Version1

Reference Guide
Estate Planning

What this document is about

This document is an information reference to be used in conjunction with your Statement of Advice, Product Disclosure Statements (PDSs) and research materials provided.

It contains information about our recommendations that you should read and understand. Further and more expansive information on any product recommended is available in the Product Disclosure Statements and research material provided with your Statement of Advice or Record of Advice.

This document does not contain financial advice and does not make recommendations for your specific financial situation and current circumstances. Information provided is general or factual in nature and should be read with consideration of your personal situation, needs and objectives.

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Section 1 - Estate Planning

1:1 Introduction to Estate Planning

Estate Planning is vital to any financial plan. A good estate plan requires the involvement of skilled legal, accounting and financial specialists to ensure the right funds get into the right hands at the right time. Your financial planner is not permitted to provide you with legal advice, we are happy to refer you to a legal specialist if required.

A broad definition of Estate Planning encompasses the following points:

- Having sufficient assets available to meet your wishes upon death;
- Transfer of ownership (or control) of those assets passes to the appropriate person or entity; and
- Ownership or control passes to a beneficiary at the right time.

Simply put, estate planning involves ensuring that, on a client's death, the appropriate assets go to the right beneficiary at the right time.

The following are some basic elements you must consider when addressing your estate planning needs:

- whether you have a current and properly drafted Will;
- your superannuation assets;
- whether you need an enduring power of attorney; and or
- whether a testamentary trusts is appropriate
- whether you have special beneficiaries with specific needs to be considered

A Last Will and Testament generally only deals with the distribution of assets personally owned by you. If your needs are more complex, an Estate Plan extends to asset protection and the ongoing minimisation of income tax for your beneficiaries.

Advance planning, good advice, and the proper assembly of important documents will all ensure that your estate is handled as easily as possible. The following issues should be considered when developing a thorough estate plan:

- asset protection
- probate avoidance
- minimisation and deferral of tax liabilities
- planning for illness or incapacity
- selection of guardians, personal representatives and other fiduciaries
- formation of family limited partnerships and other business entities
- succession strategies for family businesses.

1:2 Wills

Making and maintaining a current Will is a critical aspect of any estate plan.

A Will allows a person to direct how their assets are to be dealt with after their death. Everyone, even with modest assets, should have a current, valid Will.

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 nominate second choice beneficiaries should the first choice predecease you.
- Designates whether it will bequeath monetary values,a percentage of your estate or specific assets to beneficiaries.
- Considers the need for certain assets to be held in Trust for beneficiaries under 18 years of age (such as funds for your children or grandchildren's education).
- Takes into account any specific needs of beneficiaries (including social security).

Without a Will, you cannot control how your assets are distributed upon death. If you die without a Will, or your Will is incomplete, you are said to have died "intestate". As a result your estate will be distributed strictly in accordance with the relevant state laws governing the distribution of estate assets (which may not be in accordance with your wishes).

As we are not permitted to draft your Will, we recommend you consult your solicitor immediately and have one drafted (if you have not already done so). Once you have a valid Will in place, it should be reviewed at least every 3 years and/or whenever your circumstances change. This should also be done in consultation with your solicitor.

1:2:1 Executors

Appointing the right executor is an important decision. The executor is responsible for carrying out your wishes as expressed in your Will and has fundamental control of the process. The person or persons you select must be capable of both performing the role and be capable of working with competent advisers. The administration of an estate can be time consuming and is likely to need investing, taxation, accounting and legal input.

1:2:2 Guardians

A guardian is a person legally appointed to care for another person. Guardians are usually appointed for children under 18 whose parents are unable to care for them (or who have no parents) or adults who are unable to care for themselves due to age, injury or illness. It is prudent to appoint a guardian in a Will in order to ensure that any dependents are cared for in the event of your death. The appointment of a guardian in a Will is only a declaration of intention. Ultimately the Family Law Courts have the power to appoint an alternative guardian if they deem it to be in the best interest of the vulnerable party.

1:3 Nominating Beneficiaries for your Superannuation

Your superannuation is an asset that does not generally form part of your estate. This is due to the fact that the Trustee of the superannuation fund is required to distribute your superannuation monies in accordance with the Trust Deed.

You are able nominate beneficiaries to receive your superannuation funds when you die. Should no nomination be made, the ultimate decision-maker of how your funds are distributed after your death is the trustee of your superannuation fund.

Nominating a beneficiary for your superannuation helps your estate planning objectives to be designed with greater certainty. If you do not nominate someone specifically, the funds may form part of your estate to be divided according to the instructions in your will.

