

DONLAN

LAWYERS

WILLS & ESTATE PLANNING

A GUIDE TO PREPARING A WILL
AND PLANNING YOUR ESTATE



CONTENTS



OVERVIEW	01
WHAT IS ESTATE PLANNING?	02
WHY DO YOU NEED A WILL - AND WHAT HAPPENS IF YOU DON'T HAVE ONE?	04
CHOOSING AN EXECUTOR	05
REVIEWING YOUR WILL	07
PROTECTING ASSETS - TESTAMENTARY TRUSTS	08
GETTING HELP TO MANAGE YOUR AFFAIRS WHEN YOU NEED IT	09
ADVANCE CARE PLANNING	11
BUSINESS SUCCESSION PLANNING	12

OVERVIEW

Past statistics have indicated that around half of Australian adults probably don't have a Will. Death and legal documents are hardly topics to get excited about, however there are good reasons to record your testamentary wishes today and put strategies in place to plan for unexpected events. Without a Will and an estate plan, your hard-earned assets and loved ones may not be adequately protected when you die, and the trauma of unforeseen events like sickness or incapacity can be made worse.



The information in this e-book is general only and is not legal advice. It simply raises matters for consideration when planning your estate. In all cases, we recommend you consult with a legal professional to prepare a valid Will and estate plan that is tailored to your individual circumstances.



WHAT IS ESTATE PLANNING?

An effective estate plan means having Will to determine what happens to your assets after you die, and also planning ahead so your legal, financial and health affairs can be managed if you are incapacitated. Estate planning can also include consideration of the most tax-effective distribution of your assets, strategies to best protect those assets, and planning for business succession and continuity.

ESTATE PLANNING

KEY CONSIDERATIONS

- › Preparing for the inevitable (death) – having a valid Will to appoint an executor and direct how your assets are distributed.
- › Considering superannuation accounts – nominating the most appropriate beneficiaries (dependants) to ensure funds are received in the most tax-effective manner.
- › Planning for the unforeseen (illness / incapacity) – ensuring documents are in place to authorise somebody you trust to deal with your affairs if you are unable to, and provide directions that align with your wishes regarding your future health treatment.
- › Ensuring your estate maintains value – holding and distributing assets in the most tax-effective manner, specific to your personal circumstances.
- › Protecting your assets – taking steps to safeguard assets from third party creditors, and to protect vulnerable beneficiaries.
- › Business succession planning – ensuring arrangements are in place to deal appropriately with your business or company interests in the future.
- › Minimising potential estate disputes and family provision claims – considering who may be eligible to make a claim on your estate and taking steps to minimise potential disputes.

WHY YOU NEED A WILL

AND WHAT HAPPENS IF YOU DIE WITHOUT ONE



Whether your assets are significant or modest, your family structure complex or simple, a valid Will is the only way to ensure that your testamentary wishes are known and likely to be followed when you die.

Generally, everyone over 18 years should consider preparing a Will. A valid Will appoints one or more persons you trust to manage your estate and directs how your assets should be distributed after you die. Those appointed to manage your estate are called executors and those who you choose to leave assets to are your beneficiaries. Your Will can also appoint guardians for your minor children.

Dying without a Will is referred to as dying intestate. In such cases, your assets will be distributed according to a formula set out in the rules of intestacy relevant for each state or territory.

These rules are designed to reflect society's expectations as to who should benefit from your estate. We all know however that every family is different, and these laws may not necessarily reflect the real wishes of a deceased person or take account of his or her unique circumstances.

Dying without a Will can result in outcomes you would not have wished for and will likely cause additional pressure and costs for your loved ones. A valid Will provides direction and clarity to your family and friends at a difficult time.

CHOOSING AN EXECUTOR

Choosing an executor is a central part of estate planning. Appointing a family member is common but may not always be the best choice in your circumstances.



The responsibilities of an executor may include, but are not limited to, arranging your funeral, protecting your assets, contacting financial institutions, collecting debts and paying bills, claiming under insurance policies, applying for probate, and ensuring your estate is administered and assets are distributed according to the wishes in your Will. Your executor may also need to deal with any disputes concerning your estate and will generally carry out his or her duties under the guidance of a lawyer.



It is common to appoint one or more family members or friends as your executor/s however this is not always the case or may not be suitable in your circumstances. In addition to appointing somebody you trust to manage your estate, you should also consider whether that person or persons are:

- › willing to accept the role of executor;
- › capable of managing your estate in terms of their own health;
- › suitable to manage your estate in terms of having sufficient time, experience and the confidence to deal with your affairs in the manner you would like;
- › able to act impartially, which is particularly important if you foresee potential disputes over your estate;
- › likely to outlive you.

You may consider appointing a second alternate executor as a backup in case your first choice is unable to act in the role. Alternatively, you could appoint joint executors (two or more people) who must act jointly to fulfil the role.

If you do not have a suitable choice as an executor, you may consider appointing a solicitor or other professional as your executor.



REVIEWING YOUR WILL



Changes in your personal or financial circumstances may create problems for others in interpreting a Will that has not been updated to reflect these changes. Importantly, it may result in an outcome you did not really want.

