ESTATE PLANNING

An effective estate plan can enable you to protect and support your family and secure the wealth you have built up and provide directions on how your wishes are to be carried out upon your death or time of incapacity.

Estate planning will only be effective if it is carried out in a timely manner and by appropriately qualified professionals. A solicitor can help you make decisions about what you want done with your estate and prepare your Will. There are also beneficial ways to structure your affairs under your Will so it's important that you have a tax professional guide you through these important decisions.

ASIC's MoneySmart site states, "It's estimated that nearly half of all Australians die without a Will, or 'intestate'." This effectively means those people have a default Will written for them by their State Governments.

Will

A Will is a legal document that sets out how you want your assets to be distributed when you die. You must be over 18 and have mental capacity to be able to make a Will.

Some important items that you need to consider when drafting your Will include:

- who should benefit from the estate
- whether special bequests of assets are to be made to specific beneficiaries
- who the executor of your estate should be – this can be more than one person and they should be willing and able to accept the role
- instructions for your burial or cremation.

You may also wish to consider whether to leave assets to your beneficiaries directly or through a testamentary trust or life interest, or if a Guardianship clause needs to be included.

Testamentary Trust – this trust is particularly useful if you have beneficiaries who are young, or who have a disability, or face the potential for a divorce or other litigation, or have problems with the control of money. Your assets will pass into the trust where they can be protected if necessary and may also receive favourable tax treatment in some cases

Life Interest – a Life Interest can be used if you want to give someone the right to use an asset during their lifetime but have another beneficiary take ownership of the asset. A life interest is commonly used to enable a surviving spouse to continue living in a home with the ownership of the home passing to the children

Guardianship – if you have young or disabled children, your Will can include the nomination of your preferred guardian for those children. Your guardianship nomination is a declaration of your intentions only and can be overruled by a court if the person you nominate is not in the best interest of the child.

A Will is the first step in ensuring your estate assets reach your intended beneficiaries, in a tax effective and timely manner after your death. If you do not have a valid Will when you die, you will be "intestate". This means that instead of you determining who will receive your estate; it will be divided up in accordance with a formula set out in legislation. There is different legislation in each state / territory of Australia. This can lead to unexpected and unintended results.
It is important to ensure that your Will:

- Nominates executors (and successor executors) for your estate who are likely to survive you and who clearly understand your wishes
- Nominates beneficiaries in relation to the whole or part of your estate and nominates second choice beneficiaries, should your first choice predecease you
- Bequeaths monetary value or a percentage of your estate rather than a specific asset, as there is the risk that an asset may not be in existence at the time of distribution of the estate
- Nominates assets to be held in Trust for beneficiaries under 18 years of age. For example, you can provide funds for your children's or grandchildren's education.
- Is reviewed (and updated) on a regular basis, particularly if you have any significant changes such as a new child, divorce or marriage or the acquisition of a new sizable asset.

What assets are covered by your Will?

Generally, Estate Assets are those assets which are held personally in your name. Only these assets form your estate upon your death and the distribution of these assets is directed by your Will. Generally, estate assets consist of:

- Real property
- Cash investments
- Shares
- Personal chattels
- Loans made to the Trustee of a trust
- Income or capital allocated to you from a trust
- Interests in assets held as tenants in common (see below)
- Shares held in a company.

Upon Death what happens to the following assets?

Tenants in common assets

Tenants in common each have legal ownership of a designated portion of an asset. Upon death, each person's share of the asset is dealt with in accordance with their Will.

Non-Estate Assets

Non estate assets are assets you control but do not own (or wholly own). If another party has an inherent interest or authority in the asset, it is a non-estate asset. The succession of these assets must be individually addressed by your estate plan (and can usually be allocated to your estate if you wish) to ensure smooth and prudent distribution.

- Assets held with other parties as joint tenants
- Assets held in trust
- Unallocated assets owned by a family trust
- Superannuation benefits
- Life Insurance proceeds
- Account based annuities or pensions that have a reversionary beneficiary.

