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ESTATE PLANNING GUIDE

What is Estate Planning?

Estate planning is a strategy to provide:

a. Financial security during a person's lifetime;

b. Lifestyle certainty during a person's lifetime; and

c. Smooth, simple and tax effective transmission of a person's assets to their chosen beneficiaries upon their death.

Estate planning can also incorporate aspects of tax efficiency and asset protection during and after a person's lifetime.

An effective estate plan involves consideration of many factors and the best results are achieved through collaboration between a person, their accountant/financial adviser and the lawyer preparing the estate plan.

An effective estate plan is not a static strategy and should be reviewed periodically. This is especially so when a person's personal or financial circumstances change (such as marriage, separation/divorce, significant change in assets, death of an appointed executor/guardian/attorney or change in beneficiaries).

An effective estate plan involves consideration of many issues and typically includes ensuring a person has an:

- Effective Will;
- Enduring power of attorney;
- Enduring power of attorney;
- Advance health directive; and/or
- Effective method to hold assets/investments (such as a discretionary family trust).

Not all the documents listed above are necessary in all cases and in some cases the documents will be more complex than others (such as a Will incorporating a discretionary testamentary trust).

To design an effective estate plan, a person's personal and financial circumstances will need to be considered. Important considerations include:

- Financial situation:
    - Including assets, income, actual liabilities, contingent liabilities and interests in any business and/or trusts;
- Family situation;

    - Potential beneficiaries, blended families and capacity/circumstances of beneficiaries;
- Emotional and lifestyle issues:
    - Including the capacity to make decisions, health and lifestyle preferences;
- Transmission of assets to beneficiaries with a minimum of fuss including:
    - Provision for the emotional/physical/financial well being of minor beneficiaries and/or beneficiaries with physical and/or intellectual disabilities or other vulnerabilities; and
    - Ensuring transmission is tax effective.

Estate planning during a person's lifetime:

<u>Attorney and/or guardian:</u>

A Will only has effect upon the death of the testator (person making the Will). Accordingly, if a person loses capacity to manage their financial or personal lifestyle affairs a Will has no effect. Appointment of an attorney and/or guardian are important considerations and protect against the loss of mental/legal capacity during a person's lifetime.

An Enduring Power of Attorney allows the nominated attorney to make financial decisions on a person's behalf. Likewise, an Enduring Power of Guardianship allows a nominated guardian to make lifestyle decisions on a person's behalf. By appointing a trusted attorney/guardian (rather than an entity/person appointed by the State Administrative Tribunal), a person can ensure decisions are made in accordance with their wishes.

An attorney or guardian should be someone the person is confident knows their wishes and is trusted to respect those wishes. They should also be capable (both mentally and physically) of performing their duty under the appointments both now and in the future (as it may be many years before they need to do so).

Without these documents, decisions about a person's property/assets, medical treatment, accommodation and lifestyle may pass to an entity whom they would not otherwise have chosen to make such decisions.

<u>Gifts during a person's lifetime:</u>

Gifts can be made at any time during a person's lifetime (instead of by Will upon their death).

This can be done to help out children, for family law purposes, or for social security/tax purposes. It may also be done for asset protection/bankruptcy purposes.

A person making such a disposal needs to consider a number of issues including stamp duty liability, capital gains tax, and possibly the foregoing of superannuation and other income tax concessions which are available when transmission takes place upon death. In addition, anti-avoidance provisions of the Family Law Act, Social Security, Tax and Bankruptcy Acts may make gifting strategies during a person's lifetime vulnerable to being reversed (generally know as "claw back" provisions).

Estate planning after death:

Family provision legislation:

This legislation imposes some significant restrictions on the freedom of a person to dispose of their assets in their Will in circumstances where provision for family members is considered inadequate. An otherwise valid Will may be granted probate, but may then be subject to alternative orders of the Supreme Court if a claim under family provision legislation is successful.

Essentially, the legislation gives the Supreme Court the power to make an order for further provision out of the estate of a deceased person if the provisions of the deceased's Will, or the intestacy laws, fail to make adequate provision for the proper maintenance and support of an eligible person.

In Western Australia the people who can make a family provision claim include a spouse (including de facto spouse), a child of the deceased, and some others who are financially dependent on the deceased and (in certain circumstances) a grandchild or step child. A list of who can claim is set out in section 7 of the *Family Provision Act 1972*. Claims must be made within 6 months from the date on which the administrator becomes entitled to administer the estate of the deceased.

Whether a person is entitled to further provision than is provided by the Will of the deceased is essentially a question of whether the deceased breached their moral duty to make proper and adequate provision for the applicant. The Court will consider various factors including:

- the applicant's financial position;
- the size and nature of the deceased estate;
- the relationship between the applicant and the deceased;
- the relationship between the deceased and other persons who had legitimate claims upon them.

