



Estate Planning - Things to Consider

How can we prepare for death?

What is Estate Planning?

Estate planning is directing how assets will be divided upon death to ensure they are distributed efficiently and according to the deceased's wishes. Efficient estate planning can reduce worry for those remaining. All sorts of problems can occur if a person's financial affairs are not planned properly. A current Will is vital regardless of the amount of personal wealth held and having an Enduring Power of Attorney (EPoA) in place is highly recommended. Appropriate estate planning can help a person to pass on assets to their chosen beneficiaries in a tax and cost effective manner. As part of the process, it is important to check superannuation funds and life insurance policies to ensure the appropriate beneficiary/ies are nominated. Because beneficiaries are nominated within superannuation and insurance policies, they are often not mentioned in Wills. Restating the nominees in the Will and what they are to receive can provide clarity. Costs of probate, according to State or Territory legislation may impact on the value of the estate.

“ A current Will is vital regardless of the amount of personal wealth ”



Wills

A Will is a legal document that ensures the wealth accumulated in life is distributed to intended beneficiaries according to the deceased's wishes. If a person dies without a Will (intestate) the courts appoint an administrator and the estate is divided according to State or Territory legislation. This may cause family and beneficiaries hardship or complications and can result in lengthy delays in winding up the estate.

A Will should be reviewed regularly, at least every 5 years or when circumstances change. Minor amendments or additions can be made using a codicil. This attachment may alleviate the need to make a new will. A solicitor, the Public Trustee or a private trustee company can prepare a Will. Their fees vary so it pays to shop around. The requirements differ in each State or Territory and they should be discussed with the person or organisation chosen to prepare the Will. If the estate is administered by the Public Trustee and/or a private trustee, the estate will pay an administration fee.

Do-it-yourself will kits are available on the internet, through newsagents or other organisations. They may be cheaper but care is essential to ensure the Will is legally enforceable and all relevant matters are covered. Executor/s have the responsibility of carrying out the wishes of the deceased. The person/s chosen should be trustworthy, responsible, of suitable age, able and willing to perform the tasks stated in the Will. Ensure the location of the Will is known to a responsible adult.

Property and investments which are held as 'joint tenants' cannot be distributed through a Will. Ownership passes automatically to the survivor. If owned as 'tenants in common' the deceased's share in the asset is distributed through the Will. It is also important to ensure that plans reflect the testator's wishes and are seen to be fair to the expected beneficiaries, or the Will may be contested in court. If there is concern, legal advice should be sought. All legal documents and records should be kept in a secure place. They can be held by a solicitor or a bank in safe custody. Fees may apply. Executors are entitled to fees for administration as well as reimbursement of any expenses associated with the administering the estate.

Power of Attorney

A Power of Attorney is a legal document that provides authority to a person (attorney) to act on behalf of another person (donor). The authority granted can be as broad as to give the attorney (donee) total power to act as if they were the donor or it can be restricted to a single transaction or timeframe - such as selling a specified asset or operating a bank account while away on holidays. Often known as an ordinary or general Power of Attorney, it ceases immediately the donor or attorney becomes mentally incapable of managing their own affairs or giving instruction.

Powers of Attorney can be revoked (cancelled) and organisations that have been notified of the existence of the instrument should be informed of its revocation.

The person/s holding the Power of Attorney must be aged 18 years or older and should be trustworthy, dependable and can be relied upon to act in the best interests of the donor. A second form of Power of Attorney is the Enduring Power of Attorney which does not cease in the event of incapacity of the Donor.

“ A Will should be reviewed regularly, at least every 5 years ”

“ An EPoA ensures the donor’s affairs can be managed by a chosen party in the event of incapacity ”

Enduring Power of Attorney (EPoA)

An Enduring Power of Attorney continues to be valid even if and after the donor loses mental capacity. However, it must be granted while the donor still has capacity – is mentally capable and understands what they are doing. To have effect, the original document must be witnessed, usually by two adults and in the prescribed form. Requirements and documentation usually vary between States and Territories and compliance with relevant legislation is vital. An EPoA ensures the donor’s affairs can be managed by a chosen party in the event of incapacity. It can be established to come into effect on the occurrence of a specified event such as illness or incapacity, or operate on specific affairs. Authority may also be granted to make decisions about medical treatment, accommodation etc.