Wills should be reviewed regularly. Various life events may impact the value of your assets, the validity of the terms of your Will, and your decisions about executors and beneficiaries.

Following are common events that generally trigger the need to review your Will:

- › marriage, divorce or separation;
- › commencing a new relationship (de facto / same sex relationships);
- › the birth of a child;
- › the death or ill health of an executor who may no longer be able to act in that role;
- › the death or changes in circumstances of any beneficiaries that may prompt you to reconsider your wishes;
- › the transfer or disposal of specific assets that have been left to a named beneficiary;
- › the acquisition of new assets or business interests;
- › a significant change in your personal wealth, an inheritance or windfall.

PROTECTING ASSETS

TESTAMENTARY TRUSTS

There are extra steps you can take to protect your assets for future generations and to help ensure your estate goes only to those you intend to benefit.

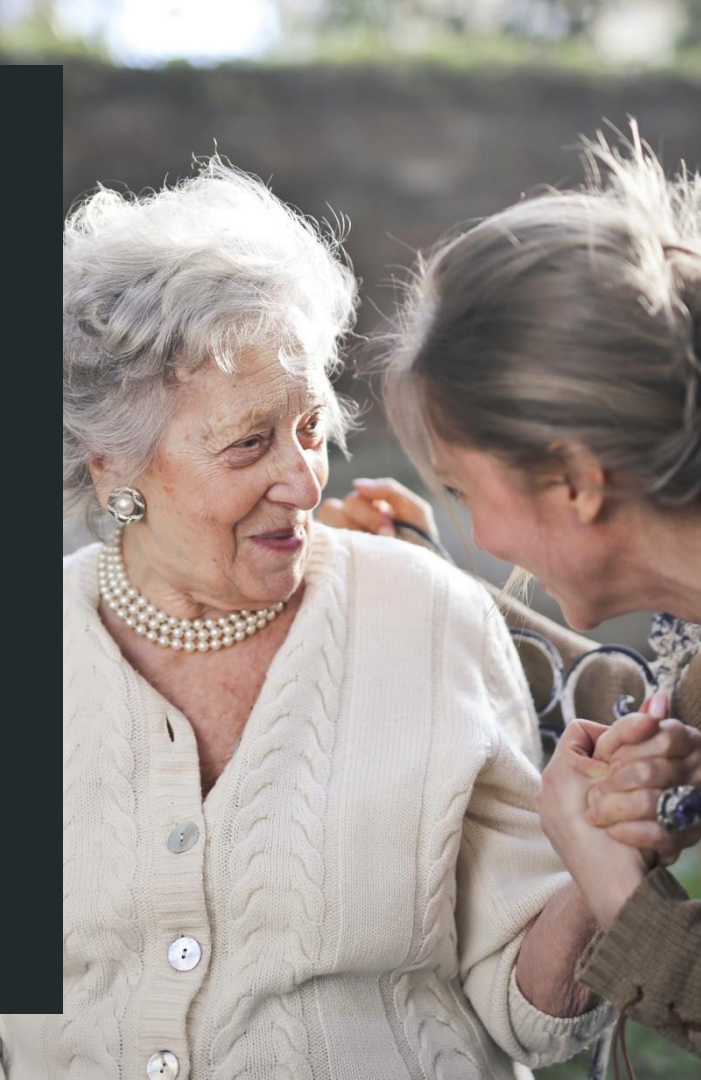
A trust separates the beneficial, from the legal ownership of property. A testamentary trust is a discretionary trust contained in a Will that comes into effect when the testator dies. A trustee is appointed to manage the trust.

Testamentary trusts can prevent assets from going to those who were not intended to benefit from the estate, such as an ex-partner of the testator's child or a creditor of a bankrupt beneficiary. Provided the trust is structured properly, in many cases assets will not be available to these third parties and can be preserved for those with whom you intended to share your wealth. This protection can also apply to 'at risk' or vulnerable beneficiaries such as those with disabilities, gambling or drug

addictions. In these cases, distributions can be carefully monitored and managed.

Having flexibility to determine when and how income and assets are distributed from a testamentary discretionary trust can also have a significant impact on how beneficiaries are taxed. The same applies to determining if and when assets are sold.

If you have a blended family, or your family arrangements are complex, or you have considerable assets or business interests, making provision for a testamentary trust in your Will may be beneficial. Your lawyer can review your individual circumstances and advise whether a trust might be appropriate for you.



GETTING HELP TO MANAGE YOUR AFFAIRS WHEN YOU NEED IT

Have you thought about what would happen if you were incapacitated and couldn't get out to manage the day-to-day jobs that we all need to take care of?



We can all take steps to simplify the management of our affairs and predetermine the type of health care we are comfortable with as we age, or if we are faced with an unforeseen health incident in our lives. Powers of attorney, enduring powers of attorney, appointments of guardianship and advance care planning are all documents you can create to appoint a trusted family member or friend to help you in such circumstances.


These documents and the relevant laws vary between each state and territory, so it's important to talk to a legal professional who is familiar with the law where you live.