Some alternative ways of holding assets to ensure that the assets pass to the desired beneficiary unaffected by family provision legislation are:

- joint tenancies with the beneficiary;
- trusts created for the beneficiary during a person's lifetime;
- use of superannuation and binding death benefit nominations directly in favour of beneficiaries;
- life insurance owned or held on trust for the beneficiary; and
- gifts to the beneficiary prior to death.

Family provision legislation can be a challenge to a person's testamentary intentions and an examination of the types of persons eligible to make a claim, and the strength of the person's responsibility to provide for them, should be considered when a Will is made.

Intestacy:

Intestacy is where a person dies without leaving an effective Will to dispose of their estate. An intestacy can be total (no Will) or partial (a Will that does not effectively dispose of all assets).

An otherwise effective Will can be held to be void (leading to intestacy) if made under circumstances amounting to duress, coercion, or undue influence, or if the Will maker lacked testamentary capacity (ie, was not fully aware of what they were signing).

A partial intestacy only affects the property not disposed of by the Will. This may occur if the Will does not dispose of all of the property, the Will is not properly executed, a particular bequest or gift made by the Will is invalid, or a beneficiary has predeceased the Testator. Another reason for a partial intestacy is by the operation of the doctrine of forfeiture, which prevents a person named as a beneficiary in a Will from receiving an interest in the estate of a deceased person if they are criminally responsible for his or her death.

Where a person dies intestate, leaves a Will which does not nominate an Executor, or where the Executor appointed under a Will is unwilling or unable to act due to ill health, then the distribution of the deceased's estate will require a person to apply for Letters of Administration from the Supreme Court to authorise administration of the estate in accordance with the statutory rules. Those rules also set out who is to inherit an estate in the absence of an effective Will, and vary, depending on which dependents/relatives the deceased leaves.

In Western Australia, the entitlements under intestacy are set out in section 14 of the *Administration Act 1903*. The Act sets out various scenarios and the beneficiaries' entitlements in each scenario.

Therefore, it is very important to ensure that a person has a Will which has been properly prepared and validly executed to ensure, so far as is possible, assets transfer in accordance with the testator's wishes.

Estate Planning Options:

There are some options under which assets can be held which give greater flexibility in how they can be passed to beneficiaries. Some of these include:

- Joint tenancies: On the death of one of the joint tenants, that person's interest passes automatically to the surviving joint tenant(s). The property does not form part of a person's estate to be dealt with in their Will (and is therefore outside the scope of a family provision claim).

- Trusts: These can be in the form of a family discretionary trust or a unit trust created by the person during their lifetime. Assets are transferred into the Trust and capital and income are distributed to named beneficiaries of the Trust at the discretion of the trustee. As trust assets are owned on behalf of the beneficiaries and are not part of a person's estate, they are also outside the scope of a family provision claim.

- Direct gifts to beneficiaries: Gifts of assets during a person's lifetime generally receive less generous tax treatment than testamentary gifts (ie, gifts under a Will). For example, real estate valued at $500,000 can be transferred to a beneficiary via a Will on payment of $20 stamp duty, but if the same property is transferred from one living person to another, then the stamp duty payable on that transfer would be many thousands of dollars. Also, a gift that is made a person's lifetime is not revocable (cannot be taken back). The provisions of a Will, by contrast, may be amended at any time before death.

Also, the anti-avoidance provisions of the Family Law Act, Social Security, Tax and Bankruptcy Acts may also capture gifts made during a person's lifetime making gifts vulnerable to being reversed.

- Testamentary trusts: Most Wills create testamentary trusts. Once the Executor has performed the function of paying the deceased's creditors and paying legacies, the balance of residue of the estate is then held "on trust" by the Executor, who then becomes a trustee. In the case of minor beneficiaries, this trust may last for many years.

  Another form of testamentary trust is a life interest, in which certain assets are left to a beneficiary for the duration of his or her lifetime only, and on their death passes to the ultimate beneficiary of those assets.

  A further form of testamentary trust is the formation of a discretionary trust within the terms of the Will, giving the trustee power to distribute the residue to one or more beneficiaries in such proportions as the trustee considers appropriate.

- Superannuation Funds: Planning for provision for dependants will need to consider the appropriateness of the different types of benefits available and their suitability to different classes of dependents.

Estate planning can be a clinical and objective process. However, the emotional needs of family members should be considered in designing an estate plan.

Some very tax effective estate plans or asset protection schemes may be inappropriate if the proposed beneficiary is uncomfortable with a perceived loss of control or ownership of an asset.

Additionally, cash is often promptly needed in the event of the death of a breadwinner. If discretionary trusts are contemplated in a Will to quarantine wealth, it may be appropriate for the testator to ensure that there is a joint account or cash legacy immediately payable to their partner/dependents on death to provide immediate funds for their maintenance. Immediate cash may sometimes be accessed through superannuation/life insurance payments released shortly after death.

