Australian
Executor Trustees

Your guide to estate planning

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What is estate planning?

Estate planning is the process of working out the best way to structure your personal and financial affairs while you are alive so that you are looked after during your lifetime, and your personal possessions and financial assets are distributed the way you want when you die.

Although it includes the preparation of a valid Will, effective estate planning goes far beyond one single document.

An estate plan gives you the opportunity to:

- nominate someone to act on your behalf if you become unable to make your own decisions
- decide whether your superannuation assets and insurance will be included in your estate
- use trusts or other structures to protect your assets and gain tax benefits
- protect vulnerable family members
- specify arrangements for the smooth transfer of your business interests.

Estate planning documents (including Wills, powers of attorney, powers of guardianship, and insurance and superannuation nominations) are the tools that are used to implement the strategies that are developed as part of the estate planning process. Without a structured plan in place, the use of these documents alone are unlikely to deliver the most efficient and effective outcome.

Why is estate planning important?

Regardless of your personal circumstances, estate planning is important because it helps to ensure you are looked after during your lifetime according to your wishes and that on your death your assets will be managed and transferred according to your wishes, in the most financially efficient and tax-effective way, to the people you wish to benefit.

In the event of your death, careful consideration needs to be given to what you have, who you want to give it to, their personal needs and circumstances, potential claims, who is an appropriate executor and trustee, and most importantly what you want to achieve with the transfer of your wealth. By having a plan in place, your wishes will be clearly articulated in the documentation.

Once you know what you want to happen on your death, you need to ensure that it is reflected in your documents, the most important of which is your Will. If you die without having a legally valid Will, it can create added stress, and expense, for your family and friends at an already difficult time.

The same difficulties arise if you lose capacity and don't have the appropriate attorney and guardianship documents in place.

Benefits of estate planning

Estate planning gives you peace of mind that your affairs will be handled exactly as you would like if you become incapacitated or when you die.

Amongst other benefits, effective estate planning also allows you to:

- protect and provide for loved ones with special needs, including young children
- ensure your children's inheritance has greater protection from creditors or any future relationship breakdown.

Everyone can benefit from having an effective estate plan in place; your affairs do not need to be highly complex. However, if you have complex family or personal relationships (multiple marriages, children from different marriages or vulnerable family members for example) or significant assets (such as multiple properties, business ownership, or assets in a family trust or family company) it is even more important to seek professional estate planning advice.

Tip Your estate planning needs should be reviewed every few years or when there are significant changes to your circumstances.

Your Will – the centrepiece of your estate planning

A Will is a formal legal document that gives you the opportunity to:

- appoint an executor and trustee
- specify how and to whom you would like your assets to be distributed
- appoint a guardian for children who are minors at the time you die
- establish one or more trusts to transfer your wealth to beneficiaries tax effectively while maximising the protection of those assets
- make specific gifts to charities or establish your own charitable foundation, and
- express your wishes regarding your funeral arrangements.

To make a valid Will, you must be over 18. If you are under 18 you will need the consent of a Court.

What is an executor?

The executor is responsible for the administration of your estate, from paying your debts to the ongoing management of your assets until the estate administration is completed. Your Will must nominate an executor. You can nominate one or more individuals, or a trustee company, or both, as executor. Administering an estate can take many months (sometimes years) so you need to be sure that the nominated person is both willing and capable of undertaking the task of executor. Also, often the person(s) nominated as executor becomes the trustee of any ongoing trusts contained in your Will.

Case study – Marriage

Geoff and his new wife, Lucy, were having lunch with a lawyer friend, James, and sharing stories about their recent wedding. They had lived together in Adelaide for 12 months before getting married and were astounded when James told them that their marriage may have revoked the Wills they had made as a de facto couple.

Sure enough, Geoff and Lucy's Wills did not state that they were to remain valid in the event of marriage. This oversight meant that if either of them died, their estates would be divided according to a government formula rather than their specific wishes.

If Geoff had died, Lucy would have to share his assets with Geoff's children from his first marriage. The fact that Lucy was now pregnant brought home to them the urgent need to get their affairs in order.

