

WHAT IS estate planning?

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Estate planning is the process of arranging your affairs now to ensure there is an efficient and effective distribution of your estate after your death. An estate plan is designed to protect your family and loved ones, and help minimise taxation upon transfer of assets in a legal and logical manner as well as ensuring your wishes are followed.

A Will can help ensure your wishes are carried out

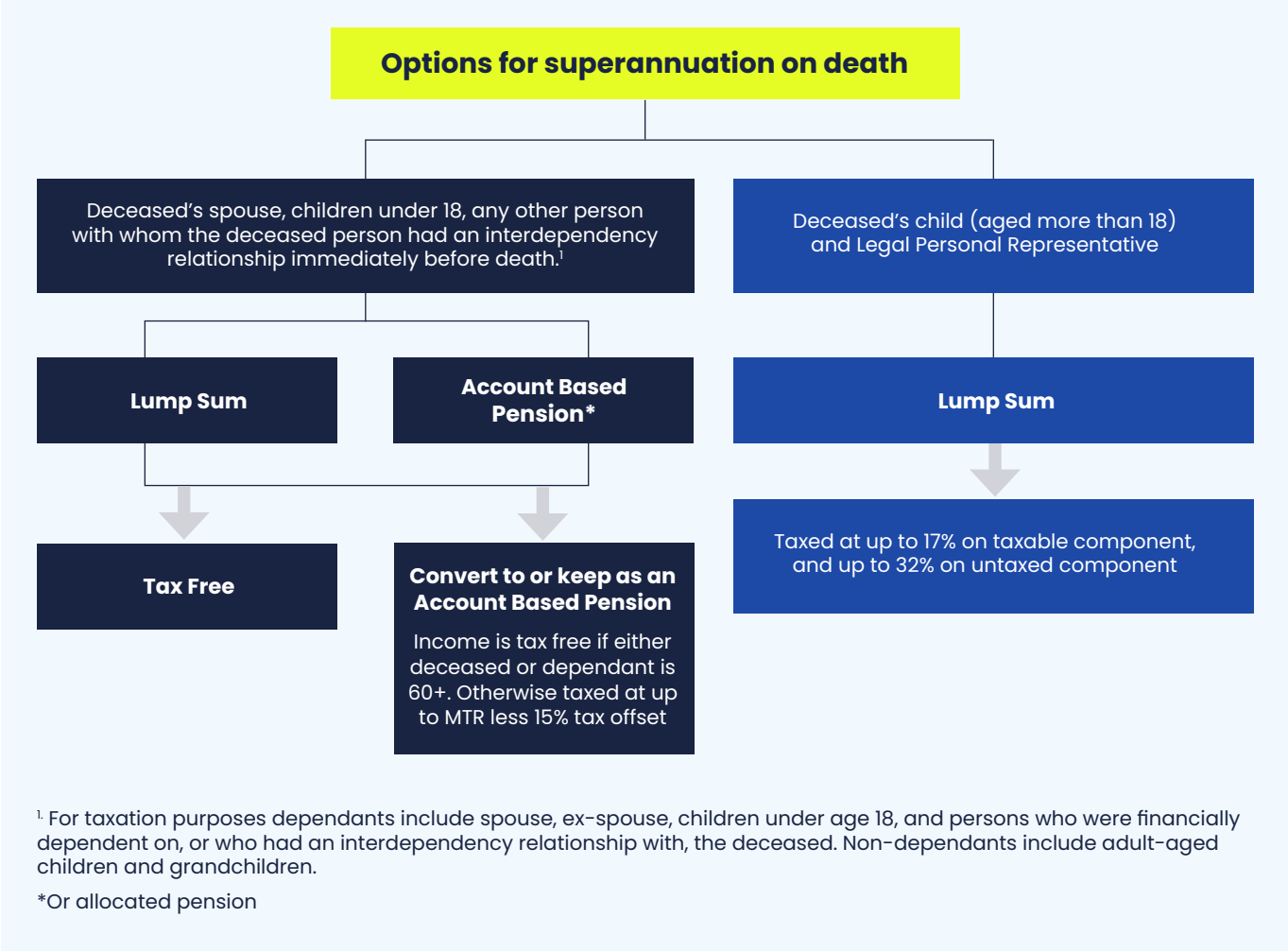
Leaving a Will is the most basic of estate planning strategies. A professionally drafted Will should ensure your estate is distributed to your beneficiaries in accordance with your wishes. In your Will you are able to:

- make gifts of assets or funds that form part of your estate
- establish trusts for the ongoing management of your assets for your beneficiaries
- appoint an executor and trustee and appoint guardians (for example, to look after your minor children).