Estate planning allows a person to make careful provision for vulnerable dependants (such as those with gambling/spending problems, exposed to Family Court proceedings or those with a disability, etc.). A common mechanism is by utilising a discretionary family trust. A discretionary trust is the most flexible option and can be used to distribute both income and capital with beneficial tax treatment. The tax advantages of other options such as superannuation funds have to be weighed against the flexibility and tax advantages that a discretionary trust offers. Where vulnerable beneficiaries are involved, the choice of trustee and provisions for control of the appointment of a trustee are very important. In the case of discretionary trusts this is more significant because the risks of poor trustee selection are not limited to fraud or abuse of power, but extend to unchallengeable exercise of wide discretions in relation to distribution of trust property.

Superannuation and Death Benefits:

Most Australians now have superannuation savings. The purpose of superannuation is to provide retirement savings for the member, or benefits to dependants in the event of the member's death. Superannuation is one type of asset that may not form part of the person's estate as it can be paid directly to beneficiaries rather than to the deceased's estate. This provides an opportunity for a person to determine who will receive the amount of their superannuation benefit in the event of their death. Depending on the rules of the person's superannuation fund, the person may also be able to specify how the benefit will be paid (eg lump sum or income stream, or paid via the person's Will).

It is important to understand who can be nominated to receive a person's superannuation and what options are available within a particular superannuation fund. The tax implications of receiving the superannuation death benefit also need consideration.

An important part of estate planning is the protection of the wealth that a person has created. One method of providing this protection is through insurance. Life insurance can form part of a person's estate or can be directed to a specified beneficiary. Term insurance is the simplest example of estate planning and its purpose is to provide a lump sum benefit on the death of the life insured. Term insurance can be held within some superannuation funds, which has the effect of increasing the benefit payable upon the death of the member.

Superannuation legislation outlines who can receive a death benefit from superannuation and the trustee of a superannuation fund must consider dependants of the member before other potential beneficiaries. When developing an estate plan, it is important to note that the term "beneficiary" has different meanings under superannuation and taxation law.

There are different types of beneficiary nominations that can be made within superannuation funds. Each superannuation fund can choose the options they wish to provide to their fund members. The options available are set out in the fund's trust deed.

If no nomination is made, the trustee will exercise discretion as to whom to pay, or the trust deed may specify the payment must be made directly to the deceased's estate. Obviously, a superannuation fund's trust deed is an important document to consider when developing an estate plan.

The types of nominations commonly offered are:

1. Nominated beneficiary: Usually an expression of your wishes to the trustee. This type of nomination is not binding on the trustee and the trustee will consider your wishes when deciding to whom to pay the benefit (which may differ from the nominated beneficiary).

2. Binding nomination – death or reversionary: These can be binding on the trustee provided the person nominated falls within the definition of dependant under the superannuation legislation. A death nomination normally relates to a lump sum payment, whilst a reversionary nomination normally relates to a pension/income stream.

   Individual superannuation funds may have a narrower definition of a dependant than that provided in superannuation legislation and this may be particularly relevant where the benefit will be paid as an income stream (eg, only a spouse or child under 18 can be a reversionary beneficiary – but note, this can vary between funds).

In many retail superannuation funds, a binding death benefit nomination is only valid for a certain period of time and must be periodically reconfirmed to remain in force. In some funds binding nominations are non-lapsing. For lapsing nominations, if the nomination is not reconfirmed, the nomination lapses and the payment of the death benefit after this date will be made according to the trust deed. For non-lapsing nominations, if a person's circumstances change and they lose capacity to change the nomination, the nomination remains unchanged.

3. Beneficiary specified in trust deed. The *Superannuation Industry (Supervision) Act 1993* has a broad definition of a dependant, which includes any spouse (either legal or de facto), child of the member, a person who is financially dependent upon the member, or another person with whom the member has an interdependency relationship, which means that the parties have a close personal relationship, live together, and provide each other with financial support and domestic support and personal care. There is no requirement for the beneficiary to be a family member and the trustee has discretion to pay benefits to one or a combination of beneficiaries.

A member can also nominate their benefit to be paid to their estate under a binding death benefit nomination for distribution under the terms of their Will. It should be noted that superannuation and life insurance proceeds are protected benefits and are not available to pay the deceased's debts unless the deceased specifically states they can be so used.

The ability to nominate the estate as recipient of superannuation proceeds depends on the trust deed of the superannuation fund in question. In some cases, the nomination will be specified in the trust deed. For example, some superannuation funds may specify that death benefits are only paid as a lump sum to the member's estate.

How Now Legal can help:

Now Legal will work with clients and their accountants/financial advisers to develop comprehensive and effective estate plans. We offer estate planning consultations for a fixed fee of $375 (this includes consultation with your accountant/financial adviser).

We also offer estate planning documents (single documents or packages) on a fixed fee basis with a simple Will for an individual starting at $175 through to a comprehensive estate planning package for a couple at $675.

Complex wills start at $375, Wills incorporating testamentary trusts start at $475.

Discretionary trust deeds start at $275.

Contact us now for a free, initial consultation on 0422 327 155 or contact@nowlegal.com.au

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