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# Appendix 5: Estate Planning

## Wills

A Will is the first step in ensuring the distribution of your estate is actioned in accordance with your wishes. Without a Will (dying ‘Intestate’), upon your death Estate assets are distributed by a formula governed by the varying State laws of Intestacy.

It is important to ensure that your Will:

* Nominates executors (and successor executors) for your estate who are likely to survive you, have the necessary organisational capacity, are motivated to act and who clearly understand your wishes.
* Nominates primary beneficiaries in relation to the whole or part of your estate and nominates subsequent beneficiaries, should your primary beneficiaries predecease you.
* Bequeaths monetary value or a percentage of your estate rather than a specific asset, as there is the risk that an asset may not be in existence at the time of distribution of the estate.
* Nominates assets to be held in Trust for beneficiaries under who are of an age or disposition that renders them incapable of responsibly managing significant assets. For example, funds for minor children’s or grandchildren’s education.

We recommend that you obtain a Will from, or review any existing Will with, a specialist estate planning legal adviser.

## Appointment of Guardians

A will-maker who has young children should appoint a guardian to take care of such children should the Will-maker die prior to the children attaining their majority.

The appointment of a guardian is usually included in the Will as a safeguard in the event that both parents die before the children are 18 years old.

The appointment of a guardian also serves to avoid the possibility of disputes between members of the family. The Court has an overriding discretion to appoint or remove a guardian.

It is the guardian’s responsibility to make the important “life decisions” on behalf of the children. The guardian must ensure that the children are adequately housed, clothed and educated. The guardianship of minor children is a responsible task. The will-maker should think carefully about the appointment of a guardian and attempt to appoint one or more persons who:

* Are prepared to take on the responsibility.
* Are of a similar age to the will-maker.
* Hold similar social and cultural views to the will-maker.

Conflicts may arise between an executor and a guardian as to how a minor beneficiary’s entitlements are to be used for a beneficiary’s ongoing maintenance, education advancement or benefit. To avoid such conflicts, a will-maker may consider appointing the same person as executor and guardian. This may, however, give rise to conflict of interest between the duties of an executor and the duties of a guardian.

You have informed us that you wish to have the children’s <*godparents*> act as guardians for your children. However, we suggest that you discuss this with a specialist estate planning legal adviser.

## Power of Attorney

This element of your estate plan is designed to be implemented prior to your death so that your affairs can be conducted appropriately.

There are the following types of Powers of Attorney:

* **Enduring Power of Attorney:** Enduring powers of attorney, provide the attorney with authority over the principal’s financial affairs (but not their health care) until they die (for example, it extends beyond any loss of mental capacity).
* **General (Non-Enduring) Power of Attorney:** General non-enduring powers of attorney can provide the attorney with restricted or unrestricted authority over the principal’s financial affairs (but not their health care), but lapses if the donor loses mental capacity.
* **Enduring Powers of Attorney (Medical):** Enduring Medical powers of attorney (medical) allow the attorney to make medical decisions on behalf of the principal if they become incapable to do so in the future.
* **Supportive Attorneys:** This role is designed to help professionals to assist the principal in making a decision. The power gives the supportive attorney capacity to obtain information and communicate the principal’s decision. Where the decision does not involve a significant financial transaction (defined as a transaction valued over $10,000 and most real estate transactions), the supportive attorney can take reasonable steps to implement the principal’s decision.

A Power of Attorney may only be granted by someone who is over the age of 18 and who is of sound mind at the time of the grant and capable of fully understanding the nature and purpose of the document they are signing. The attorney is not able to do anything illegal while operating under a Power of Attorney, nor are they able to prepare a Will on behalf of the donor or transfer the Power of Attorney to someone else unless specified.

## Advance Care Directive (Estate Planning)

This document is prepared by you to communicate your preferences and guidance in the event of your becoming incapacitated through illness and being unable to understand or direct medical staff or agree to specific treatment.

This could happen due to an injury to the brain from an accident, a stroke, or a slowly progressive condition like Alzheimer’s disease

You can also choose to incorporate it to formally appoint a substitute decision-maker. If this is required, you must use an approved form developed by each State or Territory. Any such appointee should ideally understand your values and wishes and be willing to make what might be difficult decisions.