Considerations for minimising tax for your beneficiaries

- Nominate your spouse and dependent children to be the recipients of your superannuation. Death benefits paid to your dependants are tax-free.
- Incorporate a testamentary trust into your Will. This could create capital gains tax savings as well as ongoing income tax savings for your beneficiaries, especially if you have young children or grandchildren. A testamentary trust comes into force upon your death and allows flexibility for the trustee to decide which of the allowed beneficiaries will receive distributions each year.
- Consider holding your key investments (other than your family home) in a family trust. This may create tax savings now as well as ongoing tax savings for your beneficiaries. Note, legal and tax advice is required.
- Bequeath assets with low or no capital gains tax liabilities to beneficiaries with high marginal tax rates and assets with high capital gains tax liability to beneficiaries on a low marginal tax rate.

What is a estate planning?



[1] For taxation purposes dependants include spouse, ex-spouse, children under age 18, and persons who were financially dependent on, or who had an interdependency relationship with, the deceased. Non-dependants include adult-aged children and grandchildren.

*Or allocated pension

How is superannuation treated on death?

Money in superannuation and account-based pensions should be gifted to dependants because they will pay little or no tax on the benefit, as shown above.

A dependant includes a spouse, children under the age of 18, or someone financially dependent upon you or was living in an interdependency relationship with you.

Non-dependants (such as adult children) must take all death benefits from superannuation and account-based pensions as a lump sum and pay tax of up to 17% (including Medicare) on the taxable component. If there is a life insurance component, it could be taxed at up to 32% (including Medicare).

Choosing the right executor

The executor is responsible for making sure that the instructions in your Will are carried out, and can be:

- one or more persons, or
- trustee company.

Your executor should be someone you trust and who is willing to take on the work and responsibility. If the executor you have chosen pre-deceases you or is unwilling to act as executor, your estate may not be distributed according to your wishes.

What is estate planning?

Case study: Estate Equalisation

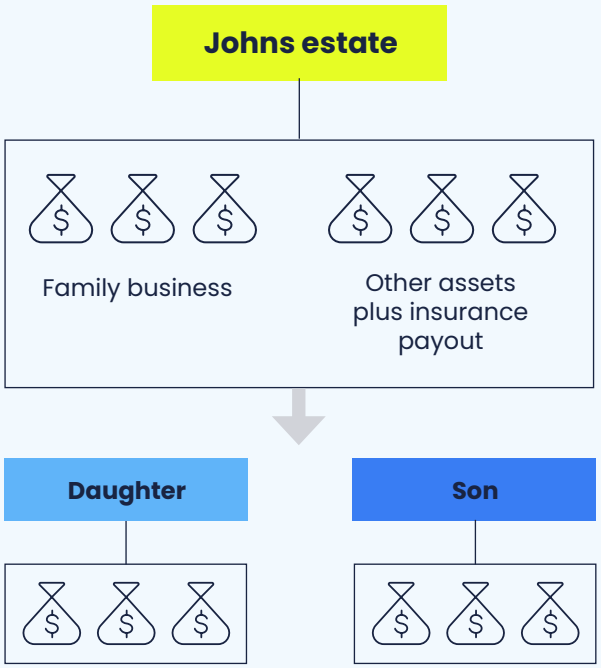
John is a single divorcee and has a son and a daughter. John owns a successful business which has a bright future.

John's daughter has been helping him manage the business since she left university and shares his passion for it. On the other hand, John's son has interests elsewhere and has chosen to not participate in the business.

In the event of his death, John would like the business to pass to his daughter. However, he recognises this would be unfair to his son because his other assets are worth only a fraction of his business.

The solution for John is to increase his life insurance to the value of his business minus the value of his other assets.

On his death, the insurance payout and other assets could be given to his son, and the business could be transferred to his daughter. This ensures John creates a fair and equal distribution of his assets. Both of his children will be pleased with the financial outcome and his wish for the business to remain in the family will be fulfilled.



What cannot be in a Will?

An asset owned by a discretionary trust.

- Life insurance policies where you have nominated someone as a beneficiary.
- Superannuation and retirement income streams which have current 'binding nominations' to be distributed directly to dependants, or income streams which are 'reversionary' or where the trustee uses discretion to pay a beneficiary directly.
- Assets which have 'joint tenancy'.

