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LAWYERS

FIVE COMPELLING REASONS WHY YOU SHOULD HAVE A CUSTOMISED WILL

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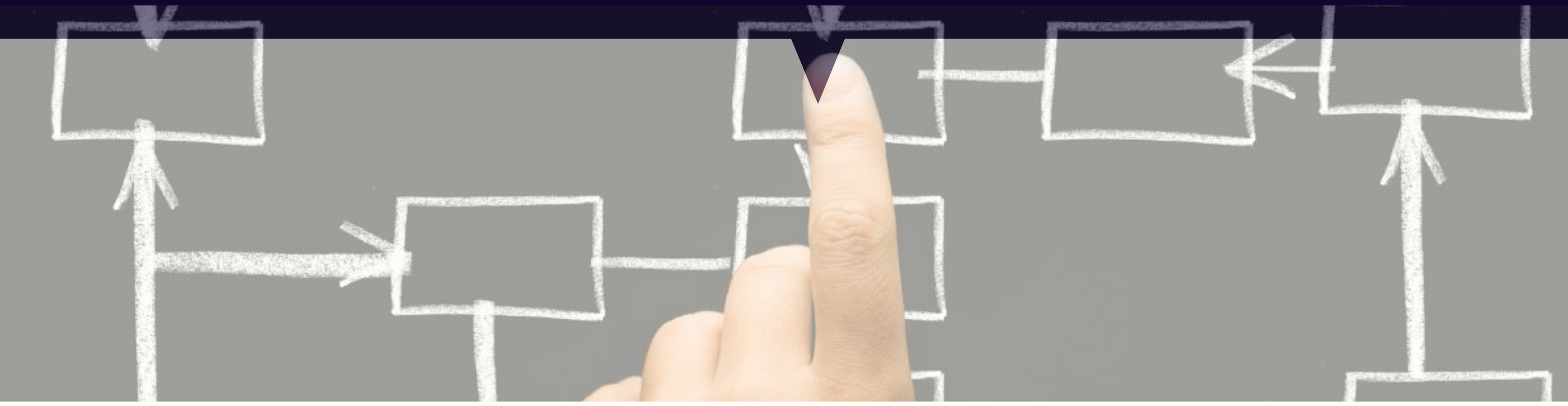
Five Compelling Reasons Why You Should Have a Customised Will

Introduction

7 out of 10 people die each year without a Will.
5 out of 10 people that have Wills need to update them.
8 out of 10 people cannot immediately locate their Will.



When I first read those figures, I couldn't believe it myself.
The majority of us don't know when we are going to die. You can be in the wrong place at the wrong time. The news is full of stories of people who have been tragically unlucky. I myself have written off two cars in my lifetime and on both occasions the cars were stationary! Therefore, it is important to get your affairs in order now.

Almost everyone owns an estate and almost everyone can benefit from estate planning.

Regardless of the size of your estate, you need to decide what to with it after you pass away.
You can't take it with you and your loved ones can't assume who gets what.
What if you and your partner pass away and your young children are left without a parent?
Although you can't take away the pain they will feel, you can secure their future.
I have been preparing estate planning documents for over 20 years. In that time, I can tell you the most common concern for clients is:

"We don't want our wealth going outside the family."

Thankfully there are strategies that can be implemented to help protect that wealth.
We know your family is the most important thing to you. That's why we've made estate planning a friendly and approachable topic, not a scary or morbid one. We want you to feel comfortable and fully educated from start to finish. Our goal to help you achieve greater peace of mind.
We focus on the fact your family will grow and change over time. Our emphasis is on planning for exciting and inevitable life changes, not just what happens when you pass away.

What is a Will?

A Will is a legal document that names the people you want to receive the property and possessions you own at the date of your death. These people are known as your beneficiaries.

Your property and possessions include everything you own: your home, land, money in bank accounts, shares, cars, insurance policies, jewellery, art, furniture, and so on. Making a Will is the only way you can ensure your assets will be distributed in the way you want after you die.

A Will can also be used to address other important issues such as appointing a guardian to look after your children until they can look after themselves and setting out your wishes regarding your burial or cremation.

Why do Wills need updating?

There are many reasons why your Will may become out of date. Life can change very rapidly. Within a very short time period your life can be heading in a totally different direction.

Here are some examples:

1. You start a new business;
2. You get married or start a de-facto relationship;
3. You get divorced;
4. You separate from your husband/wife;
5. Your children grow up;
6. Your assets increase substantially;
7. You join or leave a superannuation scheme;
8. You dispose of assets mentioned in the Will;
9. A beneficiary or executor dies or your relationship with them changes.

We recommend people to check their Wills every three to five years.

What if I marry or divorce?

If you made a Will before you married, it will automatically be revoked when you marry, unless it was made with a particular marriage in mind, or stated in general terms that it was made in contemplation of marriage. So, if you marry, it is more than likely you will need to make a new Will.

Divorce does not automatically cancel a Will. If you want to change your Will when you divorce, you will have to make a new Will. Nevertheless, divorce revokes any gift that is made to a former spouse and the appointment of the spouse as executor, trustee or guardian.

These gifts and directions will still be made. However, if the Court is satisfied the Will-maker intended them to stand despite the divorce. It is always best to make a new Will after a divorce to avoid any doubt about your real intentions.

Your wishes may not be observed if you die without a Will

Everyone should have a Will. It is the only way you can provide for people who may depend on you financially like your partner or children.

The Intestacy Rules

Even if you only own a few assets, it's worth making a Will. If you don't have a Will, your assets will be distributed according to what it is called the 'intestacy rules'. This means you have not validly disposed of some or all of your assets. These rules apply to everyone and do not take into account your individual circumstances.

A lot of people think that the Government takes their assets if they die without a Will. This can happen only in exceptional cases where there are no close relatives or persons in a family relationship who are living at the date of death. However, if you die without a Will, your assets will be distributed according to the intestacy rules formula. This might mean that your assets do not end up with the person you would have chosen.

The legal procedures for when there isn't a Will are complicated and time-consuming and may cause expense, worry, arguments and even hardship to your family.

What's the intestacy rules formula?

As mentioned, these rules use a formula to distribute assets based on the family and/or dependants that you have left behind. There is a hierarchy for claimants. It also partly depends on the amount of the estate.

The intestacy rules as to how your assets will be distributed if you die without a Will can be summarised as:

1. First, to your surviving husband/wife or de facto spouse and children. If there are no children, your husband/wife or de facto inherits everything;
2. If you have surviving children and a spouse/de facto, the first $350,000 is given to your spouse/de facto, with any excess divided equally between your children and your spouse/de facto;
3. If you have children and no surviving spouse/de facto, your children get equal shares of the estate. If any of your children have already died but left children of their own (ie your grandchildren) then that child inherits their parent's share;
4. If you have no living spouse, children or grandchildren then it goes to your living next of kin. If necessary, a search will be made to identify any living next of kin, including parents, siblings, half-siblings, grandparents, uncles and aunts and half-blood aunts and uncles; and
5. Finally, to the Government.