Because it is a guidance, it is not binding upon any medical practitioner, hospital staff member or substitute decision-maker.

The Directive can be reviewed at any time ahead of becoming seriously incapacitated. To evidence your capacity to create or alter a valid Directive, it may be co-signed by a doctor.

A Directive may be loaded to your MyGov site, as applicable, to make it accessible to medical practitioners.

<https://www.advancecareplanning.org.au/resources/advance-care-planning-for-your-state-territory>

## Funeral Bonds

A funeral bond allows you to prepay for your funeral expenses. These investments cannot be realised before maturity, which is basically upon death.

The amount of an advance payment made by a Government income support recipient for funeral services (a pre-paid funeral) is an exempt asset for Centrelink if:

* it is a contracted payment, AND
* nothing further needs to be done for funeral services to be provided in accordance with the contract, AND
* the payment cannot be refunded, UNLESS the income support recipient moves outside the designated funeral service area.

There is no limit to the amount that an income support recipient may invest in a pre-paid funeral.

However, at 1 July 2020, the total exempt amount invested in all of an individual’s funeral bonds may not exceed $13,500.

Taxation of funeral bonds:

|  |
| --- |
| * Funeral bonds that were issued by friendly societies prior to 1 December 1999 are grandfathered and are permanently exempt from tax. Amounts attributable to funeral bonds issued between 1 December 1999 and 31 December 2002 inclusive are exempt from tax for the recipient.
 |
| * For funeral bonds issued on or after 1 January 2003, income credited to the bond continues to be exempt for the policyholder, but the product provider is taxed at 30%. However, the policyholder's estate is liable for tax on any income credited to the bond from the date of lodging the investment.
 |

A burial plot acquired by an income support recipient (or for a partner) is a Centrelink exempt asset.

## Superannuation Death Benefits

**Who gets your superannuation when you die?**

Under superannuation law, strict rules govern to whom your super is distributed when you die – and it’s important to know those rules to check if your money is allowed to go to whom you intend.

One of the most important decisions you make when you join a superannuation fund has nothing at all to do with investment. It revolves around the question of who can be validly nominated as the beneficiaries of your superannuation when you die.

It’s a critical question – because if you don’t get it right your savings could be given to someone other than your preferred beneficiaries.

**Valid Beneficiaries under Superannuation Law**

When a fund member dies, subject to the trust deed, his or her superannuation can potentially only be paid to:

* The member’s spouse or de facto spouse. It does not include a former spouse or de facto.
* The member’s natural children (including a current stepchild or adopted or ex-nuptial child)
* A person who was financially dependent on the member at the date of death
* A person with whom the member had an ’interdependency relationship’
* The member’s deceased Estate

Formally, the trustees of your superannuation fund have the ultimate discretion as to whom will receive your superannuation. They can take into consideration any nomination of beneficiaries that you have made, but are not bound by your request.

An exception arises if you make a "binding death benefit nomination" or have commenced a reversionary pension.

The trustees are obliged to follow the wishes expressed in a ‘valid’ binding death benefit nomination. To be a valid nomination, you may only nominate a single beneficiary or combination of beneficiaries from the list above.

If you want someone else, such as a friend, parent, sibling or a charity, to receive your superannuation, you should consider nominating your Estate as the preferred beneficiary of your superannuation entitlements.

Your superannuation will then be distributed by your legal personal representative according to the terms of your Will and you can validly nominate anyone as beneficiaries of your Will.

**Definition of Interdependency Relationship**

A ‘dependant’ for superannuation purposes includes:

* a person with whom the member has an ’interdependency relationship’ (s.10A of the SIS Act).

An ‘interdependency relationship’ is defined as one between two persons (whether or not related by family) where:

* They have a close personal relationship; and
* They live together; and
* One or each of them provides the other with financial support; and
* One or each of them provides the other with domestic support and personal care

**Pension or Lump Sum?**

Depending on the terms of the superannuation provider’s trust deed, Trustee discretion may allow beneficiaries to request whether they prefer to receive some mix of pension or lump sum.