Essentially, a **power of attorney** is a legal document you can make that authorises a trusted family member or friend to manage certain specified matters (like your legal and financial affairs) on your behalf if you are unable to do so yourself, or for convenience. The scope of authority is set out in the power of attorney document which may be confined to a one-off transaction or provide for a range of matters. For example, you may want to authorise somebody to sign documents or operate bank accounts on your behalf while you are overseas or recuperating from surgery. In such cases, the authority can end when you return, or when you get back on your feet.

More commonly, people will grant an **enduring power of attorney** if they want to ensure that their affairs are in the hands of those they trust if they lose mental capacity. In this case, the authority to manage your affairs will last (endure) until you die. Your appointed attorney must always act in your best interests.



ADVANCE CARE PLANNING

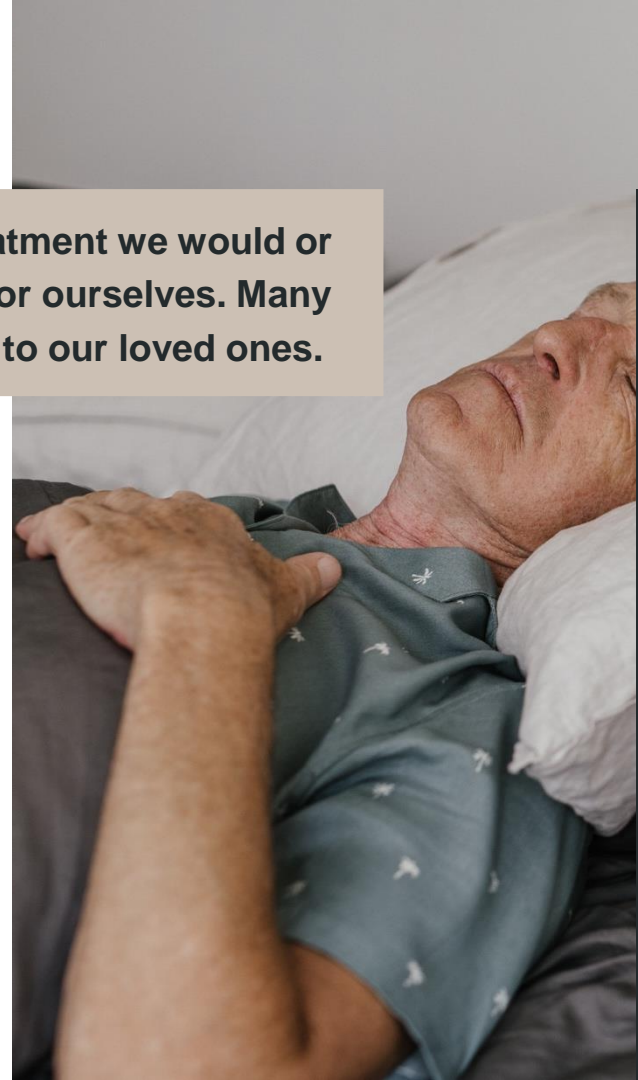


Many of us have thought about the type of health treatment we would or would not like to receive if we were unable to speak for ourselves. Many people however, have not made these wishes known to our loved ones.

Advance care planning considers your future health care needs. You can set out directions about these matters now, so that your wishes are respected if you are incapacitated and cannot convey these messages yourself. Subject to certain limitations, directions may include the type of medical treatment you consent to or refuse, and your values and preferences that should be considered regarding your future health care needs.

Transparent, open discussions with your family, friends and carers are important to ensure that your values and wishes concerning future medical care and treatment options are expressed and understood.

Different states and territories have different documents and processes to follow so it is important to talk to your lawyer and healthcare professional about these important documents, which may need to be reviewed on an ongoing basis.





BUSINESS SUCCESSION PLANNING

When you work hard to acquire and build assets and personal wealth, it makes sense to invest in sound advice to ensure these are protected.

Business succession planning involves strategies to proactively mitigate the risk associated with carrying on a business, to protect assets and guard against personal liability, and to plan how a business will be handed down to future generations.

Effective planning requires consideration of appropriate business structures, taking out adequate insurances, and using legal documents (for example, partnership and shareholder agreements) to deal with contingencies such as retirement or the unexpected death or illness of a key business partner.

If you have business or company interests it is important to think about what will happen to those interests in the future. If you have a family business and would like to involve your family in its operations and ownership, it is important to plan around such a transition to ensure minimum disruption to the operations and value of the business.

Your lawyer will often collaborate with financial advisors and accountants to ensure a holistic approach is taken and that both financial and legal options are considered.



DON'T PUT THINGS OFF!

You cannot make a Will, grant a Power of Attorney, or complete a Health Care Directive if you lack mental capacity. These documents are invaluable, providing reassurance that your affairs will be left in the hands of those you trust when you can't speak for yourself and to give clarity and certainty to your loved ones after you die.

This information is general only and is not legal advice. Laws and personal events change frequently, and it is important to obtain professional advice relevant to your individual needs and circumstances.



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