Th**ere are special rules to do with the family home, which your spouse/de facto may inherit to the exclusion of any children. As well, there are particular problems where both a spouse and a de facto survive the deceased if the de facto lived with the deceased for a two year or longer continuous period. In either of these situations it is important to get legal advice.**

An example of the intestacy rules formula at work

Jack dies leaving assets valued at $700,000. Jill is the surviving de facto wife and there are two children, Brad and Angelina.
Everyone will inherit according to the formula. This gives the first $350,000 (increased subject to CPI changes) to Jill, plus 1/2 of the balance of the estate, i.e. 1/2 of $175,000. The rest ($175,000) is split equally between Brad and Angelina. If Jill was not alive, then Brad and Angelina would inherit everything in equal shares, i.e. $350,000 each.

Dying without a Will raises particular problems if a husband and wife die together. As an example, what would happen if they were both killed in a car accident and have no children? If the wife dies instantly and the husband dies later in hospital, then using the formula, all of the wife's assets pass to the husband. When the husband passes away his assets, which now include her assets as well, pass to his next of kin.

The net result is that the wife's family misses out completely, because she died first and her assets immediately passed to her husband.

REASON TWO

You should have control over who looks after your children

Some people only consider the financial needs of their children in their Wills. However, you should also consider the welfare and upbringing of your children in the event that either or both parents die or cannot perform the role of parent/guardian.

A guardian is a person who has the responsibility for the long-term welfare of a child and has all the rights and duties for that child as imposed by the law. Parents have the guardianship of their children as a natural right unless a Court otherwise orders. The role of the guardian is to protect a child from harm.

The Court will want to be involved in a decision about guardianship if the parent who dies had sole custody of the child. In that case there is no automatic right to guardianship by the surviving parent.

When looking at child related issues, a Court bases its decision on “what is in the best interests of the child”. Unless there are compelling reasons otherwise, the Court will generally follow the detailed instructions of a parent regarding the welfare of their child.

By appointing a guardian for your children, others will not be left to guess what your wishes were for your children.

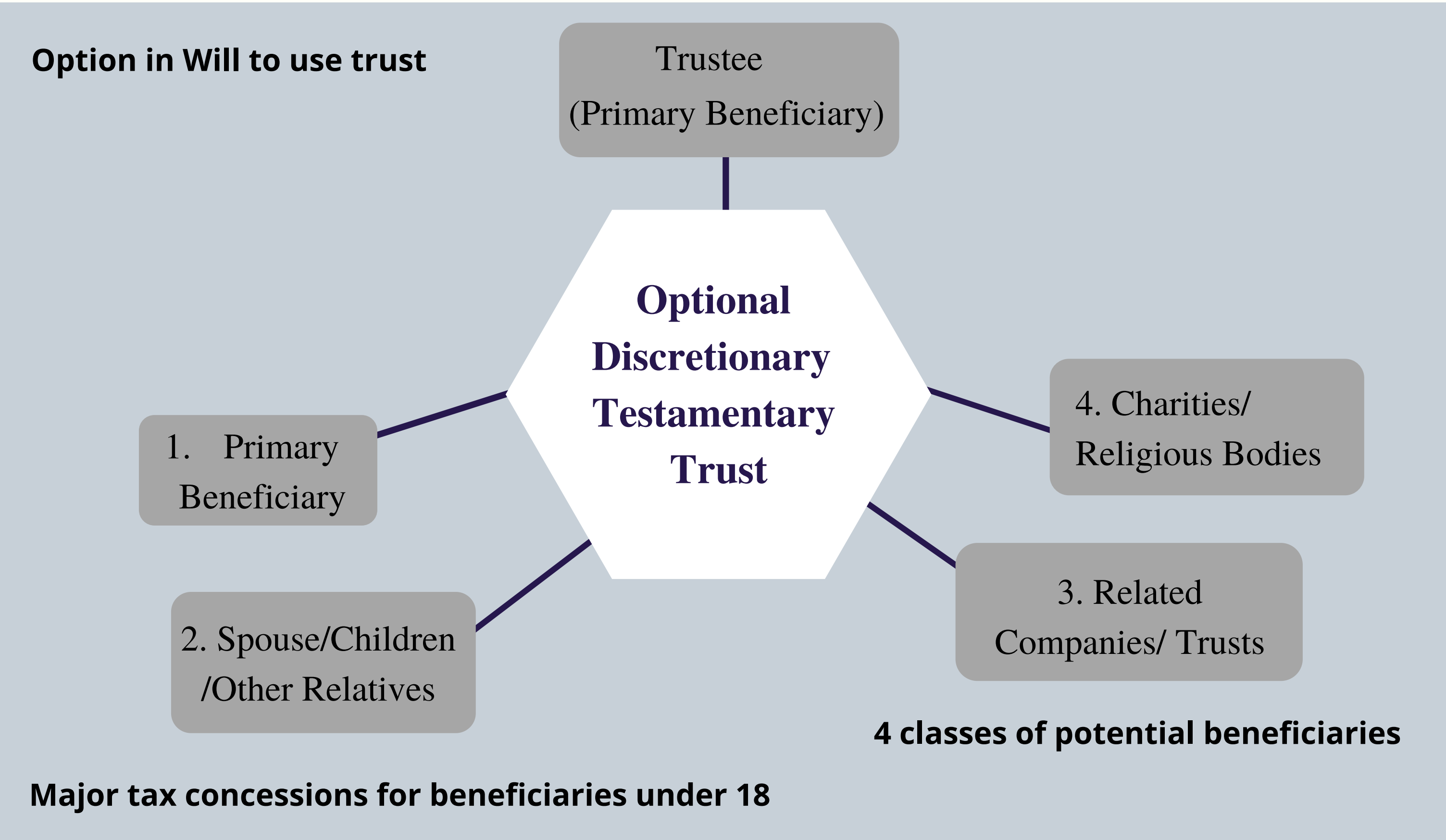
You can appoint anyone to be a guardian regardless as to whether they are a relative or not. It is recommended that you appoint only one person or one couple as this may reduce the risk of any disputes between the guardians as to the welfare of the child.

Your beneficiaries may be able to save tax

Leaving assets directly to another person is only one way of distributing assets through a Will. Another, increasingly popular strategy is using a **trust**. Trusts are used for many reasons and not just in Wills. The most common is a **family trust** which allows a person to transfer assets out of their name and into the name of the trust while still keeping control of the assets. One of options often considered in estate planning is to include a trust as part of the Will - this is called a **testamentary trust**. Advantages of a testamentary trust may include:

1. Allowing your beneficiaries to maintain social security entitlements;
2. Ensuring that your assets pass to your children even if your surviving husband/wife remarries;
3. Capital gains tax and income tax advantages for your beneficiaries;
4. Providing for children with an intellectual or physical disability or mental illness;
5. Protecting assets from spendthrift children or children that could be vulnerable to the influence of others;
6. Protecting the inheritance for your beneficiaries in circumstances of their bankruptcy or family law situation.