As with an ordinary Power of Attorney, it is possible to revoke an EPoA to appoint another attorney provided the donor has capacity. EPoA do not interfere with a donor’s right to make decisions while they have capacity. Again all organisations (financial institutions, government departments etc.) previously notified of the existence of the Power of Attorney should be informed of its cancellation, otherwise they may continue to allow the attorney to act on behalf of the donor.

It should also be remembered that the administration of the donor’s affairs, including the management of the investments, vests totally in the attorney, and if the attorney has acted dishonestly or improperly it may be difficult to prove or gain recourse.

Who to appoint

EPoA provide many benefits in managing the donor’s affairs. However, care is needed in appointing an attorney. The donor needs to understand the implications of appointing an attorney and ensure the EPoA has been prepared correctly. As the attorney can do anything the donor can in relation to dealing with their assets and financial affairs it is important to appoint a person whose honesty and integrity is impeccable. If the donor is not able to find someone they consider appropriate to appoint, a professional trustee company or the Public Trustee can be appointed. Be aware of the costs that would apply. An attorney’s powers can be revoked or suspended through each State’s or Territory’s Guardianship Tribunal if shown that the attorney has acted inappropriately. More than one attorney can be appointed to act either jointly or individually. Legal advice should be obtained in this regard. An EPoA does not confer authority on an attorney until the attorney accepts the appointment by signing the Power of Attorney. Often legislation requires certification by a solicitor or legal authority that the terms of an EPoA have been explained and appear to be understood. An EPoA ceases upon the death of the donor.

Non-Financial Matters

A separate instrument (documentation) may be required for health, medical or lifestyle matters depending on the relevant State or Territory. This instrument may be referred to as an ‘Enduring Guardianship’, ‘Enduring Power of Guardianship’ or an ‘Advance Health Directive’.

Responsibilities of the Nominated Attorney/Guardian

The appointed Attorney has a legal obligation to act in the donor’s best interests at all times. This means they must:

- maintain proper records of any dealing on behalf of the donor;
- keep their money and property separate from the donor’s; and
- avoid any conflicts between their interests and those of the donor.

Guardianship

Where an attorney or guardian has not been appointed and a person becomes incapacitated, application can be made to appropriate State or Territory Government authorities for guardianship. Generally a family member would be appointed. If for some reason this was not appropriate, the Public Guardian may be appointed.

Costs

The cost of preparing an EPoA will differ depending on who is used to prepare the document. Do-it yourself documentation is available for ordinary Powers of Attorney and for EPoA. If contemplating preparing an EPoA, be sure the document is prepared and signed in accordance with the specific legislative requirements of that State or Territory where it is to be used otherwise it may be invalid. Registration may be required and stamp duty may be payable.

Legal Advice

The information contained in this publication is of a general nature only. While it is possible to draft an EPoA, legal advice should be sought if there are any doubts or if the situation is considered complex. Assistance with legal advice can be sought via:

- Community Legal Centres;
- Practicing Solicitors;
- Public Trustee; or
- Chamber Magistrates.

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Testamentary Trusts

Testamentary Trusts are established within a Will. Upon death the trust is established and becomes the owner and manager of all assets that are passed to it through the Will. The trustee has the discretion, according to the terms in the Will, to distribute the income and capital to nominated beneficiaries. The main benefit of a testamentary trust is that the income distributed from the trust may have taxation benefits, especially if it is to be paid to children (minors). This may also help maximise a spouse's Government Income Support payment (provided they are not the Trustee). Assets may also be protected from bankruptcy and divorce etc. There are both establishment and annual administration fees for a trust. It should be discussed carefully with legal and financial advisers to determine if a testamentary trust is appropriate for the situation.

Covering the Costs

What costs are involved?

So far we have discussed the costs associated with preparation of a Will, a cost incurred and borne while the testator is still alive, and we have made mention of costs associated with administering the Will, which of course is incurred after death. A major expense of death is the cost of the funeral. This is the first charge against the Estate and includes any available bank accounts etc. The choices made in this regard can have a very great effect on the funds available for distribution to beneficiaries. It is an expense that should be budgeted for during a person's lifetime. Some people choose to put funds aside to provide for such an eventuality, while others choose to insure against the risk.

