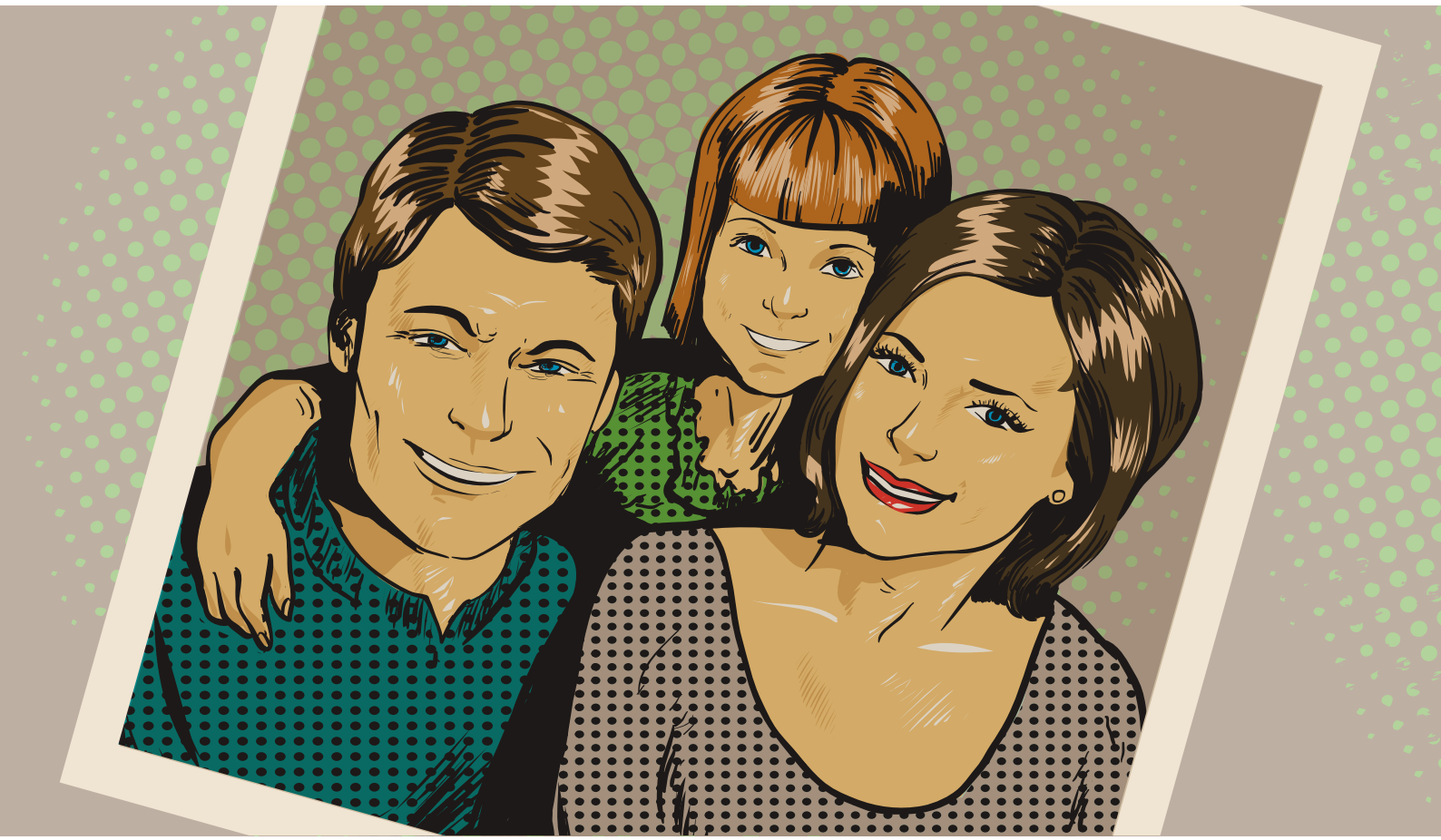
A helpful guide to Wills, Powers of Attorney and Estate Planning



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There are many examples of "newsagent" Wills going wrong.