With a discretionary testamentary trust, the trustee has the right to distribute the income of the trust to any of the listed beneficiaries as they see fit. The trustee has total discretion. Every year the trustee can change how the income is to be distributed. Your trustee can also be a beneficiary.
The structure of a discretionary testamentary trust looks something like this:



How can a testamentary trust save tax for beneficiaries?

You see, a trust does not pay tax. The beneficiaries pay the tax. Therefore, the trustee can distribute the income of the trust in a way to best use lower marginal tax rates of individuals.

With a trust in a Will, children get taxed like adults. Quite simply, many thousands of dollars can be saved each year by your beneficiaries.

Let's look at an example. In scenario one, there is a couple, Jack and Dianne that have Wills that state that if something happens to one of them, everything goes to the survivor. If something happens to both of them, it goes to their children in equal shares.

Jack suddenly passes away at a time when Dianne receives a yearly income from her employment of $60,000.00. From Jack's estate there are assets that provide an additional income for Dianne of $60,000.00 per year. If the assets were in Dianne's name, she would have to pay an additional $20,850.00 in tax on the additional income from the estate (based on current tax rates and not including the Medicare levy and other rebate).

Let's compare this with scenario two using an optional discretionary trust where Jack and Dianne have three children. The additional income of $60,000.00 could be disbursed to the three children, that is, $20,000.00 each. Remember, the children are taxed like adults so they receive the benefits of the tax-free threshold and lower marginal tax rates. As a result, there would be a combined tax bill of only $1,026.00. **This is a saving of $19,824 in one year.**

Scenario 1 (Distribution to Dianne)	
Extra Taxable Income	$60,000
Extra Tax Payable	$20,850
Total Extra Tax	$20,850

Scenario 2 (Trust Distribution to Each Child)	
Taxable Income for Each Child	$20,000
Extra Tax Payable by Each Child	$342.00
Total Extra Tax	$1,026

Now when we say that money is to be distributed to the children, this doesn't have to be a lump sum of cash. This can be done during the year by the trustee paying for the children's educational expenses, holidays, food and clothes etc.

Another example is when your surviving spouse buys an investment property with the inheritance. As the property is in their name, they must pay tax on the rental income. If in the future, they would like the children to receive the benefit of the rental income, the property will need to be transferred into their names. This will trigger Capital Gains Tax and stamp duty will need to be paid.

Alternatively, if the property was owned in the name of the testamentary trust, the trustee can choose each year who is to receive the benefit of the rental income. This can change year to year without the ownership of the property having to change. This means there is no capital gains tax or stamp duty implications.

As with the income of the trust, the trustee can select which of the beneficiaries should take the capital gain. By choosing to distribute the capital gain to a beneficiary on a low or nil income, the capital gains tax liability can be significantly reduced.

How having an Optional Testamentary Trust Saved Thousands in Capital Gains Tax

There was an 85-year-old man that passed away. He was a widow with four surviving children and ten grandchildren. His estate of approximately $1.25 million consisted of his home, an investment property and about $100,000.00 in shares in public companies.

If the estate sold those assets, there would have been approximately $100,000.00 in Capital Gains Tax payable.

However, as the deceased had optional testamentary trusts in his Will, the investments were able to be gifted to four trusts for each of the children. Those four trusts then sold the investments and the Capital Gains Tax payable was minimal as the gains were able to be distributed to other family members.
Holding assets of an estate within a trust offers the beneficiaries an opportunity to defer the need for the sale of assets (and therefore capital gains tax) until later when more numerous beneficiaries come into existence. Tax deferred is tax saved. Remember that your Will can be prepared so that the testamentary trust is optional. This means that each beneficiary makes their own decision as to whether they want all or part of their inheritance in the trust or not. It is a matter of what best suits them at the time.

What I have found is that the standard simple Will provides no assistance for beneficiaries in helping them minimise the incidence of taxation and puts most beneficiaries in the "worst case scenario" tax position.

Whether a testamentary trust would suit you depends on your financial situation. For most people who have money in superannuation and a reasonable level of assets, it is certainly worth considering**.**

REASON FOUR

Your beneficiaries may need asset protection

Another advantage of having an optional testamentary trust in your Will is to provide for the situation where your beneficiaries may require some **asset protection.**

If, when you pass away, your beneficiary is bankrupt, your beneficiary will not receive anything as the inheritance goes to the government to pay off the debts. If the bankrupt beneficiary had the option of using an optional testamentary trust, they could elect not take their inheritance and leave it in a trust where they control it but don't own it. This way the government or other creditors can't take it, as the beneficiary doesn't have any legal right to the assets in the trust.

The **testamentary trust potentially provides protection from the repercussions of insolvency and other potential liabilities.**

If your potential beneficiary is in business or in a high-risk employment, they again may not want assets in their name just in case they get sued in the future. Remember in today's society, you don't have to do anything wrong to be sued. If any of the beneficiaries are in the middle of a marital break up, putting the assets into a trust may save the inheritance becoming part of the family law property settlement and provide some limited protection.

REASON FIVE

Some assets may not form part of your estate

It is important to confirm the correct ownership of particular assets so that your wishes can be achieved. Some people are unaware that some assets will not form part of their estate when they die. For example, superannuation and life insurance may not be distributed in a Will. The superannuation benefit may go directly to the person previously nominated to the superannuation fund.

There may reasons why you many not want assets in your name. These may include asset protection, estate planning or to reduce the amount of assets at risk if the Will was to be contested.

If an asset is owned by more than one person, whether it forms part of your estate will depend on how it is owned.

There are two ways people can legally own assets:

- Jointly - This is the most common way of owning property and you would be a 'joint proprietor' with the other person; or
- As 'tenants in common' - This doesn't mean that you are tenants; rather it means that you each own a certain percentage of the property (usually 50%) and you can deal with your percentage however you want to.

If you own your home as a joint proprietor, then when you die, the home automatically passes to your other joint proprietor. It makes no difference whether you have a Will or not. But if you own your home as tenants in common, you can leave your percentage of your house to whoever you want in your Will.

You would be surprised as to how many times I have had clients say they own a property as 'joint proprietors' but upon checking, it is the other and vice versa.

Examples of problems caused by a lack of planning

One of Australia's richest men, Robert Holmes-a-Court didn't have a Will when he died. He'd had one prepared, but he spent months carrying it around in his briefcase and didn't get around to signing it. Fortunately for his wife, his children were prepared not to claim their substantial entitlements under the intestacy rules.

Then there is the situation of Aussie legend Peter Brock. At the time of his death, Brock had three Wills in existence. The Court had to decide which of the three were valid. There was a Will dated 2006 but it had no signature. There was a 2003 Will but it had only one witness when there should have been two. Then there was a third Will from 1984 that had his former wife and children as the beneficiaries.

Outside the court, Bev Brock (his former wife) said it had been an exhaustive procedure, adding it was a warning to other people to get their Wills in order. "Emotionally, physically, financially - the cost is enormous," she said. "I would hope people out there take care of their affairs and sign their Wills and get all the details done."

