



An overview of Personal Succession Estate Planning and Your Wills

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[Background information about Estate Planning and establishing your wills](#)

Introduction

Estate planning is the key to looking after your family in the event of your death. Without an estate plan, fights and legal disputes more often than not break out - even over small amounts of money. It is vital to not only have an estate plan in place but one that covers the multitude of possibilities that may arise in today's modern society. It is only with the assistance of competent advisors, both legal and financial, that a solid and strong estate plan for the transfer of assets of all types to the next generation be established.

But creating an estate plan is not a once off event. It should be regularly reviewed and include all assets particularly superannuation.

A superior estate plan adequately documents the provision for the transfer of assets from one generation to the next in the most tax and asset protective manner possible whilst simultaneously preventing dispute between the beneficiaries. To leave a Will is not enough. The right Will needs to achieve the aims of the people involved matched to the estate plan and not bring into play dispute that simply cause disruption and expense to the beneficiary family members.

In addition to a will it is important also to consider:

- Ensuring that you have adequate personal protection insurance to provide for your estate.
- Establishment of Enduring Powers of Attorney(s).
- Establishment of Medical Guardianship(s).
- Testamentary Trust and Maintenance Trust structure within the estate where appropriate to accommodate any children or grandchildren
- Any superannuation death benefits are taken into account either outside the estate or part of the estate
- Aligning any Family Trust or other Trust Appointer(s) with your estate plan strategy so they are the same and achieve your goal of having the right person as the Appointer successor
- Any holdings (the number of shares allocated) of private company shares are appropriate, so ownership of private company shares can actually be transferred to beneficiaries, or if share splits need to occur

Estate Planning Objectives for a couple

- To ensure that benefits payable in the event of death of either of you, your estate is distributed in a way that your children are treated equally and provided for, whilst still ensuring the surviving spouse is also looked after
- In the event that one dies before the other, all debts are repaid to ensure the remaining assets are as simple as possible to identify and manage moving forward
- To ensure clear and concise arrangements are put in place detailing your estate planning arrangements to ensure this process is as simple and easy as possible for the relevant parties.
- To minimize the administrative burden of estate planning issues for your loved ones, ensuring they are well provided for with no major business or administrative issues to resolve
- Where appropriate consider if there will be adequate provisions for replacing lost income, providing for school fees and overall housekeeping expenses and a full time/part time carer in the event that you both die together.
- To ensure there is a clear asset for where replacement income, housekeeping expenses, private school expenses, and repayment of debt will be funded from if one of you die (e.g. insurance option)
- Aiming for benefits from Super and your other assets are passed to beneficiaries in the most tax effective way possible.

Establish Binding Death Nominations within your Super arrangements

Establish Binding Death Nominations for your Superannuation

You may consider that you both nominate 100% of your Superannuation benefits be passed to the surviving spouse.

Alternatively within your Will, you can stipulate a percentage of your super passes to the estate to be distributed to your spouse and/or children via a Testamentary (or Maintenance) Trust which is outlined in more detail later in this document.

By having these nominations in place, this will provide you with certainty as to how these benefits will be distributed. It is important to note that for legal reasons, these nominations within a self-managed super fund and sometimes public offer super funds are generally required to be updated every three years, so you need to ensure you continue to update these nominations regularly.

Establish Wills

By establishing Wills, you both establish a legal framework for how your assets will be distributed, as well as the ability to nominate the executor(s) of your estate. By having a Will in place, this ensures that your assets are distributed according to your wishes and reduces the potential for disputes over the distribution of your estate.

There are numerous considerations for the structure of your Will. Please find below a list of issues to consider in the drafting of your Will. Please note this list is not exhaustive and there will be additional considerations your Solicitor can advise on.

Key Issues to Address Within Your Wills

- Where there is a desire to explicitly provide a lump sum for any children consider specifying that benefits received by the estate (if applicable) from Superannuation are to be directed into Testamentary Trust(s) and/or a Maintenance Trust for your children. This will ensure that there is a clear and defined allocation of funds for the children, and that these funds are insulated by the Testamentary Trust structures in which they will be held.
- Nominate the desired distribution of any properties that you own.
- If appropriate nominate the desired recipients' of your Insurance Policies held outside of Superannuation and ensure this is in accord with your estate plan and will. Also check the current Insurance Policy beneficiaries to ensure any beneficiary aligns with your estate plan.
- Nominate which assets liabilities are to be paid from.
- Ensure details of any personal items of value either financial sentiment where there could be any potential issues of contention are covered clearly within the Will using an easily adjustable "wishes list"
- Nominate at least 2 executors of your estate and make clear your intentions should any or all of your Executors or beneficiaries predecease you or not be able to act as your Executor/trustee

Align any Family Trust(s) Appointer(s) with your will strategy

If you have any type of existing trust(s) it is essential to align any estate planning strategy such that the Trust(s) Appointer in the current arrangements is considered in the overall planning of your estate.