Joint tenancy assets

Joint tenants own an asset mutually. This means that upon the death of one of the joint tenants, the other would automatically become the owner of the entire portion of the asset as if they had owned the entire asset from inception.

Superannuation assets
Superannuation is dealt with in accordance with the Superannuation Industry Supervision Act (SISA) and unless a current binding death nomination exists will be distributed at the discretion of the Trustee of the fund in accordance with the Trust deed and relevant legislation. Binding death nominations must be updated every 3 years to remain valid.

Life Insurance proceeds
The party which receives the proceeds of a Life Insurance policy is the owner of the policy:

Owner	Beneficiary
Deceased	Estate of deceased
Other owner (i.e. spouse)	Owner (i.e. spouse)

The role of Executors
An executor is the person or Trustee organisation you choose to carry out the terms of your Will. Your executor is responsible for the entire administration of your estate until the final distribution of the assets is made to your beneficiaries. Careful consideration is required when appointing the executor. It is recommended you discuss the appointment with that person prior to making the Will. In addition to estate beneficiaries, executors may also be your solicitor, accountant or a public Trustee.

It may also be helpful to prepare an Executors Dossier which can be kept with your Wills to make administering your estate easier for your Executors. An Executors Dossier contains important information about your assets such as purchase details, additions, capital gains, the location of title deeds and any other relevant information.

Advantages of establishing a Will include:

- You can choose who you wish to inherit your assets, rather than this decision being made by the laws of intestacy
- You can choose to pass certain belongings to certain individuals
- You can structure your Will to ensure that your family's wealth is protected against adverse outside influences. In some cases, your family may also need protecting from themselves.
- Ensure that items of sentimental value are retained in the family
- If you are unmarried couple, you can ensure your partner is provided for

- You will have peace of mind that your estate will be divided as you wish and you can ensure that the people you choose will administer your estate
- It will also make it easier for your loved one to deal with your affairs when you are gone.

The specific risks associated with this advice:

- A poorly constructed Will may not distribute your assets as per your requirements. For this reason, we recommend that a legal adviser assists in the creation of your Will
- It relies on you to update should there be any significant changes to your circumstances
- If you die without a Will, distribution of your assets will be in accordance with State-based legislation
- Unless you appoint a legal guardian and provisions for your minor children, they may not be cared for in the manner you would like and be unduly stressed by the process.

Guardianship of Children

The appointment of a guardian is usually included in the Will as a safeguard in the event that both parents die before the children are 18 years old.

The appointment of a guardian also serves to avoid the possibility of disputes between members of the family. The Court has an overriding discretion to appoint or remove a guardian.

It is the guardian's responsibility to make the important "life decisions" on behalf of the children. The guardian must ensure that the children are adequately housed, clothed and educated. The guardianship of minor children is a responsible task. The Will-maker should think carefully about the appointment of a guardian and attempt to appoint one or more persons who are prepared to take on the responsibility and hold similar social and cultural views to the Will-maker.

Conflicts may arise between an executor and a guardian as to how a minor beneficiary's entitlements are to be used for a beneficiary's on-going maintenance, education advancement or benefit. To avoid such conflicts these issues can be catered for.

Challenging a Will

Your Will may be challenged after your death in certain situations. Examples of these situations include:

- the Will was not your last Will, or it is not completed correctly
- you did not have mental capacity at the time you signed the Will
- you were forced or pressured into making the Will
- a person you had a responsibility to provide for believes you didn't leave them a fair share of your assets.

Family provision legislation exists to ensure that certain people are provided for after a person's death. The list of people who can challenge a Will on these grounds can vary across the States but will usually include your spouse, former spouse, children and step-children. It can also extend to other family members or individuals.

Having your Will drafted by a solicitor can reduce the chances of your Will being challenged.