There have also been many cases where homemade Wills were either unclear, not properly drawn up or caused an unwanted tax liability. Many of these cases end up in court and carry on for years, causing distress and hardship to the family of the deceased.

Further Estate Planning Documents

What is a Power of Attorney?

A Power of Attorney ("POA") is a legal document where you (the "principal") enable another (the "attorney") to act on your behalf. An attorney can sign documents for the buying or selling of property, operate bank accounts and deal with other assets. The POA only relates to financial matters as opposed to medical or lifestyle decisions.
There are 2 types of POA. A general (or ordinary) POA will no longer operate if you lose your mental capacity.
An enduring POA will continue to operate even if you lose your mental capacity. Once you lose your mental capacity, you cannot then appoint an attorney, so it is important to ensure that an attorney is appointed well before that happens.

An attorney can be anyone over the age of 18. Most people choose a close family member (e.g. their spouse) or friend whom they trust. If you choose more than one attorney, you have a choice as to whether all the attorneys have to sign documents and make decisions together or whether only one attorney needs to sign the documents and make decisions.
You can also choose when the POA will start operating. For example, you could choose to have it operate immediately or only for a certain period or when the attorney considers you need assistance or only in event of loss of mental or physical capacity.
Your attorney has a duty to act in your best interests unless authorised by the POA itself. This requires your attorney to keep their money and property separate from yours. It also requires the attorney to keep proper accounts and records.
If the attorney breaches their duty, then they could be liable to compensate you. It is also possible that a transaction by the attorney could be cancelled.
Your POA can be revoked (i.e. cancelled) at any time provided you still have your mental capacity. This requires written notice being given to the attorney advising them that the POA has been revoked.

People often associate making a POA with the elderly. But just like a Will, you never know when you are going to need one. What would happen if you were in a car accident and in a coma?

Remember that you can't make a POA if you are not mentally capable to do so and this may be the very circumstance that you need the POA the most.

What is an Enduring Guardianship?

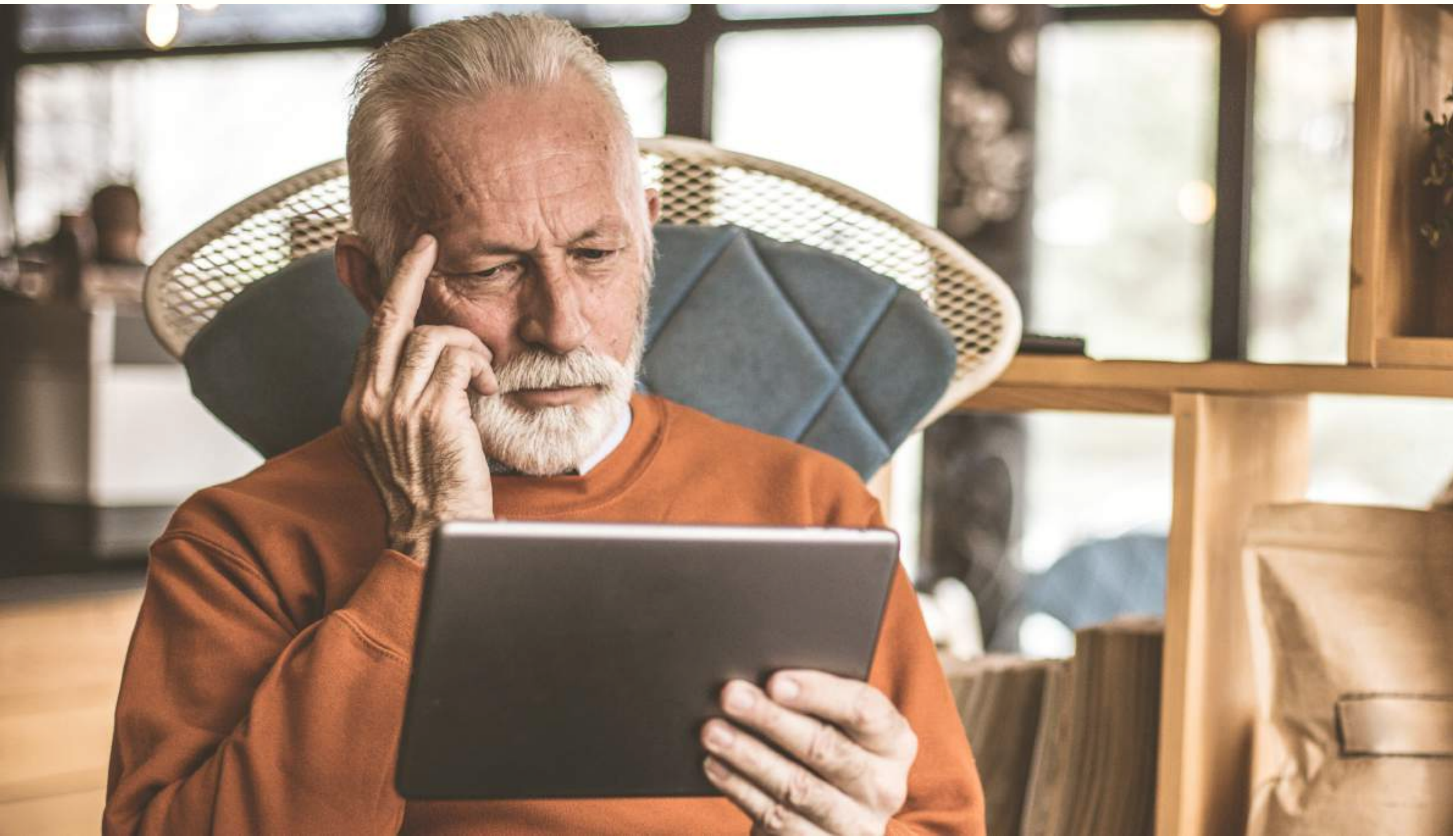
An enduring guardian is someone you appoint, when you still have your mental capacity, to make personal, health or lifestyle decisions for you should you lose the ability to make them for yourself. This is different to a Power of Attorney as that document only relates to financial decisions.

You can appoint one or more enduring guardians and you can choose which decision-making areas you want them to have responsibility for. Most people appoint a family member as their enduring guardian.

You can give your enduring guardians as many or as few functions as you like. You can authorise your guardian to make decisions such as where you are to live, what health care you receive, what personal services you receive and to consent to medical or dental treatment.

Your enduring guardians must act within the principles of the law which are set out in the Guardianship Act and in your best interest. You cannot give your enduring guardian a function or direction that is unlawful (eg: euthanasia).

In the event you do not have an enduring guardian, then the Guardianship Tribunal may make these decisions on your behalf instead. The Tribunal may make decisions that are different to those made by someone appointed by you.



Why use Tranter Lawyers for your Estate Planning

If you are after "peace of mind" then you need to see Tranter Lawyers. With our service, you can feel assured you have done everything possible for those you leave behind. You need our customised Wills if:

- You own property;
- There are specific people you want to leave your belongings to;
- You have young children;
- You have children with special needs;
- You own assets with another person, such as a house or where you have joint bank accounts;
- You have a family business;
- You have assets that are located interstate or overseas;
- You receive income from a trust or a family company, or you have an involvement in a trust or a family company;
- You are interested in minimising any taxes that may have to be paid on your estate;
- You haven't updated your Will since you have been married or entered into a new relationship;
- You have been divorced since you last made your Will;
- You have specific wishes regarding your estate.

Remember, a poorly prepared or designed Will can mean that:

1. Assets are not distributed the way you would have wanted;
2. Property is not controlled in the way you would have wanted;
3. Beneficiaries lose freedom and flexibility as they have few or no options;
4. Assets are left exposed to creditors;
5. Tax advantages are lost; or
6. Your family is forced to go to Court to enforce a document that seems to indicate your wishes.

We are so confident that we are the firm to represent you that we offer you this totally unique guarantee:

Tranter Lawyers

RISK-FREE GUARANTEE

If you are not completely satisfied with our service, we will insist we refund our fee to you in full. No questions asked.

The difference with Tranter Lawyers is this: We are always trying to improve our clients' lives. We have relationships with our clients, not just one-off transactions. Quite simply, we care.

We are one of the fastest growing businesses in the Hunter and Maitland's only award-winning legal firm – and you don't win these awards unless you have exceptional service.

Here are 7 reasons why you should deal with us before ANYONE ELSE:

1. You'll be in experienced, capable hands – there aren't too many legal firms that have the expertise in this area. We have the knowledge to meet all your needs.

2. You'll know exactly where you stand from our very first chat – you will know which direction to take, how long your matter will take and receive a firm estimate of your total investment.

3. You'll receive professional advice – your options will be clearly set out so you can make informed and practical decisions.

4. You can contact us at any time – so you can discuss your situation when you need to.

5. You'll have everything about your matter explained in PLAIN English – so that you will always understand your situation.

6. You'll be kept up to date - every step of the way.

7. Everything will be dealt with in a highly confidential manner – so you can feel at ease over any detail we discuss.

8. We value our relationships with our clients – your family will grow; you'll acquire more assets and key people in your plan will have life changes.

WHAT DO OUR CLIENTS SAY ABOUT US

Hi, we wanted to write and extend our sincere thanks and appreciation. We have been customers of Tranter Lawyers for some years now and have always been delighted with the quality of service we have received, so we thought that it was about time we put our appreciation in writing.

Not only do you provide a professional legal service that is second to none, you manage to do so without compromising the quality of your customer service. When dealing with a member of the Tranter team, (whether it be in person, over the phone, or via written correspondence), we always feel as though the person with whom we are communicating has a genuine interest in what is best for us. On every occasion that we have contacted your office, without exception, a friendly, efficient staff member with a “nothing is too much trouble” attitude has greeted us. This level of customer service, which is almost extinct in modern society, is something that we have learned to expect in our dealing with Tranter Lawyers.

Taking this into account I am not surprised to have read in the newspaper recently that Tranter Lawyers was recipient of several business awards – you truly do deserve the accolade. In a modern economy where old-fashioned values such as honesty, sincerity and a commitment to quality customer service are sacrificed in a search for the almighty dollar, many businesses would do well to take a leaf out of your book. If they only realised, as you obviously do, that a happy customer is by far the most valuable asset to any business, then they too may gain recognition as one of the fastest growing businesses around.

Congratulations on your winning formula and thank you again. As always, it has been a pleasure.

Phillip Cliff & Belinda Cliff

We would like to take this opportunity to convey our sincere thanks and appreciation.

As you are aware you came highly recommended by the Real Estate Industry. During the past 12 weeks, Melissa has not only represented us but she has also personally supported us during the whole period. Each time we dealt with Melissa, and there were many, Wayne and I came away confident that all our options and legalities surrounding those options had been explained to us.

Finally, you can be truly proud of the exceptional customer service your staff are delivering on behalf of Tranter Lawyers.

Lorraine & Wayne Heraghty

Kerry and I would just like to take the opportunity to say Thank You for the friendly professional service that you have provided us with over the last several months helping us with both legal and conveyancing issues.

The service you have provided us with has at all times been very thorough and prompt with phone calls and messages followed up. We have been looking for a legal team to assist us in our long-term investment goals that is not jaded as many are. The team of people at "Tranter Lawyers" has a fresh-faced approach to their business and we think we have found "that" team we have been looking for and look forward to a long association.

Steve & Kerry Bishop

Why not visit the testimonial page on our website at:
www.tranterlawyers.com.au
where you will see more comments from our satisfied clients.

Published by Mark Robson
June/July 2005 National Accountant

ESTATE PLANNING MUST BECOME A CONSCIOUS PART OF EVERY WEALTH MANAGEMENT DECISION

Given Australia's ageing population, changing family structures and high divorce rates, effective estate planning is now more important than ever. It needs to become a conscious part of the everyday wealth management decision of accountants and their clients rather than simply an afterthought.

Estates are becoming more complex with sophisticated superannuation strategies and frequent changes to legislation in relation to taxation all at play. In addition, there is an increased likelihood of uninformed decisions and mistakes with the higher incidence of multiple marriages and de facto relationships.

Without the necessary attention being paid to estate planning, financial decisions can have major unintended consequences for a client's family in the future. Effective estate planning ensures your client's wealth is transferred in accordance with their wishes and in the most financially efficient and tax effective way possible. In addition to current taxation concerns, effective wealth management strategies should also include careful consideration of asset protection and future wealth distribution issues.

DEATH AND TAXES

There is a common saying that the only two certainties in life are death and taxes, but many wealth management strategies do not adequately address the important relationship between the two.

Generally speaking, a lack of understanding about how various taxation laws and rulings apply to estate planning can mean people don't realise that every time they buy an asset it is effectively an estate planning or asset protection decision that will have tax implications.

There is a minefield of taxation issues to consider when drawing up a will and many people fail to seek proper estate planning advice. Consider the following examples: A will states: "I leave behind my holiday home situated at the beach to my son John and I leave an amount in cash equivalent to the value of my holiday home at my death to my son Brian."

The holiday home was purchased in 1990 for $95,000 but valued at death at $265,000. Under the will, John will receive the holiday home and Brian will receive $265,000 in cash to compensate. On first appearances John and Brian receive an equal amount from the estate. However, as the holiday home is a Capital Gains Tax asset, John has not only inherited a holiday home but also a potential tax liability.

How ownership is structured therefore will determine how the asset will be distributed when you die and an inadequate estate planning solution can cost a family thousands of dollars.

THE CASE FOR TESTAMENTARY TRUSTS

In the past, there have been limited support services for accountants and other financial advisers wanting to cover estate planning issues and, as a result, the focus has predominately been on investment products. However, there is particular scope within the industry to incorporate estate planning strategies that make better use of testamentary discretionary trusts.

The benefits of testamentary trusts include:

- Upon your client's death their children will have control of the assets of their respective trusts
- Any income and capital gains earned by the trusts can be split among the beneficiaries of the trust in a tax effective manner
- The assets owned by the trusts are protected. They cannot be accessed by any of the beneficiaries without the trustee first exercising its discretion to distribute the assets to them.

A testamentary trust will protect the assets held by the trust should any of a client's children be involved in any legal proceedings, and will also assist in protecting inherited assets in the event that any children are involved in a divorce.

COSTLY MISTAKES

Estate planning errors and oversights can have far-reaching implications. Poorly constructed wills can put inheritances at risk, cause divisions among family members and potentially ignite legal challenges that consume a significant portion of the estate's assets.

One of the most common mistakes is to fail to review a will after it is made. Often people make their will, put it in the bottom drawer and then forget to update it if or when their life circumstances change. New children, grandchildren, the death of a child, breakdown in the marriage of a child, or change in assets and debts should prompt a review of a will. Generally speaking, wills should be reviewed at least every three to five years or immediately if there is a change in the individual's family, personal or financial situation.

What many people don't understand is that if they die without a will (intestate), their assets are divided up according to state legislation. In some cases, this can mean a surviving spouse will have to share assets with children rather than inheriting. However, having to share assets with children may come as a shock, particularly in situations where assets are limited and the spouse was relying on the inherited wealth to live on. These situations can cause tension within families and in some cases may lead to legal action, which can be stressful, costly and time-consuming for those involved.

Keeping up to date with the relevant legislation is also essential. For example, under South Australian law, marriage will revoke a will, but divorce will not. This law varies from state to state and it is important that clients seek advice about estate planning implications if they are planning to marry again or are going through a divorce. Many couples make a will when they are in a de facto relationship but if they eventually marry, they often fail to make new wills, believing their old wills stand. This is not the case.

THE PROBLEMS WITH DIY

To save time and money, some people opt to make a DIY will. However, there are many mistakes that can be made, such as failing to properly identify a beneficiary or failing to accurately describe assets that are specifically gifted. If such assets are sold prior to death and the will has not been updated, bitter disputes can arise. The legal costs of such mistakes can run into many thousands of dollars.

Making your own will is akin to doing your own electrical work. If you are an electrician, fine, but if you are not then the consequences can be disastrous, particularly for loved ones. Wills are important documents and there are strict rules about how they should be executed. Failure to follow these rules can, at worse, invalidate the will completely. At best, the will may still stand but not signing, dating or witnessing it correctly may lead to long delays and additional expense for the beneficiaries.

Another common mistake people make when writing their will is to appoint the wrong person to manage any trusts created under their will. Family or friends appointed to act as Trustee of an estate can sometimes get out of their depth, fail to understand their responsibility, or simply neglect to fulfil the role properly.

Whoever is appointed must be ready to cope with all the technicalities that go with the role, which unfortunately at times can involve complex family disputes and legal proceedings. Trustees must ensure trust funds are invested in accordance with stringent rules otherwise they will be personally liable.

SECOND MARRIAGES CAN BE A MINEFIELD

Children from past marriages and the new relationship, coupled with the assets brought into a relationship by both partners, makes second marriages complex when considering a Will. Unfortunately, many people fail to take the time to do the planning necessary to ensure the interests of a new spouse and children from a prior relationship are balanced in a thoughtful manner that will minimise the risk of future legal challenges.

Careful planning can help ensure the needs of a new spouse are met, while respecting the moral entitlements of any children from a prior relationship.

Sentimental items of little or no commercial value such as photos and war medals can cause tension between family and friends during a time of grief. If there is any doubt about who should get what, where possible people should make their wishes known to their loved ones during their lifetime and then make provision in their will.

It is a lot easier and far more cost-effective to put the right estate planning strategy in place from the very beginning rather than trying to address an issue that flares up later in court. Depending on the complexity of a client's situation, specialist advice can often be crucial. NA

DISCLAIMER
This article contains general information only. Before making any decisions concerning your own estate planning or financial planning needs, you should consult an estate planner and/or financial planner who will take into account your particular investment objectives, financial situation and needs.

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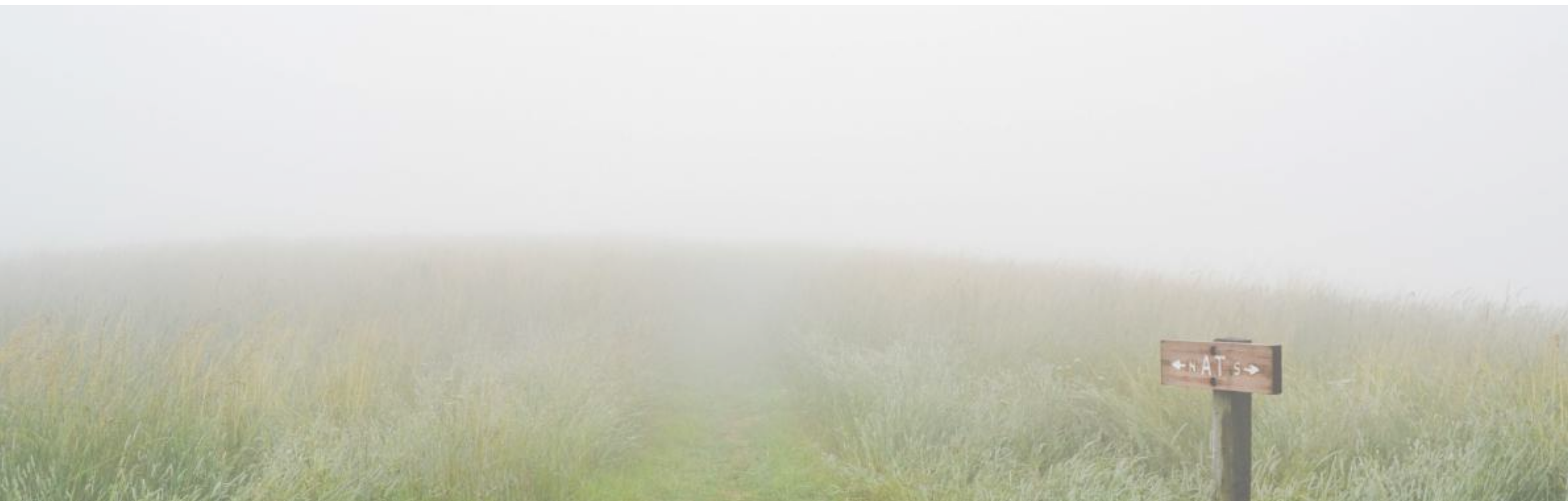

CASE STUDY - SANDY AND MICHELLE

ASSETS

Sandy has life insurance cover of $100K over his wife's life in his sole name. Michelle has life insurance cover over $250K over her husband's life in her sole name. She also has the family home in her sole name. Their cars are held in joint names.

THEIR CONCERNS

Sandy and Michelle both have basic wills but no Enduring Powers of Attorney. They have three children under four years of age (Issy, Alexandra and Michael). They want to ensure if either dies unexpectedly, the surviving spouse would have sufficient financial resources to maintain the standard of living and not compromise their aspirations for their children.

THE ISSUES

Potential estate planning issues include:

- No enduring powers of attorney
- With the exception of the family home, assets appear to be held in The Sandy and Michelle Investment Trust. Any income distributed by this trust for the benefit of infant children would attract the penal tax provisions of Div. 6AA of the Tax Act. The Trust would be tax inefficient as a source of income for their children in the death of either or both Sandy and Michelle.
- Existing life insurance policies are 'cross-owned'. With this ownership, the policy proceeds will not be an estate asset and the opportunity to stream the policy proceeds into a testamentary trust will not be available to the surviving spouse. Superannuation pensions paid to a child under 18 from a superannuation fund are not subject to RBL testing, entitled to a 15 percent tax rebate or taxed in the child's hands at ordinary adult rates
- Sandy's existing insurance is not sufficient to fund reasonable income streams for the children over the long term and an insurance review is necessary.

RECOMMENDATIONS FOR SANDY AND MICHELLE

- Sign Enduring Powers of Attorney (EPAs) to ensure the family finances can continue to be managed within the family in the event of one spouse becoming incapacitated.
- Have the Deed for The Sandy and Michelle Investment Trust amended so the power to appoint the trustee can be exercised by an appropriate person if the appointor was to become mentally incapacitated.
- **Consult their insurance adviser about:** Altering the ownership of their existing life insurance policies from cross-ownership to self-ownership Reviewing their life insurance needs to increase the life cover inside a superannuation environment so all or part of the benefits can, at the option of the surviving spouse, be paid in the form of tax effective superannuation pensions for their children.

Update to comprehensive wills incorporating an optional testamentary discretionary trust in each for the benefit of the surviving spouse and thereafter for their children.

A testamentary discretionary trust would be indispensable for:

- Protecting inherited assets from creditors
- Reducing the risk to inherited assets from a relationship breakdown
- Achieving greater tax effectiveness by being able to distribute income to family members, including grandchildren
- Encouraging investment and conservation of their children’s eventual inheritance through the use of trust as an investment vehicle.

This will give Michael, Alexandra and Issy the right to inherit Sandy and Michelle’s assets personally, or through a testamentary discretionary trust.

They can decide how much, if any, their trust will inherit based upon their financial and other circumstances at the relevant time.

Sandy and Michelle should also ensure that their wills:

- Give very flexible powers to their executors and trustees

- Appoint testamentary guardians for their children (if Sandy and Michelle were both to die) and include appropriate financial provisions.

- Include an ‘adjustment’ clause to ensure that their wealth, however owned, is divided equally between their children
- Appoint the power to appoint the trustee of The Sandy and Michelle Investment Trust to Michelle and thereafter to their executors to hold on behalf of the three children until they reach 25 year of age.

- Consider signing a ‘Letter of Wishes’ in which they both set out their thoughts for the education and rearing of the children in the event that both Sandy and Michelle were to die unexpectedly

HOW TO KEEP THE TAXMAN OUT OF YOUR WILL

Report: Debra Cleveland
The Weekend Australian Financial Review
October 23-24, 2004

The loss of a family member is traumatic enough for any household, so having to fight off the taxman or creditors is the last thing those left behind should have to face.

Financial advisers say a bit of forethought can make the difference between your family enjoying the bulk of your estate – or the taxman snuffling up to half of it.

Feel a snooze coming on when estate planning is discussed? How about just over $1.2 million tax free as a wake-up call if you leave your superannuation to the right person (a tax dependant). Still on super, did you know that some super funds will refund to your beneficiary any contributions tax you've paid – that could add an extra 15 per cent to the payout.

And don't let capital gains tax (CGT) rules catch you napping- if you've inherited the family home and you're thinking of selling, do so within two years of your relative's death otherwise you'll face CGT- from the time of the death.

"Tax is the new death duty," says Colin Lewis, head of technical services at financial planning firm IPAC securities. "We no longer have death tax, but CGT is a pseudo form of that. Death doesn't create a tax liability but ultimate disposal does."

"The worst thing is to liquidate the estate to distribute it – it depends on the needs of the beneficiaries. Plan rather that liquidate and you'll save thousands of dollars in tax".

Rod Dunn, a financial planner with RetireInvest in Bondi Sydney, says: "For most people, estate planning is a pretty important issue. Yet, as an example, many fail to realise that if they die it's the [superannuation] trustee that decides who gets the money. When people separate, one of the last things on their mind is to make sure super goes to the right people – their children rather than their ex-husband or ex-wife."

The first place to start is making sure you have a will and that it's up to date. Dying intestate – without one – can hold up things for months, even years, leaving dependents cash-strapped and in limbo.

"And remember that even if you do have a will, it's not an iron-clad guarantee as it can be challenged if you haven't made adequate provision for someone" says Lewis. What happens to your assets after death is a complex issue, so it's appropriate to seek advice. For the purpose of this article, though, we've broken the topic into five main areas.

Superannuation is discussed separately because it's so complex.

THE FAMILY HOME:

Whoever inherits it won't have to pay CGT if they sell it within two years of your death, or move in themselves to make it their principal place of residence. But, says Louise Biti, head of technical advice at financial services company Asteron, many get caught out, "If you sell after two years and three months, CGT will apply for the whole time since death. So, if you think you're going to sell, remember the two-year limit."

But if the home is being kept as an investment property, CGT will apply when it's finally sold. That's why it's' important to establish a cost base (used to calculate CGT) as soon as possible by having it valued at the date of death.

CGT ON OTHER ASSETS:

If they are acquired before September 20 1985, there is not CGT liability. CGT starts "accruing" from the date of death, so whoever inherits should get a valuation at that date to establish a cost base for when they later sell. But the 50 per cent CGT discount applies because the assets have been held for longer than a year (albeit not by the beneficiary).

Biti explains: "If you inherit shares worth $3000 that were acquired for $2000 (the cost base) in 1995, the estate or the person inheriting will face a potential capital gain of $500 (because 50 per cent of the $1000 profit is exempt if the asset is held for more than a year). So, you also inherit the fact that it's been held for more than 12 months.

ESTATE TAX:

There can be a big difference in the tax rate paid by the estate and the person inheriting an asset, Biti says. "So, it's worth having a look at whether an asset should be sold by the executor in the estate or whether it should be passed on to a beneficiary who takes on the tax liability," she adds.

The first year of an estate gives the biggest tax cuts, Biti explains: "When someone dies, it's often part way through the financial year. So, from July 1 to the date of death, a tax return has to be done for the individual – with the usual first $6000 tax-free then the normal marginal tax rates applying. Then from the date of death to June 30, the estate may need to do a tax return."

"The income of the estate is treated the same as that of individuals for the first three tax returns. So, from death to June 30 it gets the first $6000 free and then the next $15,600 is taxed at 17 per cent. So, you're getting $12,000 fax free - $6000 from the individual tax return and $6000 from the estate's tax return."

Assets likely to be sold may be better off being disposed of within the estate rather than by an individual, because the estate is also entitled to the 50 per cent CGT exemption.

TESTAMENTARY TRUSTS:

They're a way of distributing income to adult children and grandchildren without the usual massive tax hits.

"Say you want to leave money to three adult children who have their own families. If the assets are split between the three, the money is paid to them and they're going to have to invest in their names and pay their marginal tax rates. They can't give any money to their children as anything over about $700 a year is taxed at top tax rates," says Biti.

"What you could do instead is set up three testamentary trusts: each child has control over their own entitlement. The benefit of each testamentary trust is that each can choose whether they distribute the earnings to themselves, their spouse or their children. Because it's done through a will, the children get the normal adult tax rate – and the first $6000 is tax-free." Testamentary trusts also protect assets from changing family circumstances, such as adult children getting divorced.

CENTRELINK:

If family members are receiving Centrelink entitlements, will your bequest jeopardise that? "If you leave your assets to a spouse receiving a pension or allowance, not only is she going to be assessed as a single person on a much lower means test threshold, but she's going to have all the assets," says Biti.

"If she doesn't need the assets, direct them to a child or another beneficiary. Think about whether the spouse needs that money or not."

PASSING ON AS MUCH OF YOUR SUPER AS POSSIBLE

Most advisers agree that superannuation payouts after death are extremely complex, but there are ways to minimise the tax hit. Not all of the following key points will apply to everyone, but they should be enough to spur you on to ask questions of you fund – and even initiate changes to make sure your family gets the best deal.

Who decides where your super goes? Trustee discretion is standard in most super funds – that is, you may nominate who gets your super but ultimately, it's up to the trustee to decide. A recent change – but not offered by all funds – is called a binding nomination.

"They're a great creation – they give you greater confidence that your super will go to exactly who you want it to," says RetireInvest's Rod Dunn. This can be important, because some beneficiaries of super death payouts pay less tax.

Colin Lewis, of IPAC securities adds: "Historically, super death benefits that aren't paid to the estate are paid ultimately at the discretion of the trustee of the fund. If there are straightforward circumstances of a spouse and children, it's straightforward. But because there are so many blended families, it can get complicated and you may not wish a third party to decide who gets what. So, it's worth using a fund that offers a binding nomination so the fund is bound to be paid according to your wishes."

Why 'tax financial dependents' pay less tax
Tax legislation defines who these are, says Asteron's Louise Biti. They're a spouse (legally married, de facto or same-sex), former spouse and children under the age of 18. Under new "inter-dependent relationship" rules they also include "people in a close personal relationship where one or the other supports the other in a monetary or living arrangement," such as adult siblings.

Critically, people in this category can receive up to the pension reasonable benefits limit (RBL) of $1,238,440 tax-free. "it's much cheaper to ensure super goes to those people rather than anyone else," says Biti.

"If it went to a child who was over 18 and working, he or she could pay up to $204,342 in tax. That's a big difference."

Plan for children
Lewis suggests in some cases setting up allocated pensions for children – especially if there's a big amount in super and there's more left over once the spouse receives the tax-free $1,238,400. "They go out in a tax-concessionary manner and the children are taxed at an adult marginal tax rate because it's unearned income. And because it's a death benefit there's a 15 per cent tax offset so you can reduce the tax to nil virtually," he says.

Why life insurance changes things

For many people, the sums they accumulate in super won't approach the just over $1.2 million pension RBL (the amount you can take out of super without paying penalty tax rates). But with increasing numbers of super members including life insurance in their benefits, more are likely to expect big payouts after death and so should plan ahead.

There are some nasties. One is that if an insurance payout in a super death benefit goes to someone who is not a tax dependent, the tax hit is really high – more like 30 per cent than the 15 per cent that would apply to most super death payouts, says Biti.

"If you know life insurance money is going to end up with someone who is not a tax dependent, put it outside super," she adds, "Because outside super, a life insurance payout is paid tax-free no matter who gets it."

When direct payments can be better
Where a super fund pays directly to your beneficiaries it doesn't go through your estate, says Lewis. "The benefit is, its' more expedient because the fund pays directly without having to wait for probate, so it's much quicker," he says.

Keep creditors at bay

"If you have debts outstanding, creditors can have 'dibs' on your estate," says Biti. In a death nomination where super is paid into the estate, creditors may get access to that money rather than your beneficiaries if your debts exceed your assets. "If you think you're going to die with lots of debt, make sure super goes to beneficiaries outside the estate, and that the binding nomination is for your super to go directly to the beneficiary not the estate," says Biti.

Where to keep an inheritance

Super is a significant "depository" for inherited assets, says Robert Lipman, head of Investec Private Advisers. "These days a lot of older people can make super contributions prior to their retirement. Say someone is aged 60 and inherits an asset. One choice is to make a super contribution by transferring the asset into a self-managed super fund," he says.

"It will go in as an undeducted contribution and they can then commence an income stream in the super fund and hold that asset in a tax advantaged vehicle."

Say someone inherits a share portfolio, the standard approach may be to sell the shares (potentially paying capital gains tax) and hold the cash or reinvest, but tax on income or capital gains would be at his or her marginal tax rate.

"Instead, the shares could be transferred into their super fund – CGT would still have to be paid if it's relevant as there's a transfer of ownership – but dividend income and any future income will not be subject to tax when they convert to allocated pension," says Lipman

CASE STUDY
UNDEDUCTED CONTRIBUTIONS

Kevin is married to Cheryl and they have one adult son Ryan, who is not financially dependent.

Kevin has a superannuation fund with $400,000 comprising $200,000 of undeducted contributions and $200,000 of post 1983 funds. He wants to leave half of his superannuation benefit for Cheryl and half for Ryan but his superfund does not provide a binding death nomination. While his will reflects his wish for his estate proceeds to be split equally between Cheryl and Ryan, if he dies and the trustees pay the benefit to his estate, he will be sharing his estate pie with the tax office – which will take away $15,000 of his money.

His estate pie would be split as follows:
Cheryl $200,000
Ryan: $185,000
ATO $15,000

Clearly that's not the ideal outcome but some thought allows him to make sure all of his money goes to his family.

To provide greater protection of his estate, Kevin should amend his will. When he does so he should specify that if his superannuation is paid to his estate the benefit be paid as follows:

Cheryl: $200,000 of post 1983 funds
Ryan: $200,000 of undeducted contributions

If the benefits are paid to Kevin's estate by the trustees of his superannuation fund the full $400,000 will be kept within the family. None of it would go to the tax office.

This is because undeducted contributions are not taxed in the hands of the recipient (regardless of whether they area tax dependent or not)

RULES: DEATH AND TAXES

FAMILY HOME
- No CGT if the person who inherits sells the home within two years of owner's death.
- But if they sell afterwards CGT applies to whole period since death

OTHER ASSETS
- Assets acquired before September 20 1985 carry no CGT liability
- But liability accrues from date of death
- But there's a 50 per cent discount when assets are held longer than a year

ESTATE TAX
- Income of estate taxed same way as individuals for first three tax returns
- Estate entitled to 50 per cent CGT exemption

TESTAMENTARY TRUST
- Gives children adult tax rates rather than top rates
- Allows distribution of wealth to adult children without usual tax hits.