How can you fund your estate planning objectives?

Life insurance can be an important instrument in helping you meet your estate planning objectives.

- You may wish to purchase enough life insurance to ensure your spouse and children have enough money to pay off your debts, meet large expenses (such as school fees) and continue to live a comfortable life.
- If your estate will have large taxation liabilities, you may be able to purchase a life insurance policy so your beneficiaries can use this money to pay out your estate's taxation liability without eating into their inheritances.
- If you are in business with partners, a life insurance policy on each partner may help protect the viability of the business and the financial position of the surviving partners if one of you were to die.
- If it is important that your dependants are given equal shares of your estate, a life insurance policy can be used to equalise your estate.

What is estate planning?

How can you minimise the chance of your estate being challenged?

Some beneficiaries may be able to challenge the estate distribution if they feel they were not treated fairly. To minimise the risk of this happening, you could consider:

- ensuring your Will is current, comprehensive and fair.
- holding your key assets in a family trust (as these assets are owned by the trust and not you, their ownership is not affected by your death and are not subject to challenge).
- having a binding nomination for your superannuation to be transferred to dependants, or
- giving your executors adequate power to carry out your wishes.

How can you protect your assets for the next generation?

If you are concerned your dependants do not have the ability to manage or protect your assets after you die – or if you feel the assets you bequeath may be at risk, due to possible bankruptcy or legal action, you could consider using a family or testamentary trust.

The appointed trustee becomes the legal owner of the assets. This can help protect the assets from a dependent's creditors or from a dependent who may struggle to manage money responsibly.

You will need to appoint someone you trust to act as trustee or use the services of a trustee company.



CHECKLIST: Implementing an Effective Estate Planning Strategy

It is important your estate planning strategy ensures that those you care about are well provided for. Some examples of the issues you should consider are:

Families with minors

- ◯ Have you nominated a guardian for your children?
- ◯ Should your Will make provision for investment income to be paid through a Trust to protect the minor's interests?
- ◯ Do you have sufficient assets in the estate to provide an income stream to the minors?

Families with children who may be facing bankruptcy, divorce, or own a business

- ◯ Does your Will cater for a testamentary trust for each child to protect your assets from creditors?
- ◯ Does your Will protect your assets if a child faces divorce so your assets do not pass to your children's ex-spouses?
- ◯ Does your Will protect your assets if a child faces bankruptcy?

Multiple marriages and children from other marriages

- ◯ Does your Will ensure that children from all your marriages will be looked after?
- ◯ Do you need your Will to ensure that your assets pass to your children and not those of your current spouse?
- ◯ Does your Will protect your current spouse from the claims of previous spouses?
- ◯ Does your Will need to provide for an ex-spouse?

Families with members who are disabled or infirm

- ◯ Does your Will have a trust structure to provide for the long-term care of family members who are disabled or infirm?

Families with a large amount of superannuation

- ◯ Should you make a binding nomination with your superannuation fund to provide certainty as to who will receive your superannuation death benefits?
- ◯ Will your superannuation benefits be paid in the most tax effective manner?

Families with siblings who may be spendthrifts

- ◯ Does your Will provide a structure that will prevent spendthrift children from squandering your assets?
- ◯ Do you want your Will to have provisions that will maintain your assets for the benefit of your grandchildren?

Families that own a family business

- ◯ Will your family business pass to those who you want to control it?
- ◯ Will the control of the business pass in the most tax effective manner?

What is estate planning?

Protecting assets in divorce

With the high rate of divorce, many parents are concerned the inheritance they leave to their children could end up in the hands of their son-in-law or daughter-in-law if their child's marriage breaks down.

If a child receives an inheritance in their own name, that inheritance will generally form part of the child's assets, and therefore part of the matrimonial property. This could then be available to the Court for distribution upon the divorce proceedings.

However, if the assets are distributed to a properly structured testamentary trust, the inheritance may be kept apart and protected from a divorce property settlement. It is imperative that the trust be drafted appropriately to ensure this strategy is successful in protecting the assets.

What is a Life Estate?

A life interest is restrictive in that it prevents the beneficiary from selling the property that produces the income before the beneficiary's death. For example, you may wish to create a life estate in favour of your current partner.

What is a Life Interest?