"One example was that the Will-maker left 'the contents of my desk to my son'". The rest of the estate, which consisted of real estate, was left to his other children. After he died, the executors went to his home and looked through his desk. There, in one of the drawers, was the title to a valuable piece of real estate. The other children challenged the Will. While it appeared clear that the Will-maker intended that the son should receive the property, the matter came before the Court for decision. The Court decided that the son should receive the Contents of the desk – excluding the property. In summary, the property went to the Will-maker's other children and the son received nothing except the remaining contents of the desk"

"Peace of mind" is particularly important in this area of the law.

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Introduction

Lets talk about the things we don't like to talk about – Wills, Powers of Attorney, Estate Planning and ... dying.

If people find the law exciting, or even interesting, these topics are at the low end of their interest scale – most people are far more concerned about living – the myriad of issues that must be dealt with every day – getting the kids to school, going to work and dealing with problems there, trying to achieve a work/life balance, just getting on with life. Most of us don't have the time to think about what would happen if we got seriously ill and couldn't manage our affairs, how would our loved ones manage our estate when we die (and that's a "when" not an "if" – it comes to us all eventually), and how to put our wishes for our family's future in place.

This Guide is designed to answer these questions in a straightforward way, without using legal jargon that only lawyers understand. The Guide covers why you need a Will, what you can say in your Will and how your Will is prepared, signed and witnessed. The Guide then deals with Powers of Attorney and what you can trust your attorney (usually a family member or friend) to do for you if you are ill or injured and can't manage your affairs.

The different types of Powers of Attorney are explained. The Guide sets out how Estate Planning can help to ensure that your wishes about your assets are carried out, both while you are still around and after you have gone.

As you read the Guide, please keep in mind that everyone's wishes and needs are different. We can only offer general advice, based on our decades of experience in helping clients to achieve what they want in this area of the law. Our supportive Wills and Estates team of Shane Williams, Partner, and Marlee Viero, Lawyer, will ensure that your wishes are carried and that the work is done professionally, promptly and at a reasonable cost.

Finally, a word of warning. We deal with this later in the Guide, but please do not fall into the trap of doing a "newsagent" Will or Power of Attorney. These documents are too important to prepare yourself, no matter how simple the forms you can buy may appear. Sadly, we often have to deal with the result of "homemade" Wills and Powers of Attorney, which can lead to expensive cases in the Supreme Court and assets being given to the people that the Will-maker did not intend. Getting it done by a professional is cheap insurance.

So, lets get started – what is a Will?

PART 1:
Wills

What exactly is a Will?

Simply stated, a Will is a document that sets out what you want to happen to the assets (and liabilities) you own when you die. With some limitations, you can pretty much set out in your Will who is to get what following your death.

Why should I have a Will?

Let's start by saying that you don't need a Will. In fact, in you don't make a Will, the Government effectively makes one for you. Not a Will, but a rigid distribution arrangement which is set out in Government Legislation. The Government's "Will" does not take account of your wishes. It does not give you the choice of who distributes your assets. The Government doesn't know you. The Government doesn't know your family. So its solution is not tailored to your personal circumstances. It is effectively "one size fits all". So, you should have a Will to enable some careful attention to be given to your personal circumstances and wishes, and so that you can have choices and some control in the whole process.

Special words in a Will

Our laws came originally from Britain – with the convicts. British law evolved over centuries with bits of Roman, European and local law all added to the mix. We have been left with some strange sounding words when it comes to Wills – for example:

Testator – the testator is the male person who makes a Will.

Testatrix – the testatrix is the female person who makes a Will.

Thankfully, these are only used in the law relating to Wills and Probate – you don't hear people saying "*The testatrix and I are going to the movies*". Here, we use the word "Will-maker" to cover both Testator and Testatrix.

