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Estate Planning
Information Brochure

Estate Planning

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What is Estate Planning? Estate Planning is a process which considers every aspect of your legal and financial situation. This includes a properly drawn Will which will ensure that your money and assets are divided amongst your family and friends according to your wishes. Estate Planning ensures that complex family situations, business partnerships, taxation requirements and any other legal or financial matter is carefully considered. In this way, your family and friends will receive the benefits from your estate without incurring legal or emotional problems.

The importance of an up to date Will

Death, like taxes is inevitable, yet, when it comes to financial matters most people are unprepared.

A snap check of the average Australian family would find financial affairs in disarray with no-one, even the potential departed, certain of where various documents could be found.

The preparation of your Will, or the review of an existing Will, is an important part of your Estate plan. Having a valid and up to date Will is the safest way of ensuring your money goes where you want it to go when you die.

Wills can vary greatly in their degree of complexity and can be used to achieve a wide range of family and tax objectives.

Dying without a Will

If you die without a Will, you are said to have died intestate. Your assets will be distributed according to a statutory scheme which makes no allowance for the needs or merits of particular relatives or friends.

Divorce or de facto relationships

People who are divorced, re-married or living in de facto relationships should have a recent and completely drafted Will for two main reasons:-

- to overcome the inadequacies of the rules of intestacy in these situations, and
- to prevent, or at least discourage, family provision claims

Some of the major difficulties in these situations are dealt with under the heading "Family Considerations".

One example of problems which can occur is when a couple is living in a de facto relationship and one partner dies. The legal definition of a "spouse" in the case of de facto relationships depends on a number of different factors. It is possible that the law may not determine that a couple is in a de facto relationship and if one partner dies, the Estate may be distributed to the family of the deceased with no provision for the living partner, even if that was not the intention of the deceased partner.

Disposing of property by Will

It is only those assets actually owned by you that are able to be disposed of by your Will. This includes your share of property held as tenants in common with another person at the time of your death. You should seek legal advice where some assets have been transferred to a trust or a company, as you will not be able to provide for the division of these assets by your Will.

Jointly owned property

Your Will does not affect property which is jointly owned. Under property law, the rule of survivorship applies. This means that upon death, the property (subject to exceptional circumstances) is automatically owned by your surviving joint owner or owners, regardless of the terms of your Will.

Superannuation

You may be entitled to receive a superannuation benefit through a retirement plan offered by your employer. Many Will-makers, in calculating their assets, automatically include the superannuation benefit they expect to be paid on their death.

It is important to realise that the trustees have a wide discretion to pay the benefit. Depending on the provisions of the deed governing the trustees, the superannuation

might be paid in one of three ways:-

- to a person (or persons) whom the trustees are satisfied was financially dependent on the deceased at the time of death;
- to a nominated beneficiary (and there is danger here because nomination is commonly made when first joining a fund and is not reviewed);
- to the executors and trustees with the intention that it forms part of the Estate.

You should ensure that you clearly understand the terms of your superannuation arrangements, as they are often a major financial safeguard for your family and dependents. Tax considerations also arise in this context.

Life Insurance

Life insurance should be an important part of careful Estate Planning. If you have entered into a contract of insurance on your own life you may either:-

- name one or more beneficiaries (commonly your spouse or children) to receive the insurance proceeds upon your death; or
- nominate your estate as the beneficiary; or
- nominate a trust created by you during your lifetime as the beneficiary.

If the insurance proceeds are payable to your estate, they will be distributed according to the terms of your Will, or if no Will exists, according to the intestacy rules.

Willing debt-free property

It is an increasingly common practice for home buyers to take out a life policy to cover the debt of their mortgage. This is generally referred to as "mortgage protection insurance" and in many cases, is essential before a home loan will be approved. The insurance would generally expire on payment of the debt. This type of insurance can be used to cover other liabilities.

Assets held in companies, trusts and partnerships

Many people make the mistake of assuming that a Will also affects assets which are legally held by family companies and family trusts.

Assets held in this way are the property of the company or the trust, as the case may be, and the Will-maker can only give away the share in the company or units in the unit trust.

Other special provisions in relation to these arrangements may be included in your Will, for example:-

- the Will-maker may be the permanent governing director of a private company and entitled to appoint, by Will, a successor to that office.
- the Will-maker may be the donee of a general power of appointment created by an instrument of trust and the powers of appointment under the trust may be exercisable under the terms of the Will.
- the Will-maker may hold shares in a private company. Special consideration needs to be given to the disposal of those shares as a private company (unless a wholly owned subsidiary) must have at least one shareholder. This is a requirement of the corporations legislation.

