Estate Planning:
What you need to know

Estate Planning involves much more than having an up to date Will. It is important to ensure that your assets are distributed in the most effective manner and without adverse tax consequences for your beneficiaries.

So what is Estate Planning?
Estate planning involves considering what will happen to your assets upon your death or that of your partner. You may want to consider how to structure your estate to ensure it is distributed according to your wishes. You may also want to ensure your family's interests are protected and tax is minimised.

As part of your estate plan, you will need to consider factors such as whether your Will is up to date, if you have adequate life insurance, the tax consequences of how your assets are distributed, implementing a binding death benefit nomination for your superannuation and whether an enduring power of attorney is appropriate for you. If you own a business, you may also need to consider implementing appropriate business succession plans.

What is a Will?
A Will is a legal document that sets out who is to receive your assets after you die. A Will may also appoint a guardian for any children you have who are under 18 years of age and state your wishes regarding your funeral and burial.

Our solicitors can help you draft a legal Will. This may involve working with your financial planner and/or accountant to ensure the appropriate financial structures are included.

Why make a Will?
If you die without a Will (also known as 'dying intestate'), your assets will be distributed according to the laws of the State or territory in which you lived at the time of your death. This may not be the way you would have wanted your assets distributed.

Also, if you have children under 18 who are left without a parent and you don't have a valid Will appointing a guardian for them, a guardian will be appointed under the laws of the State or territory in which they live. This may not be the person you would have chosen to bring up your children. These reasons make it incredibly important to have a valid will.
Many clients have trust structures containing powers of appointment. Updating your Will to direct who those powers pass is essential to enable you to ensure those trust assets pass to who you desire.

What assets are governed by a Will?
The majority of a person's assets, including possessions, property, money in bank accounts, shares and managed funds will, upon their death, become part of their estate and be governed by their Will.

Because of this, it's important to ensure your assets are owned in the appropriate way to minimise stamp duty or Capital Gains Tax (CGT) if these assets later need to be transferred to a beneficiary.

What assets are *not* governed by a Will?
Not all the assets you own or control can be dealt with under your Will, including:

- Assets owned as a joint tenant
- Assets owned by a company or held in a trust
- Superannuation death benefits or life insurance proceeds that are paid directly to a beneficiary rather than to your estate.

Joint tenancy and tenancy in common
Jointly owned assets or property can be held in one of two ways – either as joint tenants or as tenants in common. If an asset is held as joint tenants, on your death the surviving joint tenant automatically acquires ownership of your share of the asset. The asset won't form part of your estate and can't be dealt with under your Will.

However, if an asset is held as tenants in common, your share of the asset becomes part of your estate and can be dealt with under your Will.

Assets owned by a company or held in trust
If you own assets via a company or trust, your estate plan needs to address how that control will be passed on to your beneficiaries when you die.

In the case of a company, this will involve considering who will be entitled to any shares you own in the company on your death. It may also require an examination of any rights you may have under the constitution of the company to appoint directors.

In the case of a trust, you will need to examine any rights you may have under the trust deed to appoint a replacement trustee or to wind up the trust and direct how its assets should be disposed of. If the trustee is a company, it will also involve considering who would be entitled to any shares you own in that company.

Superannuation death benefits

Many people don't realise that without a beneficiary arrangement in place, a superannuation fund can pay your death benefit to your spouse and any of your dependents or your estate, at its discretion.

To help provide some certainty, most (but not all) superannuation funds allow you to make a Binding Death Benefit Nomination, a written nomination which directs the fund on how to pay your death benefit. There are several types of death benefit nominations including binding nominations (lapsing or non-lapsing) and non-binding nominations. Your Financial Adviser can help you decide which is best for your situation.

As part of your estate plan, you also need to consider the taxation implications of how your death benefit is dealt with. Lump sum payments paid to dependents (as defined under income tax laws) are tax free. Taxable components paid to non-dependents are subject to tax.

Life insurance

When you take out a non-super life insurance policy on your own life, you generally have the option to nominate a beneficiary for the policy proceeds. Any payout under the policy will be paid directly to the nominated beneficiary (or beneficiaries), bypassing your estate. As such, your estate plan should factor in who you have nominated as the beneficiary of your life insurance policy.

It may be prudent to nominate a beneficiary or to have a third party such as a spouse or partner as the owner of the policy rather than simply having the proceeds paid to your estate (unless a testamentary trust is established). This is because a life insurance company will generally require a grant of probate to make a payment to a deceased estate for life insurance proceeds of $50,000 or more, whereas in the case of a nominated beneficiary or a third party owner, usually all that is required is a copy of the death certificate.

Testamentary trusts

A testamentary trust is a trust established by someone's Will. It comes into existence only when that person dies. Including a testamentary trust in your Will can be useful for making tax effective distributions to beneficiaries and providing significant asset protection for your spouse and/or children. Refer to our brochures titled 'Testamentary Trusts – Save $23,100' for examples of the tax advantages and 'Testamentary Trusts – Keep it in the Family' for asset protection examples.

Power of Attorney

If you are worried that you will be unable to manage your own affairs, you might consider implementing a Power of Attorney (PoA)[1]. Granting someone a PoA means they can legally act on your behalf.

There are four types of PoAs:

Specific: Enables the person to act on your behalf for a specified purpose.
Limited: Enables the person to carry out a particular transaction on your behalf.
General: Enables the person to carry out any business for you or deal with your affairs and assets.
Enduring: While specific, limited and general PoAs cover you while you are alive and of sound mind, an enduring PoA will cover you up until your death, even if you become physically or mentally impaired and are unable to manage your affairs. This person will be able to take care of your investments and other financial matters.

On death, any PoA issued becomes invalid and your Will and executor take over the management of your affairs.

Another way of planning for your future is to appoint an enduring guardian. If you lose the capacity to make your own decisions, an enduring guardian can make personal decisions on your behalf, such as where you should live and what medical treatment and services you should receive.

Tax effective estate planning

The disposal of assets in accordance with your Will may have tax consequences, including CGT, that you should consider when drafting your Will and creating your estate plan. There are many strategies you can use to help make your estate plan as tax effective as possible for your dependents and beneficiaries. For example:

- The proceeds of an insurance policy paid from a superannuation fund are tax free if paid to dependents.
- Distributing an asset (rather than the proceeds of the sale of that asset) to a beneficiary can defer any CGT liability.
- Using discretionary trusts can help minimise the tax a beneficiary pays on receipt of an inheritance.
- Using testamentary trusts can be an effective way to provide an inheritance.

Your financial planner can help you investigate which strategies may be appropriate for your personal situation or talk to our team today.

Speak to us for more information and contact us TODAY!

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[1] The powers that a PoA may confer on another person may differ between the various States and territories of Australia. It would be prudent to seek professional legal advice if you intend to make a PoA.