Beneficiary – the beneficiary is a person who receives assets under the Will – for example, a partner, children, friends or an institution such as the Red Cross.

Residuary Beneficiary – the residuary beneficiary is the person or institution that gets what's left from the estate after all the other assets have been distributed to the beneficiaries.

Estate – these are the assets – property, bank accounts, cars - what you leave in your Will.

Executors or Executors and Trustees – the executors (or executors and trustees) are the people who carry out the wishes of the Will-maker as set out in the Will. They actually become the legal owners of the estate upon the death of the Will-maker and they have control of the estate until all the terms of the Will have been carried out. They are usually relatives (a partner or adult) of the Will-maker, but can be anyone over 18. Some people use a trustee company, or your lawyer can be the executor. Lawyers have the right to charge a fee for administering the estate if they are named as executor and that is set out in the Will.

Legacy/Bequest – a specific gift, such as a sum of money.

Witnesses – two witnesses to the Will are required. They should not be beneficiaries or exectors, but otherwise anyone over 18 can be a witness – they do not have to be a lawyer or a Justice of the Peace.

What assets are not covered in the Will?

People often think that every asset that they own can be left in their Will. That's not quite true. Assets – real estate, shares, bank accounts – that are jointly owned – usually with your partner, can't be covered in your Will. For example, if you own a house with your partner or someone else, and the title to the property says that you and they are "joint proprietors", you can't leave your part of that property to someone else. The other joint proprietor gets the whole of that asset, irrespective of what you say in your Will. That is called "survivorship". If you want to leave your share to someone else who is not on the title to the property, the title has to be changed to "tenants in common in equal (or unequal) shares". The other owner's consent is needed to do that. So is the consent of any lender who has a mortgage on the title. Stamp duty and capital gains tax issues may also arise. You can then leave your half, quarter or other share in your Will.

If I am mentally unwell, can I make a Will?

To validly sign a Will or be a witness, you have to have what is called "Testamentary Capacity". That is, you must understand the purpose of the Will and distribute your assets rationally – for example, you can't say "*I leave all my assets to the Man on the Moon*". That would ring an alarm bell with your lawyer who would tell you that you couldn't do that and they may ask for a letter from your doctor to say that you are of sound mind. If after you die, the Death Certificate says the cause, or one of the causes, of death was Dementia, or another mental illness affecting your intellectual capacity, the Probate Office (more on them later) will want to know whether the deceased was suffering from a mental illness when the Will was signed.

If so, medical evidence that they were, notwithstanding the illness, well enough to make a Will would be required. Because "*he's just getting older and forgetful*" can turn into Dementia or some other disorder, it's better to make or change your Will sooner rather than later.

"Age shall not weary them"

Age in itself is no barrier to making a Will. We recently made a Will for a 98 year old client who, although a bit restricted in physically getting about, was mentally as sharp as a tack. He got a letter to that effect from his doctor, we drew up the Will, he signed it and it was properly witnessed.

What if I leave uneven shares to my children or partner?

People often want to leave different shares of their estate to their relatives, friends or institutions. In the example of the 98 year old above, he had three adult children. His first daughter had had nothing to do with him for many years, his second daughter has spent a lot of time assisting him as he got older, including helping him in selling his house and moving him into a retirement village, and the third child, a son, had been good to his father but not in the special way that the second daughter had. The Will-maker gave the first daughter (the one who never saw him) a small legacy in his Will, the second daughter got 60% of the rest of the estate and the son got 40%. In the circumstances, that was perfectly reasonable, but care had to be taken to leave a letter from the Will-maker with the Will so it was clear why each child was getting an unequal share of the estate. That was to prevent, or make it unlikely, that the child who, in this example, got less than one third of that estate, could successfully challenge the Will in the Supreme Court after the Will-maker died – see the section on Judges re-writing Wills.

PART 1:
Wills

Speaking of children, when do they benefit from a Will?

If you leave part or all of your estate to a child who is a "minor" – that is, under 18, their share has to be held in trust by the executor until they turn 18, 21 or whatever other age is specified in the Will. The executor is usually given the power in the Will to "*sell call in and convert into money*" the assets of the estate that are not cash or in bank accounts – such as real estate and shares. Alternatively, the executor may choose to retain such assets in the estate on trust for the child – for example, it may be a good idea to keep shares that are performing well.

Still speaking of children – what about the education and upkeep of those under 18 who are beneficiaries under a Will?

The lawyer who is preparing the Will should bring to the attention of the Will-maker who is planning to leave all or part of their estate to infant children (that is, those under 18) that provision should be made for money to be released from the estate by the executor to pay for the upkeep, education, health and other reasonable expenses of the child. If that provision is not made, the executor must apply to the Supreme Court to seek Orders that money be released for those purposes – an expensive exercise.

"I'm 18 I want my money!"

If a Will states that a child or children who are under 18 when the Will is made are to receive their inheritance at an age over 18, such as 21 or 25, there is authority in Court cases to say that, so long as the child or children are over 18, they can ask the executor, unless there is provision in the Will to the contrary, to pay them the money before the age set out in the Will.

What about superannuation?

Virtually everyone has a superannuation fund, whether a retail (you work for Myer or Bunnings), industry (accountants, doctors, nurses, police, even lawyers) or a "selfie" (a self-managed superannuation fund). Your Will can only deal with assets of which you are the legal owner. Your superannuation is legally owned by the Trustee of your superannuation fund. This means that separate arrangements are required, in addition to your Will, for these assets. Such separate arrangements are very much dependent on what superannuation fund you are a member of. Individualised advice is required.

A case in point

The Will-maker's first wife had died. He had three adult children by that marriage. He then re-married and, a few years later, he died. He and the second wife did not have any children together.In his Will, he left the wife a "life interest" in their matrimonial home, which was in his sole name in Geelong. That meant that the wife could live in the house until she died, but she got nothing else from the estate. His three children inherited the rest of the quite substantial assets. The wife went to the Supreme Court, saying that she had not been properly provided for. As with most such cases, a settlement was reached – the wife kept her life interest in the Geelong house but she also received a substantial cash settlement from that part of the estate that would have gone to the three children. That issue and the considerable expense incurred by the parties, which came out of the estate, could have been avoided if the Will-maker had made some reasonable provision for the wife in his Will, as well as leaving her the life interest in the house.

Can I "leave" my children to someone in my Will?

Not really. However, in a situation where the parents' relationship has broken down and the parent who has the primary care of the children does not want the other parent to care for them if the primary parent dies, then that parent can nominate someone else in their Will to care for and raise the children. Such a clause in a Will is not legally binding, but it can be used in evidence if the other parent and the person nominated in the Will end up in the Federal Circuit Court under the Family Law Act, fighting over who gets the children – another very expensive exercise. The Will-maker would need good reasons why they preferred someone else, apart from the other parent, to bring up the children – simply disliking the other parent is not enough.

The mechanics of making your Will – the executor

The first step in making a Will is to decide who will be the executor. There only needs to be one, but two are handy in case one dies, becomes mentally or physically unfit to do the work, does not want to act as executor, moves a long way away or just disappears (it's a big country). The executors can be anyone over the age of 18, but usually they are a family member or friend. It is best if they, or one of them, is younger than the Will-maker, as they are likely to survive them. If there is no executor living when the Will-maker dies, the family will need to apply to the Supreme Court to have an executor appointed – again, an expensive exercise. The executor can be a beneficiary under the Will – they often are – for example, when the executor is an adult child of the Will-maker and also receives assets under the Will.

It is the executor who instructs the lawyer about applying for a Grant of Probate after the death of the Will-maker and, as set out earlier, the executor is actually the legal owner of all of the Will-maker's assets until they are distributed in accordance with the Will.

More mechanics – the beneficiaries

The next step is for the lawyer to draw up the Will in accordance with the Will-maker's instructions, while making sure that there are no legal loopholes – such as providing reasons in a separate letter for not distributing the assets evenly to all children, or leaving the estate to the Man on the Moon. It is usual, when leaving assets to children, to say that, if a child dies before the Will-maker, that child's children (the Will-maker's grandchildren) will take their parent's share. And, of course, the Will-maker must have "testamentary capacity" – the mental ability to make the Will.

The signing bit

The procedure for signing the Will has been handed down to us for centuries – by British legal traditions. The Will-maker must sign the Will in the presence of two adult (over 18) witnesses, who should not be beneficiaries. They must all be in the same room, at the same time, when the Will-maker and the witnesses sign.There are lots of cases when a witness left the room – to take a phone call, move their car or go to the bathroom. Wills have been declared invalid by the Courts in such cases. The Will-maker and the witnesses should all use the same pen – or the Probate Office may query whether both witnesses were present at the signing. The witnesses do not read the Will – they are just there to confirm that the Will-maker signed.

PART 1:
Wills

What happens next?

The original Will is usually kept in the lawyer's strongroom and a copy given to the Will-maker. If the Will-maker agrees, the executors can have a copy of the Will but, in any event, they need to know where the original Will is kept and it is a good idea if the main beneficiaries also know the whereabouts of the original Will. Numerous Court cases have taken place where the Will could not be found – another unnecessary expense.

What happens if I die without making a Will?

The present law in Victoria that regulates who gets what if there is no Will is the Administration and Probate Act 1958. That provides –:

1. Where there is one partner and no children, then that partner takes the whole of the estate of the deceased.
2. Where there is one partner and a child or children of that relationship, then the partner gets the whole of the estate.
3. Where there is one partner and children born of a different relationship, then the partner receives all of the personal goods (clothing, furniture, motor vehicles) together with the first $451,909 and 50% of the balance, with the remaining 50% distributed equally amongst the children.
4. Where there are no partners, the estate is divided equally amongst children and, if a child of the deceased has already died, that deceased child's children take their parent's share of the estate equally.
5. Where there are no partners and no children, then the estate is divided equally between the parents of the deceased. If there are no parents, then it is divided equally between the deceased's brothers and sisters and, if there are none of those, there is a pattern of distribution down to cousins. If there are no cousins, then the State Government gets the estate.

As can be seen, this is a rigid, "one size fits all" mechanism which does not take individual circumstances into account. It can cause a great deal of pain, trouble and expense to surviving family members. We strongly recommend completion of a Will to avoid potential intestacy problems.

Judges re-writing Wills

After the death of the Will-maker, the terms of the Will can be contested in the Supreme or County Courts in Victoria by an interested party. This interested party may be a beneficiary under the Will who thought they should receive more of the estate, or it may be someone left out of the Will who wants a share of it. The Judges have very wide powers to, effectively, re-write the Will and, usually, the costs of all parties in such an application come out of the estate. It is mainly for that reason that most claims are settled before they go on to a Final Hearing before a Judge. This situation makes it doubly important to have the Will drafted by an experienced professional, to minimise the chances of a beneficiary under the Will or somebody who was left nothing making a claim against the estate.

PART 2:
Powers of Attorney

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What are Powers of Attorney?

A Power of Attorney is a document, signed by the giver of the power, by the Attorney (the person who you authorise to act on your behalf) and witnesses. There are three main types of Power of Attorney – Non-Enduring, Enduring and Medical. The document sets out what you authorise your Attorney to do on your behalf.

Enduring Powers of Attorney

(a) What are Enduring Powers of Attorney?

Enduring Powers of Attorney can be financial (the right to operate your bank accounts, buy and sell real estate, motor vehicles, shares, pay your bills, operate your business) or personal (your personal affairs and lifestyle matters, including access to your support services, where and who you will live with). Your Attorney, under an Enduring Power of Attorney, cannot make medical decisions for you – they have to be made under a Medical Power of Attorney (see below).

(b) Some examples of Enduring Powers of Attorney – Financial

If you want your Attorney to look after financial matters for you, you should appoint someone (a relative or a friend) who handles money well – someone you can trust and who will not upset your family.

You can oversee the actions of your Attorney while you are well enough to make your own decisions – for example, if you wanted to make improvements to your home you could ask for the support of your Attorney who you may give access to your bank account, while monitoring the Attorney's use of the account.

(c) Examples of Enduring Powers of Attorney – Personal

An Attorney in this category would usually be someone who knows what you want, who you are fond of and who is fond of you, and who lives fairly close to you – who could help you in dealing with Centrelink, moving into Aged Care or assisting you in a dispute with a neighbour over, say, trees or a fence.

(d) Things that the holder of an Enduring Power of Attorney cannot do

Your Attorney cannot -:

I Vote for you;

ii Make decisions about the care of your children or adopting a child;

iii Make or revoke your Will;

iv Manage your estate on your death;

v Be paid from your property, unless you have authorised that in your Enduring Power of Attorney.

PART 2:
Powers of Attorney

Non-Enduring Powers of Attorney

(a) What are Non-Enduring Powers of Attorney?

A Non-Enduring Power of Attorney is one which is usually created for a specific purpose – for example, to authorise the Attorney to operate your bank account while you are overseas, to buy or sell shares in your absence or to buy or sell real estate.

(b) How do they operate and an example

An example would be where you are going hiking for a weekend, but you want to bid at an auction of a property while you are away. You can provide your Attorney with a Non-Enduring Power of Attorney for the specific purpose of bidding at the auction, up to a limit that you specify in the document and, if the bid is successful, to sign the necessary Contract documents.

Appointment of Medical Treatment Decision Maker

(a) What is the Appointment of a Medical Treatment Decision Maker?

The basis of this Power of Attorney is to provide you with the ability to appoint someone (the Attorney) to make decisions about your medical treatment in the future if you are unable to make those decisions yourself.

(b) Advanced Care Directive

This is a document that you give your Attorney which sets out your legally binding instructions for your medical care or treatment, in the event that you do not have the decision making capacity for that medical treatment in the future. "Medical treatment" includes treatment by surgery, treatment for mental illness, treatment with prescription medication or an approved medical cannabis product, dental treatment and palliative care. It can also authorise your Attorney to direct medical staff to cease treating you, to not resuscitate you or to turn off your life support equipment.

(c) Appointment of a Support Person for Medical Treatment

Such a Support Person does not, unlike an Attorney under an Advanced Care Directive, have the power to make your medical treatment decisions. Their role is to support you to make, communicate and give effect to your medical treatment decisions.

(d) Disputes about Advanced Care Directives and Support Persons for Medical Treatment

If a person (usually a family member or friend) disputes that the holder of an Advanced Care Directive or a Support Person for Medical Treatment is not acting in the best interests of a person requiring medical or similar treatment, an Application can be made to the Victorian Civil and Administrative Tribunal (VCAT) which can vary the terms of the appointment, revoke it or appoint a new Attorney. This also applies to Enduring Powers of Attorney for financial and personal matters.

Some other issues

(a) What if no Attorney is appointed for Financial, Personal or Medical Treatment purposes?

In that case, a family member or friend will usually make an Application to VCAT for the appointment of an Attorney – again normally from amongst the family, a friend, the Public Advocate or a trustee company.

(b) Choosing the right person to be your Attorney

It is vitally important that you choose the right person – one that you can trust with your finances, your personal arrangements and even, in the case of Medical Powers, your life. Unfortunately, there have been many instances when an Attorney has run off with the person's money, their house or even made life-ending medical decisions that were not in the person's best interests. So, beware – choose your Attorney very carefully and, while you are medically fit, monitor what they are doing with your assets – if they are a true friend, they won't mind you "looking over their shoulder".

(c) Ending a Power of Attorney or Appointment of Medical Treatment Decision Maker

An Enduring Power of Attorney or an Appointment of Medical Treatment Decision Maker can be revoked, or ended, by you notifying the Attorney in writing of your decision to end the power. You have to be of sound mind – that is, have "testamentary capacity" in order to revoke. If you do not have that ability, then the Power of Attorney or the Appointment of Medical Treatment Decision Maker continues until you are medically fit enough to revoke the document. If you do not recover and you die, Enduring Powers of Attorney and the Appointment of Medical Treatment Decision Maker die with you. A Non-Enduring Power of Attorney can be revoked by you at any time that you are mentally fit but, as set out above, they are usually short-term documents for specific purposes which are revoked when that purpose has been served or any time limit on the Power of Attorney expires.

PART 3:
Estate Planning

What is Estate Planning?

So far, we have discussed various aspects of Wills and Powers of Attorney.

Estate planning is best described as the overall process of putting structures in place to make sure you are looked after while you're alive, and then ensuring that your assets are distributed efficiently in the way that you want after your death. It can include tax planning and asset protection issues for your beneficiaries. It covers many elements of asset transfer upon death – protecting vulnerable family members, arranging for a smooth transfer of business assets along with a host of other potential issues, depending on a client's circumstances.

It includes a Will and Powers of Attorney, but often extends to planning of wider issues – whom assets are transferred to, or controlled by, upon death such as superannuation death benefit nominations.

Testamentary Trusts

We are often asked about Testamentary Trusts and their benefits. A Testamentary Trust has come to mean a trust arrangement within a person's Will which allows a beneficiary to have the benefit of an asset given to them under a Will, without them legally owning it.

For example, in a 'standard' Will, the Will-maker gives assets to A (their executor) to be held on "trust" for their beneficiary B. The intention is that, when the estate is finalised B will receive the asset itself or that the asset will be sold and B will receive the sale proceeds.

This is different in a Testamentary Trust arrangement. Here, the Will-maker gives assets to C, who is the trustee of a designated trust within the Will. C is often a potential beneficiary of the assets held on trust. C also usually holds the assets for a range of potential beneficiaries (including C). The number of beneficiaries is often wide, but would usually include C, C's spouse, C's children, C's siblings, C's parents...the range can be extensive.

This is the most common form of Testamentary Trust (where the trustee of the Trust has a discretion to distribute the funds in the Trust). Effectively, it is a Discretionary Trust structure within a person's Will. Under the terms of the Trust, the trustee can distribute income, capital or a mixture of both to one, some or all of the range of possible beneficiaries set out in the terms of the Trust. None of the beneficiaries will have a right to receive anything at all; they only have a right to be considered by the trustee.

Different lawyers tend to have varying views on how these documents should be drafted. Here at Tonkin Legal Group, we lean towards giving each beneficiary the option of taking their gift under the Will either directly (useful, for instance, if a beneficiary has a mortgage they wish to reduce immediately) or having it paid to a Discretionary Trust created under the Will that the beneficiary controls. Alternatively, part of the gift can be paid to the beneficiary immediately and some to the Discretionary Trust. In many cases, this flexibility is very useful. However, each client's circumstances are different and the terms of any Testamentary Trust must take these into account.

(a) So what are the benefits?

The benefits to a beneficiary from having a Testamentary Trust available to them generally fall into one or both of the following categories:

(i) taxation advantages;

(ii) asset protection advantages

(i) Taxation advantages

Taxation advantages from a Testamentary Trust generally relate to beneficiaries who are on a lower tax rate – usually children.

Consider the following example:

James dies leaving an estate valued at $1.8 million. He leaves his entire estate to his widow Tanya who already earns $110,000 per year. They have three children aged between 3 and 11.

Tanya then invests the $1.8 million and receives investment income of $90,000 from the estate investment portfolio. Tanya already has income of $110,000 per year. When the investment income is added to her regular income she will be taxed on a gross income of $200,000 annually.

If James had provided Tanya with the option of a Testamentary Trust, Tanya could have distributed the $90,000 investment income equally between the three children rather than to herself. In this case, each child would have received income of $30,000 per year. Since each child would be taxed as an adult under the Testamentary Trust, each child would have the benefit of the tax-free income threshold. On current rates, each child would be paying tax of approximately $2,400 from their $30,000 in taxable income. This would mean that the tax saving would be in the order of $30,000 over one financial year. The benefit arises because the children would be taxed at normal adult tax rates on the trust income distributed to them; tax on the $90,000 is divided between the three children and is not solely borne by Tanya.

A popular use of this strategy is for the payment of private school fees for children.

(ii) Asset protection advantages

Testamentary Trusts can also provide advantages by way of asset protection. As the assets of a Testamentary Trust are not owned personally by the beneficiary (rather, by the trustee) creditors pursuing a person who is a beneficiary of such a Trust will generally not meet with success in seeking to access the assets of the Trust.

These vehicles can also be used in an attempt to protect assets from the spouse of a beneficiary in the event of divorce. Over a period of years, the Family Court has demonstrated a robust attitude in relation to such Trust structures. On some occasions, it has found that, although the assets of a Trust are not assets of the beneficiary as such, they can be considered by the Court as a "financial resource" available to the beneficiary for the purposes of a Family Law property settlement.

(b) No one knows the future

One of the problems with preparing Wills for clients is that it is very difficult to peer into the future. No one knows when the Will-maker will pass away. No one knows what the circumstances of a Will-maker's beneficiaries might be at that time.

If those beneficiaries are on a high income, there may be tax benefits available from a Testamentary Trust. If the beneficiaries are in business and are "at risk", the Testamentary Trust arrangements may assist in preventing an inheritance being passed directly to creditors. And, if the beneficiaries are undergoing a property settlement in the Family Court, a Testamentary Trust may also prove useful.

PART 3:
Estate Planning

Blended families

In the Estate Planning area, "blended families" require special consideration. A blended family could best be described as a family unit in which one or both parents have children from a previous relationship. The "Brady Bunch" were a good example of a blended family, where each spouse had children from an earlier relationship. However, a blended family does not require both spouses to have children from a prior relationship. The potential conflict here is between the children of a prior relationship and a second spouse.

A case in point

Imagine Richard has two adult children (Linda and Alex) from his first marriage. He then divorces and marries Christine. Experience suggests that there is considerable scope for tension between Linda and Alex on the one hand and Christine on the other. Further complications may arise if Christine has children from a prior relationship.

In this example, Christine, Linda and Alex may all have legitimate claims if Richard was to die. The task of Richard's lawyer in this example would be to advise Richard as to the best way of dealing with his estate in order to minimise the prospect of conflict and a claim against his estate upon his death. Possible solutions might include transfer of assets by Richard to a beneficiary during his lifetime (called an "inter vivos" gift), giving Christine some kind of interest in his assets after Richard's death which would last until Christine's death (a "life interest" or a right to reside in the former house for life) which would then revert to Linda and Alex following Christine's death. Each particular case will have different considerations.

PART 4:
Conclusion

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As you can see from this summary of Wills, Powers of Attorney and Estate Planning, these are not simple issues, but we hope that we have made things a little clearer.

There is no "one size fits all" in these areas of the law. Each document needs to be individually tailored to your particular circumstances. Doing a "newsagent" or a "homemade" document can create more problems than it solves and may result in considerable expense.

Our Team

Our Wills and Estates team at Tonkin Legal Group, Partner Shane Williams and Lawyers Ruby Heath and Charlie Robinson, can guide you through the process of preparing these important documents – "Peace of mind" is particularly important in this area of the law.

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