The power to appoint and dismiss trustees of a family trust may have been given to an individual with provision that, on his or her death, the power will vest in his or her spouse or personal representative. This can lead to the effective control of the trust being vested in the personal representative. Therefore you must choose your executor carefully.

Trusts

The term "trust" describes the holding of property by a "trustee" (which may be one or more persons or a corporate trust company) in accordance with the provisions of a written trust document for the benefit of one or more persons who are called "beneficiaries".

A person may be both a trustee and a beneficiary of the same trust, but only if there are other trustees or other beneficiaries. (A person cannot be a sole trustee of a trust where they are also the sole beneficiary.) A trust is only as effective as its trustee, therefore you should be careful when choosing your trustee.

It is the provision of the trust document, and not your Will or any State law, which will determine what happens to the property in the trust upon your death.

Trusts can also be created by a Will and this is called a "testamentary trust". The terms of the trust will be set out in the Will.

Companies

Since a company is a separate legal entity in its own right, when assets are held in the name of a company, the company is the legal owner and not you (even though you may be a major shareholder of the company).

Assets owned by the company cannot be disposed of by your Will.

Partnership interests

The degree of complexity in dealing with partnership interests, to a large extent, depends on:-

- whether there is a written partnership agreement; and if so,
- the terms of the agreement.

If there is no agreement, or if there is no term in the agreement to the contrary, the death of one partner will dissolve the partnership.

A problem can occur where the agreement provides that the deceased's partner's interest will be converted to a monetary value. This may take the form of an option given to the surviving partners to purchase the deceased partner's share.

Generally, there would be some mechanism for calculating the amount which the remaining partners must pay for the deceased's share.

It is important to co-ordinate the partnership agreement and the Will so that the partnership business continues to operate after the death of one partner, to maximise the amount received by the estate.

While property can be distributed after the death of a partner without the necessity of a Will,

it is highly desirable in most cases that partnership agreements which provide ways of disposing of property are supplementary to a carefully drawn Will.

Tax considerations

By including powers and discretion in your Will, such as power of sale, power to postpone conversion, power to carry on business, power of investment etc. the Will-maker can provide flexibility to allow his or her businesses and personal financial matters to continue to operate efficiently following their death, and until the estate is finalised.

Solicitors will generally suggest that wide trustee powers be included in your Will, which will enable the legal personal representative to re-evaluate the position whilst administering the estate, rather than be bound by inflexible requirements imposed years earlier in the Will. The existence of adequate powers will also facilitate the administration of the estate and avoid the need, in some cases, to seek additional powers from the Supreme Court.

Estate planning includes the use of exemptions, deductions, and other planning opportunities legally provided in the tax laws. Assets acquired prior to 20th September, 1985 will not be subject to capital gains tax when you dispose of it. However, when the beneficiary acquires such an asset by the operation of your Will, the future disposal of the assets may be subject to capital gains tax. The gain will be based on the value of the asset at the date of your death. If the asset is sold for an amount greater than this value (plus inflation) the gain will be taxable.

It is also important to realise that a capital gain to beneficiaries under your Will will not arise on the transfer of assets which you bought after 19th September, 1985. However, the future disposal of these assets by your beneficiaries may result in capital gains tax if such assets are sold for more than their original cost to you, plus inflation.

It is wise to seek expert estate planning advice to take advantage of opportunities for reducing tax. Consider the following in those discussions:-

- Cash, life insurance policies, superannuation and motor vehicles are usually tax-exempt to beneficiaries under a Will. Life insurance policies are generally exempt to the original beneficial owner of the policy.
- Seek advice about the possible exemption of some assets, such as your principal residence and non-listed personal use assets eg. boats, white goods etc.
- Gifts made to tax-exempt bodies may incur an immediate tax liability for the estate. Cash or other tax-exempt should be used.
- Always consider changes in circumstances which may occur between the date the Will was made and the date of death of the Will-maker. Those changes may affect the estate's tax position, and some flexibility should be provided in the Will to enable the legal personal representative to distribute the actual assets (called "in specie") to a beneficiary, rather than converting all assets into cash.
- There are important exemptions (full and partial) when a dwelling, which was the sole or principal residence of the taxpayer, is sold by a beneficiary or by the legal personal representative of the deceased's estate.