This requires reviewing any current Trust(s) deeds and identifying the Appointer(s) successors ensuring this is still applicable. It is vital to seek advice so that your wishes can actually occur. Remember the Appointer has the power to remove any trustee of a trust and appoint another party to act as trustee which may not be desired.

[Company shares and seeking share splitting advice](#)

If you have shares in a private company and wish to leave these shares to your beneficiaries, then please seek advice about the possible benefit of “share splitting” to allow for the shares to be passed to your beneficiaries in a practical way.

For example if you wished to pass shares in a private company to your children and your partner, and there were only 2 shares issued, it would not be possible to give 3 beneficiaries, 2 company shares.

There are potential taxation consequences that could result in unplanned tax if a share split is done post death.

It is highly recommended you seek appropriate specialist advice if you have private company shares to pass to your beneficiaries.

[Establish Enduring Powers of Attorney](#)

Enduring Powers of Attorney enables you to make Financial decisions and transactions on behalf of the other under certain pre-determined circumstances, generally such as illness, physical or mental incapacity or other issue.

By having Enduring Powers of Attorney’s in place, this will ensure that you can both operate on each other’s affairs in the event that either of you become unable to act, or become ill, ensuring one of you have access to assets and funds when required.

[Enduring Medical Guardianships](#)

An Enduring Guardian is a person you appoint to make your personal or medical decisions if you should lose the ability to decide for yourself because of a disability.

By having Enduring Guardianships in place, this will meet the objective of ensuring there are arrangements in place to deal with the medical and personal aspects that could eventuate resulting from medical disability (e.g. coma or life support).

More things to think about

[Executor\(s\)](#)

It is prudent to nominate a *principle* Executor or Executors and a *standby* Executor(s) just in case the principle Executor(s) are unable to fulfil this requirement.

The executors are:

For you:

Principle Executor: _____

Stand by
Executor: _____

For your partner:

Principle Executor: _____

Stand by
Executor: _____

[Wills - Check List](#)

Description

Appointment of Executor -who is this to be?

 Powers of the Executor

 Executor to seek professional advice

Accounting

Legal

Financial

Establishment of Beneficiaries

Specific Gifts

Life interest over main residence

Life insurance

Superannuation Death Benefits

 Super distribution in the event both die

Annual Leave and Long Service Leave entitlements at Death

Children Guardianship

Distribution of Residual Estate

Family or other Trusts-replacement Appointer or Trustee

Testamentary trusts including children

 Distribution of Income

 Distribution of Capital

Ownership of private company shares

Other documents outside of the Will

- Appointment of Enduring Guardian-Reciprocal Powers of Attorney
- Medical Guardianship
- Wishes List

Estate planning example

As an example one strategy of the will could be to use “protected” Testamentary Trust(s) to provide for the following:

Residence and accommodation for the survivor, children

- A home for the surviving partner, and or
- a home for the children to live in Australia

Testamentary (and or Maintenance Trust (s) for your children

Income for day to day living for the non-adult children and their carers

- sufficient income for the children and their carers to ensure adequate day to day maintenance, education to university or other tertiary level standard, other reasonable living expenses that in the opinion of the executor are appropriate given the intention of providing a high living standard for the children until they are aged 21 or older if they are still studying

Capital lump sums when children are aged less than say 25??

(Often used to protect adult children for unintended rights of a defacto partner)

- a capital lump sum is to be available at the executor’s discretion to assist the children in furthering their lives, a deposit on a property or other essential capital items deemed appropriate-(*to be discussed and drafted with your solicitor*)
- a capital lump sum or transfer in specie of assets within the Estate is to be available to the children at age 25, equal to xxx% of the net assets of the Estate
- any capital lump sum advanced to any beneficiary for the purpose of purchasing a property shall be treated as a loan to the Estate and an appropriate loan mortgage shall be entered into.
- where the beneficiary has a partner a condition of the loan could be the beneficiary’s partner agrees not to make a claim in relation to the property
- the beneficiary and partner execute a co-habitation agreement and the beneficiary agrees to either create a will or revoke other wills and make a new will leaving the mortgaged property to the Estate

Information about Testamentary Trusts

[What is a Testamentary Trust and should I have one? by Nicole Rockliff](#)



Incorporating a Testamentary Trust within your will can provide significant flexibility along with asset protection and tax minimisation for those who benefit from your **estate**.

What is a Testamentary Trust?

It is a Trust established under a will but it does not come into effect until after the death of the person making the will.

A Trust describes a structure whereby assets are managed by one person (or persons) i.e. a **Trustee**, for the benefit of others (the **beneficiary** or beneficiaries).

Under a Testamentary Trust the **Trustee** has the discretion to distribute capital and income between a group of beneficiaries nominated in your will. We try to include a wide number of potential beneficiaries to give greater flexibility to the **Trustee** in distributing the capital and income between such beneficiaries.

There is no standard format for a Testamentary Trust and they are adapted to suit the needs of a particular person/family.

What are the benefits of a Testamentary Trust?