An AET estate planner worked with Geoff and Lucy to put new Wills in place that ensured appropriate financial arrangements for the children of Geoff's previous marriage and separate arrangements for Lucy and their unborn child.

Geoff's financial adviser organised additional life insurance to fund a testamentary trust for Lucy and the future education of their unborn child.

Note: The laws on intestacy and the laws that set out the effect of marriage on a pre-existing Will differ in each State and Territory. An AET estate planner can provide advice about how the laws work where you live.

Why do you need a Will?

Without a valid Will, there is no specific person that has been nominated to look after your estate and there is no way of knowing how you want your assets to be distributed. If you die without having a valid Will you are said to have died 'intestate'. In these cases, a person – usually a beneficiary – needs to apply to the Court to be appointed as an administrator. The administrator is given the power to administer your estate in line with a strict legislative formula as to how your assets and personal effects are distributed.

While the legislation is intended to result in a fair and orderly distribution of property, the formula may not reflect what you would like to happen to your assets. In particular, the law has been created assuming that people want their estate divided among family members alone. Without a Will, it's impossible for any benefit to be made to close friends, in-laws, charities or other organisations.

In some cases, the process of dying intestate can actually be more expensive and time consuming than having a valid Will in place because it can take much longer to determine who will administer the estate and how it should be distributed. For example, if more than one person wants to be administrator, this could lead to delays and additional costs as lawyers are engaged to make the necessary applications to the Supreme Court. If your wishes are not known, there might be provision claims on your estate by different family members causing further expense and delaying the administration of your estate. Such a lack of clarity at this emotional time can make an already difficult period even harder for your family and friends.

What are beneficiaries?

Beneficiaries are the people or entities you nominate in your Will to receive cash, property or any other form of benefit from your estate. Beneficiaries can be individuals, charities, companies or trusts.

What does a Will contain?

There are strict legal requirements that apply to making a valid Will. Your Will must comply with these requirements or you risk having it declared invalid, in which case your Will is disregarded and your assets are distributed according to the legislative formula.

Legal requirements

For a Will to be valid it must be:

- in writing
- signed by you with an intention that it is to be a Will
- signed by you in the presence of two independent witnesses who must also sign in your presence and in the presence of each other.

A properly drawn Will should also contain the following:

- The name or names of your chosen executor.
- The date you are making the Will.
- A statement revoking any previous Wills that you have made.
- A clear statement about how you want your assets distributed.

In some Australian states, witnesses and their spouses are not allowed to benefit under your Will, so you shouldn't ask anyone who is a beneficiary under your Will to be a witness.

What you can give away

In your Will, you can give away the following assets:

- Assets held solely in your name.
- Your part of property which you own as a tenant-in-common.
- Specific personal belongings such as artworks, books, photos, musical instruments. (It is best to list specific items to ensure they are clearly identifiable).

Assets held with others as joint tenants do not form part of your estate and will automatically pass to the surviving joint owner when you die.

Some assets, such as superannuation and life insurance, do not generally form part of your estate unless you have provided these instructions. If you have these assets, it's important to think about the likely beneficiaries of these assets when considering which beneficiaries will receive the other assets covered by your Will. You should also consider the implications of giving these assets directly to your beneficiaries and whether it may be more appropriate to deal with them as part of your estate.

Case study – Estate and non-estate assets

Jean, aged 69 has one son, Sam. Sadly, Sam has a serious gambling addiction and because of that, his two daughters live with Jean on a fulltime basis. Sam does not provide any financial support to his daughters, so Jean is meeting all her granddaughters' day-to-day expenses. Jean, concerned that Sam will gamble away his eventual inheritance, is keen to ensure her granddaughters' education continues in later years.

Jean's AET estate planner was able to show her that, by directing her superannuation death benefits to her granddaughters, she would not only save around $50,000 tax on those benefits but she would have peace of mind knowing that her granddaughters' further education could be funded. Jean's granddaughters would have the opportunity to receive her superannuation in the form of a pension that would attract a tax offset of 15 per cent, resulting in tax-free pensions for each granddaughter between $20,000 and $25,000 per annum, while they remain financially dependent on Jean and until the age of 25.

