plan to intended beneficiaries (through the trustee or appointor role).<br>•Passing of control in 'family' trusts do not guarantee an equal split among beneficiaries |

## 10 Planning for the business

When you conduct a business, your estate can get very complicated.

The issues to consider are also related to how you own your business.

Are you a sole trader (so you operate through your own name)? Is there a company, or a trust? Is it a family business? Are there multiple business owners (whether family or not)?

What happens to any contacts or clients? Who takes charge? Is there a person or group of people who should form some kind of board to keep the business moving?

Business succession planning is important and as specialists in this field, we have published and presented extensively on this topic. If you would like a copy of any of these papers or would like to discuss this further, please feel free to contact us.

## 11 Other issues

In addition to the above common issues, there are a minefield of other issues to consider as part of your estate plan.

There are not enough pages to cover them all, but they can include issues such as practical and tax considerations for beneficiaries residing overseas; assets held overseas; joint investments with other persons and broken promises.

## Why choose us to assist with your estate plan?

We specialise in personal and business succession planning and have presented extensively to accountants, financial planners and other lawyers alike.

We believe that part of estate planning is knowing about the issues that could arise regardless of whether they are relevant for you today or not. As such, we focus on ensuring you understand the

bigger picture so that you can stay on top of the estate planning issues relevant to you as your circumstances change. We do this by providing you with a comprehensive estate planning presentation to breakdown and explain the complex legal issues and considerations so that you know what you don't know.

We also don't expect you to remember everything discussed in our meeting, so any recommendations in relation to non-Will assets will be confirmed in writing in a 'To-do List' to you when we provide your Will documents.

Further, we provide our services to you in the most convenient manner (whether in-person at a location convenient to you or online) at a fixed price (no hourly billings!).

Finally, with our director being a **Chartered Tax Adviser,** we have a deep interest in trusts, superannuation and tax, and leverage from our expertise in these fields to assist in providing suitable tax effective solutions regarding complex estate planning intentions for your structures.

## Interested in our help? Contact us!

If you would like us to assist with your estate plan, please feel free to contact our Legal Practitioner Director for a 15-minute (obligation free) chat, so that we can best understand your circumstances and provide you with a fixed price quote to assist accordingly.

We would appreciate you providing us with the following information (if easily available) either during or prior to our call:

| | | |
|---|---|---|
| Contact name/s | | |
| Contact email address/es | | |
| Contact phone number/s | | |
| Contact home address | | |
| Your existing wills (if any or easily locatable) | | ☐ |
| Your existing power of attorney documents (if any or easily locatable) | | ☐ |
| Summary of your main assets and liabilities, including:<br>• Owner of asset/liability<br>• Approximate market value<br>• Approximate equity value<br>• Location of asset (including if located outside Australia) | | ☐ |
| Confirmation if any assets are held in New South Wales (this is important to confirm due to particular succession law provisions in New South Wales) | | ☐ |
| Details of any life insurance arrangements | | ☐ |
| Details of your immediate family tree, including:<br>• Full name<br>• Age<br>• Relationship to you<br>• Occupation<br>• Any health concerns<br>• Details of any ex-spouses/partners | | ☐ |

| | |
|---|---|
| Any structure diagram of your group of entities (if available, otherwise, we will create one as part of our review) | ☐ |
| In relation to your superannuation:<br>• Any binding death benefit nomination<br>• Any reversionary pension nomination<br>• If you control a self-managed superannuation fund (**SMSF**) – the original trust deed and any related documents that may change the rules or structure of the self-managed superannuation fund<br>• If you control a SMSF – the most recently available financial statements and tax returns for your self-managed superannuation fund | ☐ |
| For each trust (if any) you control (whether directly or indirectly):<br>• Original trust deed and any related documents that may change the rules or structure of the trust<br>• The most recently available financial statements and tax returns for your trust | ☐ |
| For each company (if any) you control (whether directly or indirectly):<br>• Original company constitution and any related documents that may change the rules or structure of the company<br>• The most recently available financial statements and tax returns for the company<br>• The most recently available company statement | ☐ |
| Details of any joint investments or businesses you may have with other persons (whether related or non-related) | ☐ |
| Details of any roles that might carry personal liability for you and the main people to benefit under your estate (i.e. are you or they professionals such as doctors, lawyers or dentists?) | ☐ |
| Broad details of any assets that may pass to you from another estate? | ☐ |
| Would anyone be potentially dissatisfied with the distribution of your estate and might seek to challenge the provisions of the estate plan?<br>This can include any children, former spouses and anyone who you have provided financial assistance to in the past. | ☐ |
| An overview of your key objectives in relation to your estate plan | ☐ |

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