Consequences

- Once in place, you should review your Will every few years or when your circumstances change
- If you die without a valid Will, you will have died 'intestate' and the distribution of your assets in is determined by State/Territory legislation
- The tax and Centrelink implications of leaving assets to certain beneficiaries should be considered
- Even though superannuation and life insurance is often not an estate asset it is important to include provisions for the distribution of these amounts in case they do end up in your estate
- It is important to ensure that your executor and/or family know where to find a copy of your latest Will and other important documents.

Powers of Attorney

A power of attorney is a legal document that gives another person the authority to act on your behalf. Depending on the law prevailing in a particular state or territory, there are generally four types of powers of attorney:

General Power of Attorney

This is where you the donor give another person the authority to act on a specific transaction for a limited time. E.g. appoint another person to manage your finances while you are on a holiday overseas. In the event of you becoming mentally unable to manage your own affairs the authority given to the donor ceases immediately. Unless there is good reason for preparing a general power of attorney, you the donor should consider preparing an enduring power of attorney.

Who should I choose as the attorney?

Who you choose as your attorney is up to you. It may be your spouse or de facto partner, another family member or close friend, an accountant, lawyer or a Trustee company. No more than two people can be attorneys at any one time. When choosing an attorney, the Public Advocate recommends you give careful consideration to the following questions:

- Is the person 18 years of age or older?
- Is the person trustworthy and likely to act in my best interests?
- Is the person willing to take on the responsibilities?
- Is the person competent to deal with all financial and property matters relating to my estate?

- Is the person competent to take on the task of keeping and preserving accurate records and accounts of all dealings and transactions made under the power of attorney?
- Does the person live close enough to me to be able to discharge his or her responsibilities under the enduring power of attorney?
- Could the choice of attorney create conflict within the family?
- Should conditions or restrictions be placed upon the attorney?

Can a person with a decision-making disability make a power of attorney?
To be able to make a power of attorney the adult must have 'full legal capacity' ie the person must know and understand the nature and extent of their own estate (land, property and financial assets) and that a power of attorney will give the attorney complete authority to deal with all aspects of their property and financial affairs (provided that such dealings are in the interests of the person making the power of attorney).

Adults with impaired decision-making abilities, such as those with a psychiatric condition, dementia, an intellectual disability or an acquired brain injury may not be able to execute a power of attorney.

In the case of people with a mental illness, the issue of capacity can be complex particularly if their ability to make reasoned decisions fluctuates with the severity of their illness. Any doubt about the person's capacity to make the document could result in the State Administrative Tribunal finding the enduring power of attorney has not been properly made, and as a consequence it could be revoked.

What should I do if there is doubt about my capacity to make a power of attorney?
If you are considering making a power of attorney but your capacity to do so might be questioned, you are advised to seek the opinion of at least one doctor qualified to assess your capacity and to determine if you are able to make the document.

There is no specific capacity assessment in relation to a power of attorney and it will be up to the health professional assessing your capacity to decide which test is suitable.

When seeking this opinion, you should advise the doctor of your intention to make a power of attorney and request a written report of the assessment which clearly states whether or not you have capacity.

If you are assessed as having full legal capacity it is advisable that:

- the doctor who made the assessment be one of the two people who witnesses your enduring power of attorney
- you make the enduring power of attorney as soon as possible after having the capacity assessment
- you keep the copy of the doctor's assessment of your capacity with the enduring power of attorney to ensure everyone is aware you had capacity to make it.

If you are assessed as not having capacity, you will be unable to make a power of attorney.

What authority does an attorney have?

An attorney has authority, depending on the terms of the enduring power of attorney, to manage the donor's financial and property affairs in the donor's best interests.

An attorney does not have the authority to:

- make a will on behalf of the donor
- make personal, lifestyle or treatment decisions (for example, accommodation decisions)
- do any act which is illegal
- deal with any property held in trust by the donor (governed by Trust deed)
- perform the functions of a director or secretary of a company on behalf of the donor unless authorised by the constitution of the company
- delegate their authority.