If you're married or in a de facto relationship

It is likely that you would want your partner to be your major beneficiary if she or he survives you. However, you should consider how you would like your assets distributed in the event that your partner dies before, or at the same time, as you.

Omitting family members from your Will

If you want to omit a family member from your Will, you should seek professional advice to help you understand the possible legal ramifications in the event that your estate is contested. It is very important that the reasons for leaving someone out of your Will are documented properly to create the best evidence that may be required if a claim on your estate is made and to avoid significant delays in administration of the estate as well as costs related to the defence of the claim.

Choosing an executor

The choice of executor is completely up to you. Many people choose their partner, but it is also common to name more than one executor to share in the administration of your estate, as the task can be more complicated and time consuming than most people realise. It is a good idea to specify a second option for an executor in case your first choice is unable or unwilling to undertake the task at the time of your death.

The choice of executor becomes even more important if you have an existing family trust or a self-managed superannuation fund as control of these entities, and the funds within them, usually pass to your executors. An independent executor may be appropriate to ensure a balancing of the respective family interests.

It is important to select an executor who:

- will carry out your wishes without being influenced by other parties
- has the time, ability and willingness to undertake all of the necessary functions in a professional and efficient manner.

In many cases, the most appropriate solution will be to appoint one or more trusted relatives or friends as your executors. However, if your estate is large or complex, or if there are difficult or multiple family relationships involved, it may be best to appoint an impartial professional trustee company, such as AET, as your executor. You can also appoint a trusted friend or relative in conjunction with a professional trustee company. The decision depends on your individual needs and circumstances.

We would recommend that you let your executors know you have nominated them in that role, so you can be sure they are willing to perform the necessary tasks on your behalf.

Appointing a guardian

If you have young children who are classified as 'minors' (under 18) it is important to have a Will that appoints a guardian for them. In the absence of a valid Will appointing a guardian, if both you and your partner died suddenly, it may be left to the courts to decide who will care for your children.

For people with children, the ability to appoint a guardian is, therefore, a significant benefit of preparing a Will. Simply state in your Will the name of the person(s) you would like to be the children's guardian. Naturally, you will need to discuss and agree this with your chosen guardian before finalising your Will.

If you and your partner die when your children are still 'minors', the guardian will be fully responsible for the care of your children until they reach 18 years of age.

Storing your Will

There's no point making a Will if no one knows where to find it!

At the very least, you must let your chosen executor know where you keep your Will but, if possible, tell several other trusted people as well. Your executor will need to locate your Will promptly when you die so that your wishes for your funeral can be known.

As with other important documents, your Will should be stored in a secure, fire-proof place. Remember that your executor will need to access it when you are no longer around, which may make a safety deposit box at a bank unsuitable unless the box is held in joint names.

Tip Update your Will whenever your personal circumstances change, including events such as marriage, divorce, the birth or adoption of a child or grandchild, the death of one of your beneficiaries, a change in your family's health care needs, or significant growth or decline in your estate assets.

Updating your Will

If you want to make changes to your Will it is best to draft a new Will. An old Will amended by a long codicil can become a cumbersome and unwieldy document that is likely to cause confusion.

Any new Will you make should explicitly state that it revokes all previous Wills.

The last valid Will you make is the one that will govern the distribution of your estate when you die. Therefore, it's important not to put off updating your Will if the instructions you have in your current Will no longer fit your wishes.

Tip If you sell or give away a piece of property you have specifically mentioned in your Will, update your Will as soon as possible. For example, if you leave your brand new BMW convertible to your son, but by the time you die you have sold it and have a Toyota 4WD instead, it is unlikely that your son will be entitled to receive the new vehicle.

Power of attorney – protecting your interests

Have you ever stopped to consider who would manage your affairs if you had an accident or became unwell and were unable to make decisions for yourself?

Even if you are married and your partner is in good health, your partner is not permitted to sign for you, or make decisions on your behalf, without a formal power of attorney previously granted by you, authorising them to act in this way.