Family considerations

Families are sometimes reluctant to talk openly about death and inheritance matters. Young children often ask their parents "what will you leave me when you die?" As children mature the subjects of death, dying and inheritance become less easy to discuss with parents. Many counsellors advise parents to seek the opinions of their children when they are determining these important inheritance issues.

Wills should be reviewed when any fundamental alteration occurs to family circumstances.

Marriage or re-marriage

Marriage revokes the whole Will unless it is made in contemplation of that particular marriage. A person making a Will prior to marriage, and who wants his or her intended spouse to benefit under the Will, should clearly state this to the solicitor drawing the Will so that an appropriate clause may be inserted into the Will.

People living in de facto or other relationships, often make Wills with no intention to marry. If marriage does occur between these people, their Wills are revoked (although some bequests in the Will may still be effective) and new Wills should be made, especially where other persons are named in the Will. Persons in de facto or other relationships should seek professional advice to ensure that their Wills are effective.

Divorce

Dissolution of marriage has an immediate impact on existing Wills, although in Queensland, as well as in some other States, the whole Will is not revoked. However, any gift or appointment in favour of a spouse will be revoked immediately after the divorce takes place. Divorcing spouses should seek professional advice on the making of new Wills following dissolution of marriage.

Complex family situations

Certain problems may arise with second marriages, de facto partners, step-children etc. Some of the most difficult situations include:-

- where one partner has children from a previous marriage or relationship and the other has not;
- where both partners have children from previous marriages or relationships;
- where both partners have children from previous marriages or relationships and also have children from their present marriage or relationship;
- where both partners have children from previous relationships, and a major part of their separate investments has been used to purchase their present family home which they own as joint tenants.

Caring for disabled children

Many parents of children who are disabled are concerned about making provision for their disabled children when they (the parents) die.

Disabled children's interests are sometimes cared for by way of a "protective trust". This trust can be created either during the life of the parents or through the Will so that it takes effect upon the death of the parents.

The trust could be structured so that the child would have the benefits of the income and, if necessary, the capital of the trust during their lifetime. Provisions could be made in the trust deed for the trust to cease upon the death of the child, and for the trust funds to be distributed in accordance with the particular wishes of the parents.

If the trust is created during the parents' lifetime, provision could be made in the Wills of the parents for all or part of the estate to be paid to the protective trust (as a beneficiary of the estate). In this way, the trust will continue to operate for the benefit of the child during his or her lifetime.

There are many legal issues to be considered when setting up a trust, whether it is the type which operates during the lifetime of the parents, or through the Will. It is wise to seek professional legal advice before the trust is created.

Important considerations are:-

- providing income for the beneficiary while considering social security and taxation implications;
- ensuring that the trustees appointed are both responsible and sympathetic;
- ensuring the trust has sufficient flexibility so that the trustee can meet changes in circumstances such as variations in social security entitlements and changes in taxation law.

Family provision legislation

Under the relevant legislation, if a person dies (whether there is a Will or not), and adequate provision has not been made from the estate for the proper maintenance and support of the deceased's spouse, child or dependent, the court has a wide discretion, on application by the aggrieved person, to order that some provision from the estate be made for that person.

Whether or not the application is successful, it may be many months before administration of the estate can be completed.

In some cases, it is the intent of the Will-maker to exclude one or more children from benefiting under the Will. However, this omission is often the cause of emotional trauma to family members and can cause expense to the Estate. You should be aware that, in some cases, step-children and adopted children may have a right to make an application for provision out of a deceased estate.

Power of Attorney and Enduring Power of Attorney

We recommend that everyone should consider appointing an Attorney to handle your affairs if you become incapacitated or if you are absent from home in circumstances which affect your ability to handle your personal or business affairs. If you are planning to be away from home for an extended period, or are approaching an age when you may find difficult in handling your own affairs, it is particularly wise to consider giving a Power of Attorney to someone you trust. Spouses should consider exchanging Enduring Powers of Attorney to prevent difficulties if one partner becomes seriously ill or incapacitated.

Help in making and up-dating a Will

If you do not have a Will, or wish to give someone some benefit during your lifetime, you should consult your solicitor and your accountant.

You should prepare a list of your assets, both those you own independently and those which are jointly owned. Consider your wishes for the future welfare of all your children, particularly children who are minors. Also consider your wishes regarding bequests to charities, funeral arrangements and organ donorship.

Your solicitor will help you develop your estate plan. In some cases, both your solicitor and your accountant will discuss aspects of the overall estate plan.