The costs associated with a funeral or cremation depend on the standard of the coffin/casket, other ancillary items such as funeral cars, floral tributes, the wake and tombstone or plaque. While such expenditure can be debated from many angles, ultimately it is the choice of the person expending the funds.

This could be the wishes of the deceased prior to the event, if they chose to make their own arrangements and prepay them, or the surviving family or friends. Pre-planning for this eventuality ensures that decisions are made at a time without the emotions or stress at the loss of a loved one. A possible consequence of such prepaid expenditure could result in a spouse qualifying for Government Income Support. Undue extravagance can also decimate an estate.

Funeral Bonds

Funeral bonds are investments used for accumulating funds to pay funeral costs. They cannot be surrendered or accessed until death. They are usually offered by friendly societies and trustee companies. Money can be invested as a lump sum or through regular instalments. Additional deposits may be possible. Interest (commonly called a bonus) is paid annually and is added to the investment. Upon death, accumulated earnings and capital are paid to the estate to help cover funeral expenses. Alternatively the proceeds can be paid to a nominated funeral director.

It is important to carefully check what is paid upon death, with any fund being considered. Some funeral bonds will pay the total balance of funds to the estate. Other funeral bonds can only pay the actual amount required for the funeral to the estate. Proof of funeral costs may be required. Any surplus may remain in the fund. Check the Product Disclosure Statement (PDS) carefully and invest enough money to pay for the funeral desired.

Fees

- Entry fees vary, usually 0% - 4%.
- The initial or entry fee may also be charged as a flat dollar fee.
- Annual management fees range from 1.25% to 2.25% of the total value of the fund. They are deducted from investment earnings before the annual bonus is declared.
- Exit fees may apply.

Funeral Bonds generally require a minimum initial investment of \$500 although if a regular savings plan is established the initial requirement may be as low as \$100, with monthly contributions from \$50. They can be owned individually or in joint names but generally only one funeral may be paid for with the bond. Upon death of a joint owner, the surviving owner can usually decide if they wish to pay for the funeral or leave the funds invested until their own death.

It should be remembered that money can only be paid out on death and not prior to the event. If the bond only returns the actual amount required to pay the funeral expenses the estate may lose some capital and/or earnings if the account balance is higher. It should also be remembered that if the funeral costs more than the value of the bond, more money will be required from other sources.

Where the funeral bond has been assigned to a funeral director as part of a prepaid or prearranged funeral, the entire value of the bond is paid to the funeral director following the owner's death.

Government Income Support

A Funeral Bond with contributions up to an annually indexed amount is exempt under both the Income and the Assets tests. If more than this amount is invested the full amount is assessed under both tests. The annual amount can be obtained from us, the Department of Human Services Financial Information Service (FIS) staff or the Department of Veterans' Affairs (DVA).

“...accumulated earnings and capital are paid to the estate to help cover funeral expenses...”

A funeral bond investment is not an exempt asset if the investor has another funeral bond in their name or jointly owned with another person or if they have prepaid their funeral expenses. Bonds assigned with prearranged funerals are treated as prepaid funerals. For further details contact a Department of Human Services Financial Information Service Officer (FIS) or the Department of Veterans' Affairs (DVA).

Taxation

Bonuses earned on funeral bonds purchased before 1 January 2003 are tax exempt and do not have to be shown on the owner's tax return. The friendly society does not pay tax on the earnings of these bonds either, so earnings are credited to the account tax free. Benefits paid out upon death are also exempt from taxation.

Any money not used for funeral expenses and returned to the estate by the fund may be liable for income tax. This is the responsibility of the executor. For policies purchased after 31 December 2002 the earnings are taxable at a rate of 30%. This is paid by the provider prior to the allocation of earnings. When distributed the tax paid is recovered and paid to the estate or a funeral director. The executor of the estate or funeral director will be responsible for the taxation of the benefits received.