There are many benefits as follows:

1. Flexibility for your beneficiaries

The **Trustee** may distribute capital and income to any nominated **beneficiary** at any time and in any proportion. A Testamentary Trust gives the beneficiaries both flexibility and control over when and how they take their inheritance.

2. Protection of Assets

The assets form part of a Trust and therefore they cannot be taken out of the Trust without the **Trustee** agreeing to distribute them to the beneficiaries. None of the assets are legally owned by the beneficiaries which may protect the assets of the Trust from some of the following circumstances:-

2.1 Divorce/breakdown in relationship of a beneficiary - if an intended **beneficiary** is in a "shaky" relationship (such that the marriage or **de facto** relationship will dissolve in time), then if the assets are held in a Testamentary Trust, they are not classed as assets of any individual and therefore the Family Court cannot make an order requiring the distribution of those funds. In other words the spouse or partner of an intended **beneficiary** will not reap the benefits of an inheritance.

2.2 Creditor protection - to protect the bequest from creditors of a **beneficiary**. If an intended **beneficiary** had a number of creditors and/or is likely to be at risk of being made bankrupt, the Will maker can protect the bequest of monies under a will to them so that the inheritance will not be at risk of being required to be given to the **Trustee** in **bankruptcy** or creditors.

2.3 High Risk Beneficiaries - if an intended **beneficiary** is in a high risk profession or business where **negligence** claims are likely, a Testamentary Trust will protect the inheritance.

2.4 Will challenges - if an intended **beneficiary** receives monies in your **estate** via a Trust then, as it is not in that beneficiaries **estate**, it cannot be subject to a Will challenge when they die.

3 Protection of Beneficiaries

3.1: Vulnerable Beneficiaries

(a) Social **Security** Entitlements - if an intended **beneficiary** receives a social **security** entitlement such as a pension or disability support pension, they would be at risk of losing such entitlements if they were to receive a lump sum inheritance and therefore a Testamentary Trust enables them to have monies distributed to them or to others on their behalf to meet their needs from time to time with the effect that they are not at risk of losing their social **security** entitlements.

(b) Vulnerable beneficiaries - if one of the intended beneficiaries is either a spendthrift or has gambling/drug addictions, you can provide for such a **beneficiary** through a Trust ensuring that his/her share of your **estate** is kept intact.

(c) Remarriage of spouse - in this situation the Testamentary Trust is useful for families who wish to provide for their spouse but are concerned that the spouse may remarry and divert the family assets to the new family or, as sometimes happens, uses the family assets in risky or unprofitable ventures at the suggestion of the new spouse.

3.2 Taxation Advantages

Taxable income generated by the trust can be allocated to the beneficiaries of the Trust in a tax effective way. Under the Trust, the **Trustee** has the power to distribute the Trust income to any of the persons nominated as potential beneficiaries under the Trust. Therefore, for example if the spouse, partner or dependant of an intended **beneficiary** is not working or receiving an income, the Trust may allocate income to such a person (provided they are nominated as a potential **beneficiary** under the Trust). A child (minor under the age of 18 years) is currently entitled to receive a tax free annual income from a Testamentary Trust of \$6000 (this is tax free only if the child has no other income).

Who can be a Trustee of a Testamentary Trust?

Anyone you wish, including the executors of your Will, their spouse or partner or their children. The **Trustee** has effective control of the Trust, so the **Trustee** should be a person or persons who the Will maker knows and whom the Will maker Trusts are acting in the best interests of those who will receive the main benefit of either the whole or part of the **estate** that the Will maker left subject to the testamentary Trust.

It is possible to establish a number of testamentary Trusts under a Will and name different Trustees for each of them.

What should I consider before establishing a Testamentary Trust under my Will?

There will be ongoing administrative costs involved in maintaining a Trust, such as accountancy fees for preparation of Trust taxation returns. Factors that you should consider include whether the income generated by your **estate** will be sufficient to **warrant** a Testamentary Trust, whether you have sufficient assets in your **estate** and whether any of the above apply to one or more of your intended beneficiaries.

Should you have any query regarding the above please call me on 0412 511 662.



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[Estate Plan and Wills WORKBOOK](#)

Client Names		
Executor name		
Address		
Standby executor name		
Address		
Estate plan strategy	Beneficiaries	Beneficiaries
<i>Gifts-charity donations</i>		
<i>Personally owned assets</i>		
Home		
Jewellery		
Children's Guardian		
Guardian's name		
Address		
Standby Guardian name		
Address		
Super		
Binding death nominations		
To estate		
Insurance policies outside of super		
Beneficiaries		
Investment properties		
Tenants in common		
Individually owned		
Shares in companies		
Beneficiary		
Share splitting appropriate?		
Family Trusts		
Primary Appointor		
Secondary Appointor		
Executor as LPR as last resort?		
Testamentary Trusts		
For spouse?		
For children		

Overview

Enduring Power of Attorney name		
Address		
Standby Enduring Power of Attorney name		
Address		
Enduring Medical Guardian name		
Address		
Standby Enduring Medical Guardian name		
Address		

[Assets and Liabilities summary](#)

[Mud map \(if applicable\)](#)