You could include a life interest in your Will. This is a form of testamentary trust where you grant an individual a lifetime benefit from an asset, or the income from an asset, of your estate. For example, you may own your principal residence and be in your second or third marriage. Upon death you may wish to pass the property to your biological children, but you still want to ensure your current spouse has a roof over his or her head for the rest of their lifetime. You could establish a life interest in favour of your spouse in your will. Once the surviving spouse has passed away, the property is then passed to your children as per the terms of the will.

A life interest ensures that your property can still pass through your bloodline, without any sacrifice of standard of living of your surviving spouse.



Case study 1

Ensuring your estate plan has sufficient funding

Liz and Stuart have two small children and a large mortgage. Stuart's small business is starting to succeed and life is looking good for the family. Unfortunately, Stuart dies in an accident and while the mortgage is covered by his life insurance, there is little left over to help Liz support herself and their two children. Liz therefore has to seek employment, leaving her less time to spend with her children.

Stuart and Liz did not have an effective estate plan. They failed to provide adequate funding via life insurance in the event that one or both of them died.



Case study 2

Protecting your assets by ensuring they pass to those you intend

Jack and Penny own an investment portfolio that they built up over a lifetime of hard work. When they both pass away, they leave their estate to their only daughter Mary.

Mary is married to James, and they have three children. Mary and James' business is experiencing financial difficulty as James often squanders the profits. Finally, the business goes into liquidation.

As Mary and James had personally guaranteed the debts of the business, they lose their home and all of the inheritance from Jack and Penny. If Jack and Penny had made a provision in their Will for the establishment of a trust, they may have protected their assets from creditors and ensured that their grandchildren benefited from their estate.

What is estate planning?

What is a Buy-Sell Agreement?

A buy-sell agreement is used by partners in a business to ensure that the business interest of one owner will be able to be sold to the other owners when a trigger event occurs, such as a death of a partner.

Insurance is often used to finance a buy-sell agreement to ensure the surviving partners have sufficient funds to buy the deceased partner's share of the business. This means the deceased partner's estate is fairly compensated for giving up their rights to the business.

Other Estate Planning Instruments

What is an Enduring Power of Attorney?

An enduring power of attorney is a formal instrument by which one person (the donor) empowers another person to represent them or to act in their stead for certain purposes. For example, if you are unable to manage your own affairs due to serious illness, accident, or mental incapacity you may need someone to look after your finances. An enduring power of attorney will give that person the authority to make financial or legal decisions on your behalf. If you do not have a power of attorney, the public trustee may be given the responsibility of handling your finances.

Unlike a general power of attorney, which ceases if the donor loses mental capacity, an enduring power of attorney remains in force. Consequently, there are special rules concerning both establishing an enduring power of attorney, and the responsibilities of the attorney. These rules vary from state to state; therefore, legal advice is required.

If your attorney needs to deal with your real estate (e.g., sell, mortgage or lease your home or any investment property), your power of attorney must be registered with the relevant state government property management authority. If you own properties in more than one state, your power of attorney must be registered in each state your attorney may need to transact in.

It is important to consider carefully who you grant powers to. You should ensure they have the skills, capacity and willingness to fulfil the duties required. If you (or they) later change your mind about who should act as your attorney, you can revoke a power of attorney (even if it is registered) by contacting the relevant Authority and completing a 'Revocation of Power of Attorney' form.

What is an Enduring Power of Guardianship?

Except in the state of Queensland, an attorney can only make financial or legal decisions on behalf of the donor. In Queensland an attorney can also make personal or lifestyle decisions for the donor. In other states, you must appoint an enduring guardian to make day-to-day lifestyle or personal decisions for you, should you become incapable of making these decisions for yourself.

Lifestyle or personal decisions include decisions such as:

- where you live,
- what medical treatment you receive, and
- what services you need.

What is estate planning?

What is an Advance Care Directive?

An advance care directive (also known as an advanced health directive, or advance personal plan in different states and territories) allows you to express your wishes concerning future health treatment.

It is only used if you become incapable of making or communicating health care decisions for yourself, as a result of illness or injury.

Generally, the directions you give in an advance care directive override the decisions of an enduring guardian thereby giving you greater control over the medical treatment you may receive in future.

If you do not have an advance care directive in place, then a plan of care may need to be established for you. This may be written by your enduring guardian (or court-appointed administrator) in partnership with your family and/or your treating doctors. Because you won't have input into this plan of care, it may result in treatment decisions being made that you would not wish for.

Estate documents are legal documents and should be drafted professionally by a lawyer who is familiar with estate planning in your state or territory.

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