Using Binding Death Benefit Nominations, the member may be able to specify that their spouse, children, or financial dependants are to receive some combination of a lump sum or pension payment.

If a dependent child is to receive a pension, then special rules apply.

* The child’s pension will typically be obliged to be converted to a lump sum when the child turns 18
* However, if the child is still a financial dependant, the pension may continue until age 25
* The pension balance will be received by the child or guardian as a tax-free lump sum.

If a child is permanently disabled, the death benefit pension can continue indefinitely or until the balance is paid out

A pension is not able to be reverted to a non-dependant (as defined under taxation law) upon death. Death benefit payments to such non-dependants have to be made as a lump sum.

**Taxation of Superannuation Death Benefits**

Superannuation law determines who may validly receive a superannuation death benefit but Taxation law determines the tax treatment of that lump sum or pension benefit in the hands of the recipient. The two treatments do not fully align in the definition of ‘dependent’.

The following table outlines the taxation of lump sum death benefits paid from superannuation:

|  |
| --- |
| Taxation of Superannuation Lump Sum Death Benefits |
| Valid Superannuation Beneficiary | Taxation |
|  Dependants under taxation law | Tax Free |
| Non Taxation law Dependants | Tax Free Component | Tax Free |
| Taxable Component – Taxed Element | 15% [1] |
| Taxable Component – Untaxed Element | 30% [1] |

Notes:

|  |  |
| --- | --- |
| [1] | Plus Medicare levy of 2%. |

The following table provides a brief explanation of the taxation of death benefit pensions paid from superannuation:

|  |
| --- |
| Taxation of Superannuation Death Benefit Income Streams |
| Age of Deceased Pensioner | Age of Valid Superannuation Beneficiary (Dependants under taxation law only) | Taxation |
| 60 or Over | Any Age | Tax Free |
| Under 60 | 60 or Over | Tax Free |
| Under 60 | Under 60 | Tax Free Component | Tax Free |
| Taxable Component | Tax at Marginal Tax Rate with a 15% Tax Rebate [1] [2] |

Notes:

|  |  |
| --- | --- |
| [1] | When the beneficiary reaches age 60, this becomes tax free. |
| [2] | Plus Medicare levy of 2%. |

## Superannuation Death Benefit Nominations

Death benefits are funds paid upon death by the Trustee of your superannuation fund to your estate or to the beneficiary you have nominated. When nominating a beneficiary, it is important you understand that there are implications for each choice you make, including the type of nominations that you make.

There are two types of nominations for beneficiaries: binding and non-binding.

**Non-Binding Nominations**

Many death benefit nominations made by members of superannuation funds are not automatically binding on the superannuation fund trustee. Typically, a trustee of the super fund can validly exercise a discretionary power to determine how the benefit is distributed and to whom.

**Binding Nominations**

However, Nominations can be made ‘binding’ upon the trustee subject to the rules written in the trust deed of the fund.

A death benefit will be binding upon the trustees if:

* The nomination form includes the name of each person(s), or class(es) of person (e.g. spouse), and the allocation of the death benefit amongst nominees is clear;
* Each death benefit nominee is a legal personal representative or valid dependant of the member;
* The nomination form is dated and signed by the member in the presence of two adult witnesses, neither of whom is a nominee named in the notice;

The nomination typically lapses after 3 years. Therefore, a new nomination form needs to be provided to the trustee every 3 years to ensure that your nomination remains in force. You may also change your nomination anytime within the 3-year period. It would be prudent for you to ensure that your nomination is updated.

Some funds have the option for non-lapsing nominations.

**Regular Review**

It is important to review death benefit nominations regularly and to include full details of your beneficiaries – including their relationship to you, their full name and their address.

Keeping your superfund trustee informed of any changes to your beneficiaries – or changes to their personal details – will make the task of distributing your super much less complex for all involved.

Death benefits will have tax implications for the receiving beneficiary, so you should discuss your intentions with your specialist estate planning legal adviser. You can then ensure your Will fully reflects your intentions as well as make an informed decision on whether to make binding or non-binding nominations.