Enduring Power of Attorney

This is similar to a general power of attorney except that it can continue even if you become mentally incapacitated (lose mental capacity). An enduring power of attorney is an essential document, particularly for older people who are finding it increasingly difficult to attend to their personal affairs. It is therefore extremely important that you only grant this power to someone you can trust.

When does an enduring power of attorney come into effect?
The donor (person making the enduring power of attorney) must decide whether the enduring power of attorney will come into effect immediately or in the event they lose capacity.

If they choose for it to come into effect only if they lose capacity, an application will need to be made to the State Administrative Tribunal to confirm loss of capacity and declare the enduring power of attorney is in force.

Revoking an Enduring Power of Attorney
Provided the donor still has legal capacity, they can revoke an enduring power of attorney at any time by simply tearing up the document. However, it is preferable to put the revocation in writing and registered in those states / territories where registration is applicable. All copies of the power of attorney should also be retrieved from the attorney so it is clear to the Attorney that their power has ended. A copy of the revocation letter should also be sent to all relevant organisations (such as banks, etc).

What if I reside in Western Australia but have assets outside the State?
The Public Advocate recommends that Western Australian residents with assets outside the State seek legal advice as to whether a Western Australian enduring power of attorney is recognised in the jurisdiction where the assets are held and, if not, whether they are entitled to execute an enduring power of attorney under the laws of that jurisdiction. Witnessing requirements vary between jurisdictions.

For people living outside Western Australia but with assets in this State, the Public Advocate recommends that a Western Australian enduring power of attorney is executed.

Do I continue in my role as attorney if the person who appointed me dies?
No, an enduring power of attorney ends on the death of the donor. This means your role as attorney ends immediately on the death of the donor. At this point the provisions of the person's Will take over.

It would be expected that you secure the estate of the person and hand over relevant documents to the executor of the Will. If you are the executor of the person's Will your function in finalising the estate is as the executor and not as the attorney.

Advantages of establishing an Enduring Power of Attorney include:

- Your POA can make financial and legal decisions for you if you lose the capacity to make your own decisions
- A relatively easy and inexpensive method of financial management
- Provides continuity of management of your financial affairs, thereby minimising immediate financial hardship if your decision making ability is suddenly impaired.

The specific risks associated with establishing an Enduring Power of Attorney include:

- That the person you entrust as your Enduring Power of Attorney is not trustworthy
- Make sure you nominate people that you know are trustworthy, if possible financially astute, and likely to be around when you need them
- If the donor wishes to revoke the authority given under the power of attorney, the donor must have the capacity to do so and;
- In the instance that the donor wishes to revoke authority given under the enduring power of attorney and the original enduring power of attorney is destroyed, care needs to be exercised in this instance to retrieve all known copies of the document
- In the instance that the donor wishes to revoke the authority given under the enduring power of attorney by preparing a formal revocation of enduring power of attorney, then in the event of your death, all Powers of Attorney automatically cease and the executor of your Will takes over responsibility.

Consequences

- You should review your Enduring Power of Attorney regularly to ensure it continues to be appropriate for your circumstances
- It is best to seek legal advice and have the Attorney documents drawn up by a solicitor.
- Legislation relating to Enduring Powers of Attorney varies between Australian States and Territories. If you move interstate it is important to review any existing Enduring Powers of Attorney and they may need to be redrafted
- An Enduring Power of Attorney can only be signed whilst you have legal capacity so planning ahead is important. In some cases this may need to be verified by a doctor or solicitor. You can cancel or change your Power of Attorney at any time whilst you continue to have legal capacity.

Enduring Power of Guardianship

In certain states, e.g. Victoria, an enduring power of guardianship can be prepared. An enduring power of guardianship enables a donor to appoint an attorney to make lifestyle decisions (such as where the donor lives and works) in the event of the donor losing capacity in the future. The donor can express preferences in relation to lifestyle decisions in the document.

If you do not appoint an Enduring Power of Attorney and are no longer able to manage your financial affairs, provision is made in each Australian State where a "financial manager" can be appointed. Unfortunately, the appointee may not necessarily be who you would have chosen which may cause considerable conflict and anguish among family and friends.

