

1 July 2019

Having an appropriate estate plan in place will ensure that in the event of your death or incapacity your assets are distributed according to your wishes.

Developing a robust estate plan should ensure that:

- the ownership and control of your assets passes to your intended beneficiaries;
- your assets may be protected if your beneficiary or estate is involved in any legal difficulties (for example, divorce or bankruptcy);
- tax is minimised on the income and capital gains earned on assets; and
- you have peace of mind of all matters of your estate, both financial and personal.

Given the nature and complexity of this area, your legal adviser should advise you on this matter.

## Estate and non-estate assets

For the purposes of managing your estate, your assets are broken into two categories; estate and non-estate assets.

Estate assets are those which you personally own and have ultimate control over. The distribution of these is managed through your Will. Non-estate assets are those that you do not legally 'own' (although you may have beneficial ownership) and cannot directly control. These assets cannot be directly distributed via your Will.

Some typical examples of estate and non-estate assets are provided below:

Estate assets	Non-estate assets
Direct property (held as tenants in common or owned individually)	Direct property (held as joint tenants)
Personal possessions incl. motor vehicles	Superannuation
Shares	Life insurance policies
Bank accounts	Investment bonds
Loans to a trust	Company assets
	Unallocated family trust assets

## Wills

A Will is a legal document that sets out your wishes as to how your estate assets are to be distributed upon death. It ensures your loved ones are not faced with difficult decisions and doubt about your wishes and intentions upon death. If you were to pass away without a valid Will in place, the distribution of your assets will be determined by your relevant State or Territory, which may not reflect your wishes and could result in delays, conflicts and excess costs, which could otherwise have been avoided.

### Important elements in constructing a Will

A Will may comprise the following elements:

- Beneficiaries - The beneficiaries are those to whom you want to leave your estate. It is important that you also nominate replacement beneficiaries in the event your primary beneficiaries predecease you.
- Executors – The executor is responsible for the administration and execution of your Will. It is important that you nominate an alternative executor who is able to resume responsibility if the original executor is unable to continue.
- Specific bequests - Allows specific items to be left to certain individuals. The main benefit is that an executor can avoid the need to sell the asset and incur capital gains tax.
- Equalisation clause - Grants your executor the power to make adjustments between beneficiaries to provide an equal distribution where executors decide to make uneven distributions of particular assets or categories of assets (e.g. superannuation).
- Testamentary trusts – Can be established to hold assets for the beneficiaries in your Will.

### Reviewing your Will

As your personal circumstances change, it is important that your Will is kept up to date to ensure your assets are transferred to your intended beneficiaries according to your wishes. A review should be considered in any of the following circumstances:

- Marriage, separation or divorce, or upon entering into a new relationship. It is important to bear in mind that a marriage revokes a Will but divorce does not.
- Birth or death of children, close relatives, or other changes in your family circumstances.
- Significant changes to the value of your assets or the manner in which you own assets.
- Retirement from full-time employment.

Over the years there have been significant and continuous change to the taxation, superannuation and social security laws impacting upon Wills and deceased estates. These changes reinforce the importance of regularly reviewing your Will to ensure it continues to comply with your wishes in the most efficient manner.

### Testamentary Trusts

A testamentary trust is simply a trust created by a Will. It is usually a discretionary trust that gives the trustee full control over who (out of a range of beneficiaries nominated in the Will), when and to what extent benefits are distributed. Alternatively, a testamentary trust may be a fixed trust, with specific beneficiaries receiving a fixed share of the assets and income of the trust.

It is also possible for the testamentary trust assets to pass into the direct control of the beneficiaries, a process called vesting, at a date stipulated in the Will or even at any earlier date if the trustee so decides, and they have been given that power in the Will.