An enduring power of attorney is a legal document in which you authorise someone you trust to make decisions and sign documents on your behalf if you are no longer able to do so. It is an important component of estate planning. You do not want the administration of your financial affairs to be in limbo for months, or even years, because you have lost capacity but no one has the authority to take control.

You can appoint your partner, another trusted family member, friend or a professional trustee company, such as AET, to act as your attorney.

An enduring power of attorney will prevent the government from intervening in your affairs if you suffer an accident, illness or loss of mental capacity.

It is possible to limit a power of attorney to a certain timeframe (eg while you are overseas) or to making decisions in certain areas only (eg medical power of attorney). See our website at **www.aetlimited.com.au** or call us for more details.

The benefits of trusts

A trust is a legal structure in which money or other assets are held under the administrative control of an independent third party, the trustee. The trustee is responsible for looking after the trust assets in the best interests of the beneficiaries of the trust.

There are many different types of trusts. In context of estate planning, trusts are an extremely valuable tool that can bring much needed flexibility to the distribution of your assets, often saving many thousands of dollars in tax for your beneficiaries, as well as protecting the interests of your beneficiaries over the long term.

Testamentary trusts

While many people create trusts (eg family trusts) during their lifetime to protect their assets or minimise tax, it's also possible to establish a trust under your Will which is activated when you die. This type of trust is called a testamentary trust.

Your Will must appoint a trustee for the testamentary trust. The trustee is responsible for administering the trust assets, in the way your Will specifies, for the benefit of the trust beneficiaries. As the trust has been created under your Will, it is common for the executor to be appointed to act as trustee, although this may not always be appropriate.

Almost every Will should give the beneficiaries the opportunity to hold assets in a testamentary trust as there are clear tax advantages over inheriting assets in their own name. These advantages apply for children who are minors, as well as income-earning adults and pensioners, as you can see in the following case study.

Testamentary trusts can last for many decades following your death and can provide benefits to multiple generations of your family.

Case study – Testamentary trusts

Mary's husband John died unexpectedly at the age of 39. In the midst of dealing with his death, Mary pondered life after John and how she would cope financially and support their three children, all under 12 years of age.

She was relieved to hear from her insurance broker that John's insurance would be paid quickly. She calculated that John's $2 million life insurance would generate about $100,000 income each year.

The unwelcome news from her accountant was that the $100,000 income would be taxed solely in her hands despite the fact that it had to support four people. After tax, the $100,000 would reduce to $73,553.

Mary's accountant explained that if the insurance had been paid to John's estate and if he had a testamentary trust in his Will, the trustee could have divided the income of $100,000 equally between Mary and the three children and been left with $95,112 after tax, a saving of $21,559 each year!

Mary now understood the importance of having an effective estate plan in place and promptly met with an AET estate planner to ensure that her Will was updated and contained a testamentary trust for her children.

Charitable trusts

Another common form of trust created under a Will is a charitable trust. It is, however, also possible to set up a charitable trust during your lifetime.

A charitable trust allows you to develop your own special giving program which will carry on in your or your family members' name forever, supporting the causes that are important to you. Setting up a charitable trust, or another charitable giving vehicle, during your lifetime may also carry significant tax advantages both in your lifetime and during the estate administration process.

There are many types of charitable trusts, including:

- education and scholarship trusts in support of a school or university
- medical trusts in support of a particular field of medical research
- trusts supporting a church body or community services group
- trusts supporting the poor and needy in the community
- trusts supporting emerging artists or particular arts organisations.

Setting up one or more trusts under your Will can be a complex undertaking and requires professional assistance. When considering your overall estate planning and wealth management structures, it's well worth the effort to have specialists, such as our AET estate planners, guide you through the process. Dying with a poorly constructed estate plan, or with no plan at all, will almost certainly lead to a delayed and costly administration process and poor outcomes for your beneficiaries.

Need more information?

If you would like more information on the estate planning process, or professional assistance with the preparation of your estate plan, call us on **1800 882 218** or visit our website **www.aetlimited.com.au**

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