Advance Care Directive

An Advance Care Directive can give you peace of mind knowing that those caring for you will know what your wishes for medical treatment and care if you are no longer able to make or express your own wishes. You may also be able to name someone to speak on your behalf.

Benefits

- It provides a clear decision-making framework when trying to establish care decisions.
- Allows you to document your preferences/instructions for your health care, end-of-life, living arrangements and/or personal matters, should your decision making ability be impaired
- Allows you to appoint decision makers to make these decisions on your behalf, if you are not in a position to make decisions yourself

- Your affairs may be conducted in a manner similar to how you would conduct them.

How it works

An Advance Care Directive is a legal document detailing your wishes, preferences, and instructions for your living arrangements, personal matters, future health care, and end-of life decisions should your decision-making ability be impaired. The document may also allow you to appoint a decision maker to act on your behalf should you not be in a position to make decisions for yourself.

This document does not cover financial or lifestyle decisions so it is important to have an advanced care directive in conjunction with your Will and Enduring Powers of Attorney and Guardianship.

When choosing your substitute decision-maker, you can appoint a trusted friend or family member solely, jointly, or in conjunction with a solicitor or professional Trustee company. The person you choose must be comfortable taking on this responsibility. To help relieve this burden, it can be a good idea to explain any wishes you have with your chosen person and your family in advance.

If I make an Advance Health Directive do I need to make an Enduring Power of Guardianship too?

You are under no obligation to make an Enduring Power of Guardianship just because you have made an Advance Health Directive, nor do you have to make an Advance Health Directive because you have made an Enduring Power of Guardianship.

However if you chose to make both, you would be increasing the likelihood that in the event you lost decision-making capacity, decisions made on your behalf would reflect the decisions you would have made yourself.

If I did not have an AHD or EPG, who would make treatment decisions on my behalf if I was unable to make them myself?

If treatment was needed urgently, the decision would be made by the relevant health professional. If the treatment was not urgent, the health professional would have to refer to the hierarchy of treatment decision-makers. The decision would need to be made by the person highest on the list (hierarchy) who was available and willing to make the decision.

You can revoke or change the directive by making a new Advance Care Directive.

Consequences

- You should review your Advance Care Directive regularly to ensure it continues to be appropriate for your circumstances
- Legislation relating to Advance Care Directives/Powers of Attorney varies between Australian States and Territories. You should seek legal advice to have the power correctly drafted for the relevant state legislation
- An Advance Care Directive can only be signed whilst you are competent to do so. You can enforce a new Advance Care Directive at any time (thereby revoking any existing Advance Care Directive) whilst you are competent to do so
- This Advance Care Directive is not a Will. It also cannot be used to make financial or legal decisions. It is recommended you think about appointing an Enduring Power of Attorney and an Enduring Power of Guardian to make decisions about your future finances and legal matters.

Testamentary Trusts

A testamentary trust is a trust established by a Will that comes into effect upon the death of the Willmaker. The most common type of testamentary trust is a Discretionary Will trust. It describes a form of ownership of asset whereby a Trustee holds assets on trust for the benefit of one or more beneficiaries. This means that the assets pass to a Trustee who holds the estate assets on trust for the benefit of the beneficiary and a category of other discretionary beneficiaries rather than direct to a beneficiary in the situation of a Will. In order for the beneficiary to have the option of a discretionary Will trust, the Will must specifically provide for the establishment upon the death of the Willmaker.

The Will usually sets out who is to have ultimate control of each discretionary Will trust established. The trust is managed by the "Trustee" and all decisions regarding the management of the trust are made by the Trustee. Effective control of the trust rests with the person or persons who have the power to remove and appoint the Trustee. This person is usually called the "appointor" or "guardian". The power to appoint or remove a Trustee is referred to as the "power of appointment".