Common reasons to include a provision for the establishment of a testamentary trust include:

- Asset protection – The use of a testamentary discretionary trust provides a degree of protection for trust assets from claims by creditors, or beneficiaries who may not be able to manage the assets themselves. The trustee controls when and how the funds may be accessed, and for what purpose.
- Reducing tax – A child receiving income under a testamentary discretionary trust pays adult tax rates, not the penalty tax rates that apply to income received through family discretionary trusts. Income paid for the benefit of children might be tax-free (if within their tax-free threshold). The same income received by a surviving spouse might be taxed at the top marginal tax rate.
- Inter-generational wealth transfer – Instructions can be made so that certain beneficiaries can be provided an entitlement to income from the trust but not the assets. In this way, for example, a spouse can be provided for but the assets ultimately passed to your children or grandchildren.

## Superannuation death benefits

To ensure your superannuation benefit is paid to your preferred beneficiaries in the event of your death it is important to understand the various death benefit nominations available to you under your superannuation agreement. These include:

- Non-binding nomination - If you have made a non-binding nomination, the trustee of your superannuation fund need only consider your nomination as a guide. They will have the ultimate discretion to determine who receives your superannuation benefits.
- Binding death nomination - This is a legally binding nomination. The superannuation trustee does not have any discretion to determine who your benefits are to be paid to upon your death. A binding death nomination may be either non-lapsing or will lapse after three years unless it is confirmed, modified or revoked within that time.
- A non-lapsing binding nomination will not lapse unless it is modified or revoked. The Trustee of the super fund is compelled to pay the benefit to your nominated beneficiary as long as they are an eligible dependent at the time of your death.
- Reversionary nomination - This type of nomination relates only to superannuation pensions and can generally only include a dependant, such as a spouse. It provides binding instructions to redirect payment of a pension to a specific beneficiary upon the death of the original recipient.

Although there is no limit on the number of binding or non-binding death nominations you can make, to be valid, the nominee must be one of the following at the time of your death:

- Your spouse (legal or de facto);
- A child (which includes an adopted child, step-child or an ex-nuptial child) of any age;
- Any person with whom you have an interdependency relationship (as defined in superannuation law); or
- Any person financially dependent on you.

We can help you understand the types of nomination available to you to ensure you make the best decision for your situation.

## Powers of attorney

A Power of Attorney is a legal document which enables you to appoint another person to make decisions or sign documents on your behalf. You can appoint more than one attorney and if appropriate, set guidelines, conditions or limits in relation to how and when your attorney can use their powers.

There are two types of Powers of Attorney which you may consider:

- A General Power of Attorney; or
- An Enduring Power of Attorney

A General Power of Attorney enables you to appoint someone to make decisions and take actions on your behalf, whilst you have the capacity to do so, but are not personally able to attend to them. For example, you may wish to appoint a relative as your attorney to manage your financial affairs whilst you are overseas or interstate.

An Enduring Power of Attorney allows you to appoint someone to make decisions on an ongoing basis, even if you have impaired capacity.

If you did not have a Power of Attorney and you lose capacity, you may not have the opportunity to make your wishes known and ultimately someone would step in to make decisions on your behalf, for example, depending on the relevant state legislation the Public Trustee may be appointed to take care of your financial matters.

### **Medical decisions**

It's important to note that a Power of Attorney does not normally allow your representative to make decisions about your medical treatment or health.

Each Australian state deals with this situation differently, but most have a method by which you can authorise someone to make these types of decision for you. For example, in some states a Medical Power of Attorney can be completed, whilst others have an Advance Health Directive, in which an individual outlines their wishes in certain medical situations.



For further information please speak to your solicitor or legal adviser. We can help match you with an appropriate professional estate planning specialist to best meet your needs.

**Ask your Apt Wealth Partners financial planner for more information.**

#### Disclaimer

The information in this document does not constitute financial product advice and is of a general nature only. It does not take into account your individual objectives, financial situation or needs. It should not be used, relied upon, or treated as a substitute for specific professional advice. Apt Wealth Partners (AFSL 436121 ABN 49 159 583 847) recommends that you obtain professional advice before making any decision in relation to your particular requirements or circumstances.