Investing With Safety

- Money lodged in funeral bonds cannot be accessed until the funeral is provided. Invest what is needed for the funeral, keeping other funds accessible for living.
- Ensure funeral requirements are fully costed and accounted for to avoid unexpected costs.
- Read the PDS carefully and fully understand it before investing or making a purchase.

Prepaid Funerals

An alternative to a funeral bond is a prepaid funeral plan. Arrangements for the funeral are agreed upon with a funeral director. The price is set at the time of prepayment and no further amounts are charged at the time of death.

Increases in cost are covered by the earnings of the investment. It may not include the cost of the burial plot which may need to be paid for separately. Payments can be made as a lump sum or in instalments over an agreed period, usually up to 3 or 4 years. The instalment method is more expensive.

Contract details should be provided by the funeral director prior to the agreement being signed. A refund of money prepaid or the transfer of the certificate may be possible. Money paid into the plan is invested by the trustee and cannot be accessed by the funeral director until the funeral service is delivered.

The amount spent on a prepaid funeral plus the cost of a burial plot, if not included in the prepayment, is exempt from both the income and the assets tests for recipients of Government Income Support payments.

In the event of death while travelling, transport of the body/remains can be arranged by paying an extra premium. It is important to choose a funeral director who is a member of the Australian Funeral Directors Association or other similar association. If the chosen funeral director is no longer in business when the funeral is required, another association member will provide the service. Each State/Territory has legislation that specifies the obligation providers must abide by.

Refer to the relevant State/Territory Government website or Office of Fair Trading.

“ It is important to choose a funeral director who is a member of the Australian Funeral Directors Association ”

Government Income Support

Any amount spent on prepaid funeral arrangements are not assessed for Government Income Support purposes.

Taxation

Prepaid funerals are not considered investments and have no savings component, so no taxation issues apply.

Insurance Plans

A funeral insurance plan can be purchased to cover funeral expenses. Automatic acceptance may be available until age 80 years, but the amount of the premium increases with age.

Cover is often limited to \$15,000 although higher cover may be offered for accidental death or for stepped premium arrangements. Payment will not be made if premiums are terminated prior to death. With most policies an exclusion period may apply except for death by accident. The market is competitive so obtaining several quotes would be prudent. Terms and conditions of the policies available vary, so it is important to understand them before entering a contract.

These insurance plans are particularly attractive to those who have not accumulated money to pay for their funeral.

However there are risks. If the insured dies in the first year exclusion period or the insured cannot maintain the premiums over the long term the coverage ceases and premiums are not refundable. The risk to their estate if they live a particularly long time after commencing their policy, is that the premiums paid may end up greater than the cost of the funeral.

Government Income Support

Insurance plans are not assessed for Government Income Support purposes as any benefit isn't paid until the event of death.

Premiums cannot offset other assessed income.

Taxation

Insurance plans are not considered investments and have no savings component, so no taxation issues apply.

Other potential resources

Life Insurance

Life insurance cover provides funds for life should the insured become unable to work or should they die prematurely. Life insurance takes many forms: trauma, income protection, total and permanent disablement, death cover to name a few. Once the insured reaches the end of their working life their insurances should be reviewed to determine if they are still appropriate and required. Death benefit insurance essentially ensures that the nominated beneficiary/ies will be protected if specified events happen to the insured. The annual premiums can be an unnecessary expense if the insured has made other provisions.

Life Insurance may also be included within Superannuation. Life insurance can be a useful way of distributing wealth to beneficiaries.

“ The market is competitive so obtaining several quotes would be prudent ”

This strategy may appeal to people who have many beneficiaries and a major asset that is not easily broken up (such as a small business) for distribution. Dividing estate assets can in some instances lead to the failure of a family business, unnecessary capital gains tax liabilities or a contested Will. Ownership of life insurance policies and beneficiary details should be checked as these may have unintended consequences for the beneficiaries of the estate.

Government Income Support

In the event of the death of a member of a couple the surviving partner may be entitled to a bereavement allowance payment from the Government. Eligibility is subject to both an Assets Test and an Income Test. The maximum rate of payment relates to the rate of pension payable at the time and is payable for up to 14 weeks after the death of the partner. If the surviving partner is pregnant at the time of death of their partner, the bereavement allowance may be payable for the duration of the pregnancy. For more information on the Bereavement Allowance or other payments and services that may be available if help is needed after someone has died, contact the DVA or FIS at the Department of Human Services or search their respective websites for 'What to do when someone dies' or 'What to do following a death'. The web addresses are www.dva.gov.au and www.humanservices.gov.au.