We recommend you ensure that your nomination of beneficiaries of your superannuation monies is current. It is important for you to nominate the beneficiaries of your superannuation fund in accordance with the procedures of the Trustee. Maintaining current nominations of beneficiaries will ensure that the Trustee of your superannuation fund will consider your wishes when determining the distribution of your superannuation monies in the event of your death.

When nominating your beneficiaries it is important to consider who is a dependant under the tax legislation in order for the benefits to be distributed tax efficiently.

1:3:1 Preferred Nomination (Non-Binding)

When a preferred nomination is made the trustee of the superannuation fund holds the final decision and discretion as to who the payment is made to, as a result the fund has a responsibility to contact all possible beneficiaries and manage any claim upon the funds contrary to your preferred nomination. As a result the process can take up to six months from time of death until the funds are distributed and your nominated beneficiary can be overturned where it is seen in the best interest of your dependents.

1:3:2 Binding Nominations

You may consider making a Binding Nomination. A binding nomination is only valid for as long as the Trust Deed stipulates (commonly three years) and should be regularly reviewed and/or renewed, as your personal circumstances may change. This is a nomination that the trustee is obligated to follow and, in some circumstances, can significantly reduce the amount of time required to pay out your benefit. A binding nomination also needs to be witnessed by two persons who are not beneficiaries.

Please note that valid beneficiaries nominated under a binding nomination must be financially dependent on you or be your Legal Personal Representative.

1:3:3 Tax Treatment of Superannuation Death Benefits

From 1 July 2007, all death benefits paid as a lump sum to a spouse, child under 18, financial dependant or interdependent (i.e. dependants) will be tax-free. A Taxable Component paid as a lump sum death benefit paid to any other beneficiary (non-dependant), will be taxed at the rate of 15% (plus Medicare), however the low rate cap that would normally apply to the taxable component will not be available.

A pension (superannuation income stream) is only able to revert to a dependant (i.e. spouse, child under 18, financial dependant or interdependent).

A reversionary pension will be paid tax free to a dependant where:

- The dependant is at least 60 years of age when the benefit is received, or
- The deceased was over 60 years of age at the time of death

A reversionary pension will be liable for tax on any taxable component where:

- Both the deceased and the dependant are under 60 at the time of death

Where both the deceased and the dependant beneficiary are under 60 years of age, tax will be payable at the beneficiary's marginal tax rate (plus Medicare levy) on any part of the pension sourced from a taxable component, but the dependant is entitled to a tax offset equal to 15% of the taxable component. Upon the beneficiary reaching age 60, the pension will be tax free.

1:4 Power of Attorney

Another important aspect of estate planning is the appointment of a power of attorney. A power of attorney is a document whereby a person appoints another to perform certain tasks on their behalf.

There are two basic approaches to powers of attorney:

- Non enduring power of attorney; and
- Enduring power of attorney.

1:4:1 Non-Enduring Power of Attorney

A non-enduring power of attorney is usually set up so the attorney can cover a specific event for a fixed period of time (restricted). For instance, it can be granted for duration of your absence (for example, if you are going overseas). However, the power can be unrestricted whereby the attorney has the capacity to make any decisions on behalf of a person with respect to that person's property, while the power of attorney remains in force.

If you are going to be absent from your normal place of residence for a considerable period, you may want to consider who will look after your financial affairs. Given that you can limit the powers granted under a power of attorney, you may wish to grant a close relative a limited power of attorney to look after your financial affairs whilst you are away.

Non-enduring Powers of Attorney will become invalid if the person who granted the power becomes mentally incapacitated.

1:4:2 Enduring Power of Attorney

The enduring power of attorney is suited to looking after the affairs of a person when they are not in a position to look after their affairs themselves. Unlike a general power of attorney that ceases to be active once a person who granted the power becomes mentally incapacitated, an enduring power of attorney remains in place when a person becomes mentally incapacitated.

In light of this, consideration should be given to granting an enduring power of attorney. This will ensure your affairs can be handled on your behalf should anything happen to you. Furthermore, it would continue to operate if you became ill or disabled and lost the capacity to make decisions.

Because of its legal effect, an enduring power of attorney can only be signed after obtaining the advice of a solicitor. The use of an enduring power of attorney should be carefully weighed before implementing such a strategy.

1:4:3 Financial

A power of attorney (financial) is a legal document that appoints one or more people to make financial and legal decisions for you.

Unlike a general power of attorney, it continues to be legal even if you are unable to make these decisions yourself. This means that someone you choose can take control of your financial and legal affairs if you ever lose capacity.

When making decisions for you, your attorney must:

- Act in your best interests
- Wherever possible, make the same decision that you would make
- Keep accurate records of dealings and transactions
- Avoid situations where there is a conflict of interest
- Keep your property and money separate from their own.

You can limit how you want your attorney to carry out their responsibilities and place conditions on the decisions they make on your behalf. You can include instructions about what you would like your attorney to do and they must act on these. You can also set out your wishes, but these are not binding on the attorney.

If you have large capital assets, such as property or shares, you can leave clear instructions about how your attorney should manage, distribute or dispose of these assets.

If you do not specify any limits, your attorney will be able to make any financial or legal decisions on your behalf from the time the power of attorney begins until it is changed or cancelled.

1:4:4 Medical Treatment

A power of attorney (medical treatment) is a legal document that appoints an agent to make medical decisions for you. These may include agreeing to medication, surgery, and other medical procedures.

It can allow you to have control over who will make decisions on your behalf if you are ever unable to do so yourself, such as in the event of dementia, an acquired brain injury or becoming unconscious as a result of an illness.

An agent can agree to or refuse medical treatment including your involvement in medical research. They can only refuse medical treatment if:

- The treatment would cause you unreasonable distress, or
- The agent reasonably believes that you would consider the treatment unwarranted.

An agent's decision takes precedence over those of an enduring guardian you may have appointed who has health care powers.

1:5 Testamentary Trusts

A trust is an obligation where a person/entity (the trustee) is legally bound to hold and deal with property for the benefit of other people (the beneficiaries). A testamentary trust is created via a Will and is activated as a result of death. The Will details the framework for the operation of the trust and records the terms and conditions of the trust. The terms of the trust can be drafted to suit varied needs.

When a person includes a Testamentary Trust in their Will, upon death their designated assets pass to a Trustee. These assets are held on Trust for the deceased's beneficiaries, rather than passing directly to those beneficiaries.

As a form of discretionary Trust, the Trustee is able to distribute income in a tax effective manner particularly to children under age 18 who are taxed at normal adult rates rather than the punitive rates applying outside such a structure. The Trust Deed provides guidelines for the payment of income and capital to the beneficiaries. Within the guidelines, the Trustee has discretion as to where these benefits are paid.

It is vital, when considering the use of a Testamentary Trust to seek specialist legal advice from an appropriately licensed solicitor.

Tax Benefits - Income Splitting

Under the terms of a properly drafted Testamentary Trust the Trustee can have the discretion to distribute different types of income to different beneficiaries so as to ensure maximum tax-effectiveness of the income distributions.

An example of this benefit is the ability of a Trustee to allocate the net capital gain component of the Trust's net income to beneficiaries who have accumulated realised capital losses, as it is these beneficiaries who can then use their capital losses to offset the distributed capital gain. Discretionary streaming of the Trust distributions can also be useful, for example, to distribute unfranked dividends and franked dividends to different beneficiaries.

Asset Protection - Creditor Protection

The Testamentary Trust can be drafted so that certain beneficiaries have the benefits of a discretionary entitlement to income from Trust assets, but are not entitled to the Trust corpus. As such, if a legal claim were made against such beneficiaries, the assets held in the Testamentary Trust may not be subject to any creditor claims.

The Testamentary Trust can provide invaluable protection to a beneficiary of assets for a deceased estate in circumstances where the beneficiary is likely to be subject to claims by creditors.

Asset Protection - Family Law

People are becoming increasingly aware that assets they give to their children under a Will may become assets of their children's marriage and accordingly be subject to a property settlement should there be a breakdown of the marriage.

In such circumstances, the Testamentary Trust can be tailored specifically to ensure that a testator's assets stay within their family or their direct lineal descendants for a period of up to 80 years after their death or less of course if they desire.

The level of family law protection can be tailored to the specific circumstances requested by the client.

Asset Protection – Vulnerable Beneficiaries

The terms of the Testamentary Trust can assist to provide the necessary care and support for vulnerable beneficiaries in a tax effective and meaningful way. The discretion of the Trustee can be used to allocate assets or income towards a beneficiary in a way that is most suited to their needs and capacity.

1:6 Joint Asset Ownership versus Tenants-in-Common Ownership

Jointly owned assets (usually for example the family home) cannot be disposed of through a will. Upon death of one owner in a joint tenancy, the asset passes automatically to the survivor/s. Assets held under tenancy-in-common are considered assets of an individual's estate. A tenancy-in-common exists where two or more persons share possession of an asset. When one owner dies, there is no automatic transfer of that share to the other owner/s.

Upon death of a tenant-in common, the deceased's portion of the asset is treated as a separate asset for CGT purposes. It is possible to hold property as tenants-in-common in unequal shares.

Notes: