

A photograph of an elderly woman with short white hair and a young child with dark hair, both smiling and looking off-camera. The woman is wearing a blue and white striped shirt, and the child is wearing a white shirt. They are outdoors with green foliage in the background.

Guide to planning your estate
2020/21

Thorough estate planning involves implementing strategies to deal with all your assets – not just those covered by your Will.

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Plan your estate

Estate planning is about much more than preparing a Will.

Thorough estate planning involves putting in place strategies that address all aspects of your situation.

Often, we assume this simply involves making it clear in a Will who we would like to inherit assets if we pass away.

However, while a Will can help ensure your estate is distributed according to your wishes, it may not be effective in dealing with a significant portion of your wealth.

For example, the proceeds from superannuation funds and life insurance policies don't automatically form part of your estate, which means that addressing these investments in your Will may be ineffective unless you take some important additional steps.

A well-prepared and executed estate plan can ensure the right assets go to the right people at the right time, in an efficient and tax-effective manner.

It can also ensure that if you're unable to make important financial and lifestyle decisions for yourself, the right person is able to step in on your behalf.

In this guide, we outline the key tools and strategies you could use to achieve your estate planning objectives.

But before you take any action, you should speak to your financial adviser.

You and your adviser can then work with appropriate legal and taxation professionals (where necessary) to implement the strategies that best meet your needs.

Understand implications for different assets

Before you start planning your estate, it's important to understand the way different assets are treated and the options available to you.

Making sure your assets go to the right people after you pass away is not always as simple as stating your wishes in your Will. How your property is distributed may depend on a number of factors, including:

- whether you owned an asset individually or jointly
- the legal structure of ownership, if an asset is owned by more than one person
- the terms of your Will, and
- State or Territory based legislation.

An asset you own individually (or your ownership interest in a particular asset that you own with someone else) will be categorised as either an 'estate asset' or a 'non-estate asset'. This will play an important part in determining how the asset is dealt with when you pass away.

Estate assets

Estate assets will automatically form part of your estate when you pass away. This means they can be passed on according to your wishes via your Will – see page 8.

Key examples of estate assets include:

- individually owned bank accounts, term deposits, listed securities and managed funds
- interests in a private company or unit trust, and
- ownership interests in any assets owned via a 'tenants in common' arrangement.

A tenants in common arrangement is where each owner has a distinct legal share of the asset. Ownership may be 50:50 or the shares may be unequal, but each party may deal with their share as they wish. Upon death, your share will not automatically pass to the surviving owners.

Non-estate assets

There are a range of assets that won't automatically form part of your estate when you die that are generally known as 'non-estate assets'. However, some non-estate assets may be distributed according to the terms in your Will if very specific arrangements are made.

It's important you understand what will happen to non-estate assets when you pass away and the arrangements you may be able to make to ensure they are passed on to the people you wish.

Key examples of non-estate assets include:

- assets owned in a 'joint tenancy' arrangement, such as a jointly owned home or bank account, where ownership automatically passes to the surviving owner, regardless of the terms of any Will
- assets held in a discretionary family trust of which you are a trustee or beneficiary, which will remain in the trust when you pass away
- money held in superannuation (in the accumulation or pension phase), which can be paid to certain eligible dependents or your estate and you can influence where it goes by completing a valid death benefit nomination – see page 12, and

- proceeds from life insurance held outside superannuation, which can be paid to the policy owner, a named beneficiary or the estate depending on how the policy is established – see page 14.

Deciding whether to direct super and life insurance proceeds to your estate or not, will depend on your specific situation and estate planning objectives.

For example, you may want the money to go to your estate so it can flow to a testamentary trust, which could help to protect assets and provide tax planning opportunities – see page 10.

Alternatively, if you are concerned your estate could be challenged, making arrangements for the money to be paid directly to eligible beneficiaries can ensure it doesn't form part of the pool of assets which could be contested.

Seek advice

Your financial adviser, together with your taxation and legal professionals, can help you assess the estate planning implications for each asset and investment you own and assist you to make suitable arrangements. They can also help you in ensuring that any future investments you make are structured in a way that is consistent with your estate planning preferences and objectives.

Prepare a Will

If you die without a valid Will, your estate assets will be distributed by a Court appointed administrator, according to the intestacy laws.

While the intestacy laws vary between the different States and Territories in Australia, they generally only cater for certain family members, in strict proportions, and are unlikely to reflect your wishes.

A suitably drafted Will can help ensure your estate assets (see page 6) are distributed efficiently and effectively to the people you want and avoid unnecessary costs and delays.

Here are some key issues to discuss with your financial adviser, solicitor and registered tax agent.

Who should you nominate as your beneficiaries?

While you can leave your estate to pretty much anyone you like, you do need to be careful. Challenges against a Will often occur when people feel they haven't been provided for fairly.

If you think your Will is likely to be challenged, or you have intentionally provided for certain beneficiaries in unequal proportions, it may be a good idea to also leave a 'letter of wishes' in addition to your Will.

A letter of wishes is not binding and doesn't necessarily ensure the estate will not be challenged. However, if correctly drafted, it may help in providing guidance and justification to the executor (and Courts if a Will is challenged), in explaining why certain individuals have been catered for in the manner chosen.

What assets do you want your beneficiaries to receive?

Leaving a lengthy list of gifts is usually not encouraged, as the assets held at the time of making your Will (and their value) may differ significantly from the assets owned at the time of death.

It may therefore be a good idea to only gift a small number of specific assets in your Will and assign a percentage of the remainder of the estate to each beneficiary.

What type of Will do you need?

Many people create what is often called a 'standard' Will, where ownership and control of the estate assets is passed to the beneficiaries named in the Will and these beneficiaries can use the capital and income as they choose.

Another option is to prepare a Will that includes provisions for the establishment of a testamentary trust after you pass away. By doing this:

- ownership and control of the assets will pass to the trustees of the trust, and
- income and capital will be distributed in accordance with the rules of the trust, which are contained in the Will.

The Will can be drafted so that the establishment of the trust is at the discretion of the executor, who could consider whether or not this is appropriate based on the circumstances that exist at the time you pass away.

A testamentary trust can provide a number of key benefits, including asset protection and tax planning opportunities (see page 10). However, a standard Will could be a more suitable and sensible outcome if your circumstances are fairly straightforward and the total value of your estate assets is insufficient to justify the additional costs that would be incurred establishing and running a testamentary trust.

Who should be your executor?

When preparing a Will, you need to decide who you would like to be your executor.

The executor is responsible for a range of tasks, such as locating the Will, organising the funeral, arranging probate, collecting the assets, repaying debts and distributing the assets.

When choosing your executor, make sure you select someone who is trustworthy, in tune with your objectives and capable of performing the required tasks. Being an executor can be onerous, so it's also important the person you appoint is willing to perform this role.

You can have more than one executor if your circumstances warrant it. For example, you have two adult children and you feel it may be unfair to only appoint one of them.

Should you use a trustee company?

While most people appoint an individual(s) as their executor, a trustee company may be a good alternative in some circumstances – particularly if your estate is complicated, likely to take a long time to administer and/or suitable friends or family are not available.

A trustee company can provide expert administration and legal services and charges a fee, typically paid from your estate, after your death. It is important to understand the fees and charges involved for these services before a third party executor is appointed, to ensure that the estate will be able to meet these expenses without jeopardising your estate plan.

Should you appoint guardians for children?

If you have children under the age of 18, you should consider naming a guardian in your Will. If you and your partner die, a guardian can make legal decisions on behalf of your children and ensure their needs are met.

Does your Will need updating?

If you already have a Will, you should review it frequently and update it where necessary to make sure it continues to meet your needs and circumstances. Examples of events that could trigger the need to update your Will include:

- the birth or death of a relative, or other potential beneficiary
- your assets change significantly, either in value or in type
- you enter into or wind up a business, or make significant changes to your business structure
- you marry, divorce or enter into a new relationship, and
- tax or other law changes impact your situation and arrangements already made.

Seek advice

To find out more about Wills and how they fit into your broader estate planning, we recommend you speak to your financial adviser and a suitably experienced solicitor.

Consider a testamentary trust

When creating or reviewing your Will, you may want to consider the benefits of having a testamentary trust created after your death.

A testamentary trust is a trust that is established after you pass away by making suitable provisions in your Will.

Where this is done, you can make provision for certain assets to be controlled and managed by the trustees on behalf of the beneficiaries of the trust.

This could provide some benefits, including asset protection and tax planning opportunities.

Asset protection

The assets in a testamentary trust are generally protected from legal action, such as claims by the creditor of a beneficiary or the former spouse of a beneficiary. A testamentary trust can also:

- safeguard the interests of vulnerable beneficiaries, including those who are spendthrift, or suffering gambling, drug or alcohol addictions, and/or
- provide effectively for beneficiaries who are unable to manage their financial affairs (eg minor children and people with a mental or physical disability).

Furthermore, you can give the trustees full discretion to decide which beneficiaries receive income or capital and when they receive it. Alternatively, you can include specific provisions in your Will restricting access to income or capital until certain conditions are met (eg until your children reach certain ages).

Planning opportunities

If suitable provisions are included in the trust deed:

- the trustees may have the flexibility to decide which beneficiaries receive income from the trust, and

- income may be directed to different beneficiaries each year, without having to transfer ownership of the assets.

As a result, the trustees can split investment income amongst various beneficiaries.

Normally, when a minor child receives income from an investment, amounts over \$1,307 pa are taxed as high as 45% (rate applies in 2020/21 financial year).

However, generally when investment income is distributed to a minor child from estate assets held in a testamentary trust, tax should be payable at normal marginal rates.

You should seek taxation advice from a registered tax agent to confirm the tax implications of a testamentary trust.

Consider the costs

A testamentary trust will need to satisfy certain requirements, such as completing annual tax returns.

The trustees may also need up-front and ongoing professional advice (eg legal, taxation or financial planning) and any costs incurred should be weighed up against the benefits of maintaining the trust. Additional requirements apply if the trustee is a company.

Seek advice

While your financial adviser can help you assess the merits of a testamentary trust, you will need to seek professional legal and taxation advice when making suitable arrangements.

Execute a Power of Attorney

By executing a Power of Attorney, you can authorise another person to manage your financial affairs when you are unable to.

While a Will can be an effective estate planning tool, it only comes into effect when you die. A Power of Attorney on the other hand, can enable someone you trust to make decisions on your behalf while you are still alive.

This could include, for example, buying and selling assets, arranging loans and performing a range of other legally binding tasks.

You may be able to choose for the Power of Attorney to be effective from the time you sign the document until such time that you formally rescind it, or for it to come into effect only in specific situations.

Types of Powers of Attorney

A Power of Attorney can cover all circumstances, specific events (such as the sale of a house) or a defined period (eg if you travel overseas).

A general Power of Attorney will cease to be valid when you lose mental capacity. If you would like the Power of Attorney to continue to be valid, it may be more appropriate to implement an enduring Power of Attorney, which will continue to operate if you lose mental capacity.

An enduring Power of Attorney should be considered as you get older and the chance of developing dementia and other conditions that could impact your legal capacity increases. However, even if you are young and healthy, you may also want to establish an enduring Power of Attorney as part of your broader estate planning.

Unforeseen accidents that could leave you unable to manage your financial affairs can occur to anyone at any time – whether it's a car accident, sporting incident or unexpected illness. Importantly, you can only establish a Power of Attorney yourself if you have legal capacity, which means it is always best to plan ahead.

In some States and Territories, it may also be possible to execute enduring Powers of Attorney that extend to making lifestyle and medical decisions. Otherwise a separate document may be required that appoints a person(s) as your guardian. Where available, this could include:

- deciding where you live and who you live with
- agreeing to medical treatment, and
- planning leisure activities, such as holidays.

Seek advice

To find out more about Powers of Attorney, we recommend you speak to a suitably experienced solicitor.

Make plans for your super

It's important you understand the options available for your super when you die and what you can do to ensure it's paid according to your wishes.

For many people, super represents a substantial part of their total wealth. However, super (and any life insurance held in super) doesn't automatically form part of your estate. When you pass away, your super can be paid to certain eligible dependents (see page 13) or your legal personal representative (ie your estate).

Also, if you complete a valid binding nomination while you are still alive, the trustees are required to pay the money to the eligible person(s) you have chosen. Otherwise, the trustees get to decide who the money goes to and it might not end up in the hands of the people you intended.

Beneficiary nominations

In most cases, it is possible to make a death benefit nomination for each of your super or pension accounts.

You can only nominate people who are eligible to receive a superannuation death benefit (see page 13) or your legal personal representative.

As a general rule, the validity of your nomination will only be assessed when the death benefit is payable. So you should ensure it's valid when you make it and review it if your circumstances change to make sure it's still appropriate.

There are different types of beneficiary nominations. The most common are 'binding' nominations and 'non-binding' nominations.

Not all super funds offer both binding and non-binding nominations.

Binding nominations

Most super funds offer binding nominations. Some binding nominations are 'lapsing', which means they need to be re-submitted every three years to remain valid. Others are 'non-lapsing' and will continue until you either revoke or update the nomination.

If a valid binding nomination is in place at the time you pass away, the trustees of the super fund are required to distribute your super benefits to the person(s) you have nominated.

Non-binding nominations

With non-binding nominations, the trustees are not required to follow your instructions. They will be guided by what you complete in the nomination. However, they have full discretion to pay your death benefit to another eligible beneficiary or your legal personal representative, which may not reflect your wishes.

Key issues to consider when making your nomination

If you nominate your legal personal representative when completing a binding nomination, your super will be paid to your estate, where it will be dealt with according to your Will (or the intestacy laws if you don't have a valid Will – see page 8).

There are a range of reasons why you might want your super to go to your estate. For example, you could include provisions in your Will for the money to pass into a testamentary trust, which could help to protect assets or provide tax planning opportunities – see page 10.

However, a Will and the terms expressed in it can be challenged in the Courts by certain other people who believe that they have not been adequately provided for.

If your Will is likely to be contested, you may want to nominate for your super to be paid directly to one or more eligible dependants – see table below. This is more likely to ensure your estate planning objectives are met, as a binding nomination usually cannot be overturned by the Courts if valid at the time of death and the trustees have acted in line with super law and the rules of the fund.

Seek advice

Your financial adviser can help you decide which type of nomination you may want to complete for your super and explain who you can nominate. They can also review any nominations already in place to ensure they suit your needs and circumstances.

Summary of death benefit payment options

The table below summarises which beneficiaries may be able to receive a superannuation death benefit as a lump sum and pension, as well as who may receive a lump sum payment tax-free.

Beneficiary	On death, which beneficiaries are eligible to receive your super as a:		
	Lump sum ¹	Tax-free lump sum	Pension ²
Spouse	Yes	Yes	Yes
Child:			
• < 18	Yes	Yes	Yes
• 18-24 and financially dependent	Yes	Yes	Yes
• 25 or over and permanently disabled	Yes	Yes	Yes
• 25 or over and financially dependent (unless disabled)	Yes	Yes	No
• 18 or over and not dependent	Yes	No	No
Financial dependant (see above for children)	Yes	Yes	Yes
Interdependant (see above for children)	Yes	Yes	Yes

¹ A lump sum payment can also be made to the estate and the tax treatment generally depends on whether it's ultimately received by a beneficiary that is eligible to receive your super as a tax-free lump sum, such as your spouse or your child if under 18 or financially dependent on you.

² There is a limit on how much super you can transfer to a 'retirement phase' pension during your lifetime. This is known as the 'transfer balance cap' and in 2020/21 it's \$1.6 million. This cap may be indexed in future years. Counted towards this cap would be amounts used to start a 'retirement phase' pension from your own super account, as well as a pension that is received as the result of the death of another person. Modified rules apply when a superannuation death benefit is paid as a pension to a child. Penalties exist for exceeding the cap.

Fund an estate planning gap with insurance

Life insurance can be a cost-effective and convenient way to ensure your dependants can maintain their living standard if you die.

If you have a financially dependent family and pass away, the emotional strain can be quickly compounded by financial strain if you haven't made suitable plans to help protect their financial future.

Without the ongoing income you earn from working, your family could struggle to cover the mortgage, pay their living expenses and meet a range of other costs.

By taking out life insurance, you can generally ensure a suitable sum of money becomes available for your family upon your death to help meet their immediate and future financial needs, and achieve your estate planning objectives.

How much cover do you need?

The amount of life insurance you may need to achieve your estate planning objectives will depend on your circumstances and what you want to achieve. Some key issues to consider include:

- How much of your income would your family need if you are no longer able to provide for them?
- How long would you like the income to be paid for?
- Would you like your mortgage or other debts to be paid off?
- Would you like to leave an inheritance for your children?
- Are there any costs that would need to be met, such as funeral expenses?
- What investment assets would be available to help meet these needs?

Your financial adviser can take into account all these issues and help you identify how much life insurance is right for you and your family.

Policy ownership options

If you need more insurance you could consider taking out the cover in your own name or in your super fund. Each option has some distinct benefits and key issues to consider.

Ownership via super

It may be more cost-effective to hold life insurance in super rather than your own name. For example, in the 2020/21 financial year:

- if you're eligible to make salary sacrifice contributions, you may be able to purchase insurance in a super fund with pre-tax dollars
- if you make personal super contributions, you may be able to claim the contributions as a tax deduction – regardless of whether they are used in the fund to purchase investments or insurance, and
- if you earn \$54,837³ pa or less and you make personal after-tax super contributions, you may be eligible to receive a Government co-contribution of up to \$500 that could help you cover the cost of future insurance premiums.

These concessions may make it more cost-effective to insure through super, or help you get a level of cover that might otherwise not have been affordable.

³ Threshold applies in 2020/21. Includes assessable income, reportable fringe benefits and reportable employer super contributions (of which at least 10% must be from eligible employment or carrying on a business).

Another benefit of insuring in super is that you can usually arrange for the premiums to be deducted from your account balance without making additional contributions to cover the cost.

This can make insurance affordable if you don't have sufficient cashflow to pay the premiums outside super.

The trade-off, however, is that you will use up some of your superannuation savings that could otherwise meet your living expenses in retirement.

Also, there are restrictions on who you can nominate to receive your super in the event of your death (including the proceeds of life insurance held in super) and tax may also be payable by certain beneficiaries on the proceeds (see page 13). It is important to consider these issues when determining the most appropriate way to own any life insurance policies.

Personal ownership

While insuring in super may be more affordable, if you take out life insurance on your own life, outside super, you can generally nominate a beneficiary to receive the policy proceeds without restriction.

You could nominate another individual as the beneficiary, where the payment would be made directly to them in the event of your death.

Alternatively, you can arrange for the payment to be made to your estate by either nominating the estate as the beneficiary of the policy, or not nominating an owner or beneficiary. In this case, the life insurance proceeds will be distributed in accordance with the provisions in your Will, or the laws of intestacy if you pass away without an appropriate and valid Will (see page 8).

It may also be possible for your desired beneficiary to be the owner of the life insurance policy, where they could directly receive the proceeds in the event of your death, without making a beneficiary nomination.

Seek advice

Your financial adviser can help you decide how much life insurance you may need and how best to structure it to achieve your estate planning objectives.

Some other estate planning issues to consider

There are a range of other estate planning issues your financial adviser can help you consider.

Choosing suitable investment structures

When deciding where you invest current and future wealth, it's important to take into account the estate planning implications. The way you structure ownership of your investments can impact whether the money will or won't form part of your estate when you pass away.

Your financial adviser can help you assess different ownership options, such as investing in your name, your partner's name or jointly with your partner. They may also identify whether further tax and legal advice is required to consider, for example, establishing a family trust, company or other arrangement.

Providing an early inheritance

If you are close to retirement (or already retired) you may want to gift some cash or other assets to your children, for example.

This could help you to increase social security benefits and/or reduce aged care costs in the future. This is because, after five years, gifted assets are not assessed for social security and aged care purposes.

However, it is important to consider whether you will be able to meet ongoing regular and lump sum expenses after you provide your gift.

It is also important to get advice from a financial planner, solicitor and a registered tax agent to ensure you understand all the consequences of gifting before you do so.

Seek advice

Because the laws are complex and can vary from one state or territory to the next, you should seek professional financial, legal and taxation advice relevant to your personal circumstances when considering any of the issues and strategies discussed above.

Your estate planning checklist

The checklist below summarises some key estate planning issues to discuss with your financial adviser, solicitor and registered tax agent.

- Do you have a Will?
- Would your circumstances warrant including provisions in your Will for the creation of a testamentary trust in the event of your death?
- Have you executed a Enduring Power of Attorney?
- Have you completed a valid and up to date nomination for your superannuation?
- Will enough money (including the proceeds from insurance) become available to enable your dependants to maintain their lifestyle if you pass away?
- Are your investments and other assets held in structures that are aligned to your estate planning objectives?
- Could you benefit from passing on some of your wealth before you pass away?

Your financial adviser, solicitor and registered tax agent can help you address these and other estate planning issues, and ensure that your plans are consistent with your personal needs and circumstances.



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