Superannuation Death Benefits

A death benefit is typically paid from a superannuation (super) fund, Retirement Savings Account, Approved Deposit Fund or superannuation income stream. This section focuses on death benefit payments from super funds.

It is up to the trustee/s of the superannuation fund to release and distribute the funds upon the death of the member. Member's funds may be distributed to a 'dependant', a 'non dependant' or a Legal Personal Representative (LPR) of the member and is distributed separately to the member's estate.

Superannuation funds allow members to nominate beneficiaries which may allow the distribution of benefits to be conducted in a more timely manner and without having to pass through the estate – saving Probate.

The definition of dependant differs slightly depending on whether it is in relation to who is entitled to receive a death benefit or how that death benefit is to be taxed.

Assessment of dependency is carried out by the trustee as at the date of death. Binding nominations by a fund member can underline the intentions of the member on how death benefits should be distributed.

Payment of the benefit – A death benefit from a super fund is a payment a person receives because of the death of another person who was a member of that fund. Payment can only be made to a superannuation dependant or the member's LPR with some very limited exceptions. The benefit can also be paid tax free. There are additional restrictions for payment of a superannuation income stream to dependent children.

Under superannuation law a dependant is defined as:

- the surviving spouse (or de facto including same sex partner);
- any child (restrictions apply on income streams paid to a dependent child);
- a financial dependant of the deceased member; or
- a person who had an interdependency relationship with the deceased member.

Note that the trustee can pay the benefit to a non-dependant if no LPR or dependant can be found.

“ Assessment of dependency is carried out by the trustee as at the date of death. ”

Special rules apply for dependent children and particularly children with a disability. This should be investigated with professional assistance if such circumstances exist.

Special conditions may also apply in cases where the deceased died in the line of duty. This includes a member of the defence force, Australian Federal Police (AFP), State or Territory police or a Protective Services Officer within the AFP. Again this should be investigated, if applicable, with professional assistance.

Taxation – How the death benefit is taxed in the hands of the recipient depends on whether or not the person was a dependant of the deceased as defined under taxation law (a taxation dependant), and whether the amount is paid as a lump sum or as a superannuation income stream. Details are discussed below.

A death benefit can be paid free of tax to a dependant beneficiary. A dependant under taxation law is:

- a surviving spouse or de facto spouse;
- an ex spouse;
- a child of the deceased aged under 18;
- any person who is financially dependent on the deceased at time of death; or
- any person who was in an interdependency relationship with the deceased at the time of death.

The taxable component of a death benefit payment made to a non-dependant will be only paid as a lump sum and taxed concessionaly at either 15% or 30% plus Medicare Levy depending on whether the payment was from a taxed or untaxed source. The temporary Budget repair levy of 2% applies to those on the highest Marginal Tax Rate (MTR) for the financial years 2014/15, 2015/16 and 2016/17. No tax is payable on the tax exempt component.

Superannuation benefits are comprised of various components. For this publication, the main components to be aware of are the Taxable component and the Tax Exempt component.

As a broad and general rule money contributed to superannuation by a person from their savings or from their after tax income comprises the Tax Exempt component, as they had previously paid tax on that money. Money contributed by their employers, whether voluntarily or as a result of legislation, and money salary sacrificed into superannuation together with all the earnings of the superannuation fund, form the Taxable Component of the fund. As stated, this is a very broad rule.

Investing through superannuation is often used as a tool in Estate Planning to seek to deliver assets to the contributor or to their beneficiaries in as tax effective a way as possible.

Professional advice should be sought when seeking to do this.

What is an interdependency relationship?

Two people have an interdependency relationship if:

- they have a close personal relationship; and
- one or each of them provides the other with financial support; and
- they live together; and
- one or each of them provides the other with domestic support and personal care.

It does not matter whether the two people are related as family. Two people may still be considered in an interdependency relationship if they cannot satisfy one or more of the above conditions due to a physical, intellectual or psychiatric disability.

“ ...conditions may also apply in cases where the deceased died in the line of duty... ”

Things that must be attended to when someone dies

“ ..the executor of the deceased's estate will attend to matters following the person's death... ”

Usually the executor of the deceased's estate will attend to matters following the person's death. The funeral must be arranged or the previously made arrangements implemented.

Financial institutions, relevant Government Authorities and regular billers need to be notified of the death. Such organisations usually have their own documentation to be completed.

Reimbursement for the funeral payment can only be made to the person who was invoiced and paid for the funeral. The original account and receipt should be made available together with evidence of the death – usually a Death Certificate. The deceased's full name, address, date of birth, date of death and account numbers should be provided. If using a Solicitor it is possible to give authority to the Financial Institutions to deal directly with them. If a Will exists, a certified copy should be provided to the financial institution. Depending on the value of the deceased's assets, application for probate may be necessary. This is usually done through the State Courts. DIY kits are available online. The requirements in the various jurisdictions differ.

Jointly held property – particularly the home – needs to be transferred to the survivor.

Operation of the deceased's accounts

The treatment of the deceased's accounts with financial institutions vary according to the ownership of the account. Individual accounts are usually frozen while joint accounts are usually transferred to the survivor.

Checklist for financial institutions

When dealing with financial institutions the following may be required.

- Original death or medical certificate
- Certified copy of Grant of Probate or letter of administration
- The original Will (if applicable)
- Identification documents totalling '100 point' requirement
- The original funeral account/receipt

Glossary

Attorney - *The person appointed or empowered to transact any business on behalf of the donor.*

Beneficiary - *A person who will ultimately receive deceased's insurance, superannuation and some or all of the estate benefit.*

Billers - *Organisations that regularly bill for services provided such as gas/ phone/ electricity companies.*

Codicil - *A separate document that amends an existing Will and is executed in the same way as a Will.*

Donee - *The person appointed as attorney.*

Donor - *The person granting the Power of Attorney.*

Executor/s - *The person/s nominated to distribute a deceased persons estate.*

Intestate - *A term used when a person dies and no valid Will is in place.*

Joint tenants - *Joint ownership of an asset where both parties have rights over the whole asset.*

Probate - *The legal process of administering the estate of a deceased person by resolving all claims and distributing the deceased person's property under a Will.*

Revoked - *To have withdrawn or to have cancelled the authority granted in a Power of Attorney or EPoA.*

Tenants in common - *Joint ownership of an asset where each owner only has rights over their portion of the asset – usually real estate.*

Testator - *The person making the Will.*

'100 point' requirement - *A system where various forms of identification documents are allocated a certain amount of points and a total of 100 points must be achieved to satisfactorily establish identity.*

National Seniors Australia (National Seniors) is a not-for-profit organisation that gives voice to issues that affect Australians aged 50 years and over. It is the largest membership organisation of its type in Australia with more than 200,000 members and is the fourth largest in the world.

The Financial Information Desk (FID) is an independent, confidential service funded by National Seniors that aims to improve the investment information available to older Australians

Our Objectives

- To provide an accessible, independent and trustworthy source of information for older Australians - particularly those with modest means.
- To promote industry and community awareness of consumer investment issues - particularly amongst older Australians.
- To promote industry understanding of consumer investment issues and to contribute to the raising of industry standards.
- To examine any unfairness in the market between consumers and providers of investment services and to provide information to consumers on dispute resolution processes.
- To represent the views of consumers on investment issues to industry and government organisations.
- To research and publish items on consumer issues relevant to the financial welfare of older Australians.
- To liaise with relevant consumer, community, academic and industry groups, as well as government organisations, to further these objectives.

This publication is intended as a guide only and is not in any way an endorsement of any product mentioned. Readers should not rely on this information alone as a basis for making an investment decision. The Financial Information Desk is an independent service funded by National Seniors Australia Limited that provides a free independent source of investment information for its members and works at arms length from government and the financial services industry. © This material remains the sole copyright of National Seniors Australia and may not be reproduced wholly or in part without prior consent. The information contained in this publication is current as of 22/06/15 and is subject to change.

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