

understanding estate planning

Estate planning seeks to ensure an individual's estate is passed on to their intended beneficiaries in an efficient and tax-effective way. An effective estate plan should ensure that;

- Sufficient assets are available in the event of death to reduce or eliminate the likelihood of a family member suffering financially,
- Provide clarity about who gets what, and
- Be regularly reviewed.

While a Will is an important aspect of an effective estate plan, not all assets can be dealt with by the terms of a Will. These assets are generally referred to as non-estate assets – a typical example of a non-estate asset is a superannuation account. Assets that can be dealt with via Will are referred to as 'Estate' assets.

As a result, in building an estate plan it is important to consider the nature of each asset and the most effective means of transferring that asset to the intended beneficiary. In addition, it is important that an appropriately qualified legal specialist is engaged to ensure all the necessary steps are followed.

WILL

An individual, who becomes deceased without a valid Will, is referred to as dying 'intestate'. In these circumstances, each State has laws which deal with how the individual's assets are to be distributed, however this may result in an individual's assets being distributed in a manner which is not reflective of their wishes.

Creating a valid Will requires the nomination of an Executor. The Executor has the duty of carrying out the deceased's wishes as documented in the Will and is granted the power to administer the estate. This will likely include collecting assets, paying off any debts and distributing the benefits to those entitled.

The individual appointed as Executor requires careful consideration and more

than one Executor can be nominated to execute the terms of the Will. While family and friends can be nominated as executors, it is also possible to nominate an independent professional such as an Accountant or Solicitor.

SUPERANNUATION

As noted above, superannuation is an asset which is excluded from your Will. Any benefit payable on death is distributed by the Superannuation Trustee in accordance with the Trust Deed. However the law prescribes that only certain individuals may generally be nominated as the beneficiary of a superannuation account. These beneficiaries are referred to as 'Dependant' beneficiaries and include your spouse, children, Legal Personal Representative or any other financial dependant.

While the terms of a Will cannot directly deal with a superannuation benefit, by nominating their Legal Personal Representative (i.e. their Executor) as the beneficiary, an individual allows the terms of the Will to deal with the distribution of the superannuation benefit.

In order for the deceased to advise the trustee how they wish their superannuation benefit to be distributed, a Death Benefit Nomination needs to be completed. The nomination can either be binding or non-binding on the Trustee.

- A Binding Nomination is made where the beneficiary is one that is allowed under the law (i.e. spouse, child, legal personal representative etc.).
- A Non-Binding Nomination is to any other individual; however the Trustee is under no obligation to follow a Non-Binding nomination and is in fact obliged to ascertain whether there is a more appropriate beneficiary.

CASE STUDY

Alistair currently has \$500,000 in a superannuation account, \$10,000 in a bank account and a share portfolio worth \$250,000. All his assets are in his own name. While the terms of Alistair's

Will can deal with his bank account and share portfolio, he will need to lodge a Death Benefit Nomination with the trustee of his superannuation fund to advise of his nominated beneficiary.

Should Alistair wish to have his superannuation death benefit dealt with via the terms of his Will, he will need to nominate his Legal Personal Representative as his nominated beneficiary. Importantly, whether or not Alistair makes such a nomination will depend upon his estate planning objectives and personal circumstances, together with the personal circumstances of his intended beneficiaries.

TESTAMENTARY TRUSTS

Commonly, when assets are distributed to beneficiaries via Will or a Death Benefit Nomination, the asset is received in the beneficiary's name. That is the beneficiary becomes the owner of the asset. However this does not need to be the case and in certain circumstances, it may be more appropriate for this not to occur.



This article by Frank Camilleri (above), National Technical Manager.

One way the assets can be transferred is via a Testamentary Trust which is created under the terms of the Will. In this situation, the assets are held in trust for the intended beneficiaries. One or more trustees are appointed (which may include one or more of the beneficiaries) to administer the assets for the benefit of the beneficiaries.

Establishing a Testamentary Trust can have several advantages. These include;

- The estate of the deceased may be protected if a beneficiary is in financial difficulty or suffering marital problems.
- Where the deceased has young children, a more tax-effective income can be generated to meet the lifestyle needs of the family in the future.

There is much flexibility around how a Testamentary Trust can be incorporated into a Will and as always, the most appropriate method will depend on objectives and circumstances of the deceased at the time.

OTHER CONSIDERATIONS AND THE IMPORTANCE OF PLANNING

In establishing an Estate Plan, there are numerous issues which may need to be considered to ensure the objectives of the individual are, as far as is practical, satisfied. These can include whether assets are owned in the correct manner to create an effective Will and whether the terms of a Will are likely to be challenged by a disgruntled family member.

Most importantly, Estate Plans are generally not one-dimensional. For example, an effective estate plan can include:

- The creation of a Will,
- Alteration to the way assets are owned,
- Transferring funds to other ownership structures,
- Nominating a beneficiary for a superannuation death benefit,
- Taking out or topping up an insurance policy etc.

Further complexity is added where an individual has had multiple relationships (either married or defacto) and/or has children from one or more of those relationships.

Given that estate plans can be multi-dimensional it is crucial that an Estate Plan is implemented and reviewed regularly. To achieve this it may require several professionals (i.e. Solicitor, Accountant and Financial Adviser) to work collaboratively.

POWER OF ATTORNEY

While Estate Planning is generally thought of as dealing with an individual's assets upon death, it can also include authorising others to make certain decisions during an individual's lifetime. This is achieved by granting a Power of Attorney to another person. This allows the nominated person, the Attorney, to

make decisions, sign documents, and act on your behalf in various matters.

ENDURING POWER OF ATTORNEY

One of the limitations of a standard Power of Attorney is that it generally ceases to have effect when the individual suffers mental incapacity. This is an important issue. Should an individual suffer from mental incapacity; this is when an Attorney is needed most. This issue can be overcome by the use of an Enduring Power of Attorney which is essentially the same as the standard version except that it does not cease upon mental incapacity.

MEDICAL TREATMENT AND LIFESTYLE DECISIONS

It is important to note that there are different requirements for dealing with medical and lifestyle decisions when an individual is incapable of making such decisions.

Moreover, these requirements vary from state to state. For example, in New South Wales, an Enduring Guardianship is required for this purpose.

In contrast, an Advanced Health Directive is required in Queensland and a Medical Power of Attorney in Victoria.



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