Typically, one of the beneficiaries of the estate is usually the Trustee and holds the power of appointment. However, the Trustee and the beneficiary can be different people. Benefit and control of a discretionary Will trust may be separated where the Willmaker does not want the beneficiary to have complete control of the trust. This is often the case where the beneficiary is suffering from a legal disability or is likely to be unable to appropriately manage the trust.

In the absence of any specific restrictions imposed by the Willmaker on the beneficiary, a beneficiary generally has the choice of whether to invoke the discretionary will trust upon the Willmakers death. The executor usually makes this decision in consultation with the relevant beneficiary. Typically, the default position is to establish this trust. If a beneficiary elects to establish the discretionary will trust, the beneficiary can subsequently end the trust and take the assets of the trust personally. However, careful planning and advice should be obtained prior to the vesting of a trust that has been established.

The beneficiaries of an estate who are given the "option" of taking their entitlement as beneficiaries of a discretionary Will trust are usually termed "primary beneficiaries". In addition to the primary beneficiaries of the trust, the Will provides for a class of additional discretionary beneficiaries who can receive income and capital from the discretionary Will trust. The decision to distribute income and capital to the discretionary beneficiaries rests with the Trustee who is usually the primary beneficiary or such other person or entity nominated by the primary beneficiary. To maximise flexibility, the class of discretionary beneficiaries should be drafted widely and should include immediate family and other relatives of the primary beneficiary. In addition, other potential discretionary beneficiaries such as associated trust, charitable organisations and related companies should also be included.

Once established, a discretionary Will trust has a maximum life span of 80 years therefore the Will should be drafted to allow the Trustee the discretion to end the trust any time prior to the expiration of the 80 year period.

Where the Willmaker is leaving their estate to more than one primary beneficiary, the Will should make provision for each beneficiary to take their entitlement as the Trustee and beneficiary of a separate trust. This avoids problems that may arise where on discretionary Will trust is jointly controlled by siblings and enables each beneficiary to deal with their respective entitlements in different ways.

For example: one beneficiary may choose to leave the discretionary Will trust in place while another may terminate the trust and take the entitlement personally, while a third primary beneficiary may elect not to invoke the trust at all. No consultation is required between the beneficiaries.

As a discretionary Will trust has the capacity to run for an 80 year period, it will generally outlive the primary beneficiary. It is therefore necessary for the primary beneficiary as part of their estate planning, to provide for the succession of control the discretionary Will trust. This can be provided for in the primary beneficiaries Will or by a separate deed prepared during the lifetime of the primary beneficiary.

The advantages of testamentary trusts include:

- The ability to protect assets from potential creditors and unforeseen relationship breakdowns. For example, should your spouse or child form a relationship in the future which breaks down over time, if you have left assets to them in the form of a trust the partner cannot directly access these assets. An inheritance held within a Testamentary Trust is less likely to be the subject of a Family Court order in the case of a marriage breakup. It may be regarded as a financial resource and have some effect on the terms of a property settlement but this is a preferable outcome to the property being at the disposal of a Family Court order
- The ability to share the assets with family members with reduced transfer costs and ease of access
- Income tax minimisation, particularly for minor children who are taxed at adult rates. The Trustee of a non-fixed trust is able to stream the income to beneficiaries
- The trust is able to earn investment and business income
- Flexibility; crisis provisions can be included in the will to trigger alternatives where a beneficiary becomes incapacitated, bankrupt or experiences family breakdown
- The ability to allow you to rule from the grave by setting guidelines, such as age, education for children and grandchildren, income streams versus lump sums for spendthrift individuals etc
- Releasing certain beneficiaries from asset management responsibilities (e.g. minors, the elderly, the incapacitated or the financially unsophisticated or gullible). The flexibility of a Testamentary Trust, especially if combined with a Memorandum of Wishes as to how the Trust should be administered, may be an appropriate arrangement
- The Trustee has total flexibility to invest in whatever assets they wish (subject to the trust deed) and can draw on capital or income at any time.

Testamentary Trust example to distribute Estate assets for current and future generations: