

# Let's chat

Estate planning

# House keeping

- ID documents to sight
- Full names, correct spelling and pronunciation
- Worthwhile details to be aware of
- Intentionally 'non-technical', but ask if you are curious
- Non-relevant slides skipped
- Complex estates (?)
- Feel free to ask questions at any point

# Full information

- If not told 'full picture' estate planning arrangements may not be carried out
- I.e.
  - not told of key relationships may result in unexpected Will challenges
  - not told of various structures may mean assets do not pass as you intend
  - not told of residency status may result in adverse tax consequences occurring
  - etc.

**About you and your objectives**

# Your details

## Verification of ID

- Full name
- Aliases/former name
- Address
- Phone/email
- Date of birth
- Occupation
- Preferred language
- Any rush for estate plan? Unwell/going overseas?
- Prior Wills? Foreign Wills? Mutual Wills? Reason for change?

# Family and key persons

Please provide me with the following information in relation to your immediate family, people you want to benefit from your Will and key persons for your 'Will' as well as people who may be unhappy with your Will:

- Full names and other names they go by
- Relation to you (including if 'step' or 'adopted')
- Your relationship with that person (great, good, alright, estranged)
- Details of age and place of residence
- Other details to be aware of including their health, bankruptcy, their occupation or past history

The information provided here will outline if there are estate planning issues to be aware of including but not limited to: estate challenges, if 'special' strategies should be employed and if your intentions need amending.

# Family tree

# Assets and liabilities

Please provide me with the following information in relation to significant **assets** or **debts** that you own (whether directly or indirectly):

- Specific details about asset including who legally owns
- Market value, debt linked to assets and approximate equity
- Who to benefit from the asset including if there are particular 'directions'
- Where is the asset located (if held interstate or overseas)

Depending on how your asset is held and who you would like to benefit, it may either be easily done, or potentially complicate your affairs (because it cannot be easily achieved).

Any persons assisted with contributing to acquisition of assets?



# Structure diagram

# Your objectives

In your own words:

- Who do you want to benefit from your assets
- Who do you want to be in charge of those assets (relevant if benefiting persons are minors)
- (If applicable) Who do you want to look after any minor children
  
- Are there particular people you do not want benefiting from your assets?

Consider different alternatives, scenarios and backups.

# Considerations for minors

- Should the same people:
  - Manage the finances; and
  - Care for such minors?
- Should a representative from each side of the family be involved at a decision-making level of:
  - Managing the finances for minors; and/or
  - Caring for minors?
- The persons caring for such minors have all the rights and responsibilities for making decisions about the long-term care, welfare and development of the child (such as education or religion)
- Consider practical implications if guardians of minors are not living with such minors

# Prior Will

- Prior estate planning documents?
- Reason for updating?
- Does it make sense?

**How can we achieve your  
objectives**

# More than a Will

Various ways you can 'own' an asset.

It is important to appreciate that having assets held in different manners – such as jointly with other people, through trusts and through companies – will impact what needs to be done. A Will *might* not be enough!

# Summary table

| Ownership      | What governs   | What to look for  | How asset can pass  |
|----------------|--|---|---|
| Personal       | Will<br>If no Will – the law                                     | N/A   | Can pass asset directly<br>Can pass control over asset  |
| Superannuation | Superannuation documents and beneficiary nominations             | Has a 'beneficiary nomination' been made and is it binding? | Can pass superannuation directly (to a limited number of people)<br>If held in a 'SMSF', you can pass control over SMSF |
| Jointly        | Either the law or your Will (depending how joint interest owned) | Joint tenants or tenants in common                          | Depends on how joint interest owned   |
| Company        | Company constitution<br>Legal owner of share                     | Who is the director or shareholder                          | Cannot pass company asset directly<br>Can pass control over company   |
| Trust          | Trust document<br>If unsure, trust law                           | Who is the trustee or appointor (controller)                | Cannot pass trust asset directly<br>Can pass control over trust   |
| Partnership    | Depends on how owned and third party agreements                  | Depends on how owned  | Depends on how owned  |

# Estate challenges

## Family provision application

- Eligible person able to challenge – generally includes spouse, children and people dependent on you which can include parents, ex-spouses and people who you provide maintenance to)
- Prove not adequately provided for – based on various factors
- Appreciate persons with special disabilities with greater claim
- Only affects assets going into your Will – except if assets held in NSW



# Estate challenges

Factors a Court considers in determining if an eligible person is adequately provided for:

- Financial position of eligible person and needs now and into the future
- Ability for eligible person to meet financial obligations
- Physical, intellectual or mental disability of eligible person
- Size of estate
- Contributions made by eligible person to deceased's estate or deceased's welfare
- Competing claims from other beneficiaries
- Standard of living of the eligible person during deceased's lifetime
- Relationship between deceased and the eligible person
- Wishes of the deceased

# Estate challenges

Other ways to challenge

- Will leaving markings suggesting ‘tampering’ or ‘missing pages’
- Invalid Will (not executed properly)
- No capacity to make Will (unable to properly understand what is being signed)
- Promises made to a person not kept in Will

# Estate challenges

- Making provision
- Bypassing your Will
- Joint tenancies
- Direct superannuation nominations
- Separate successor control documents
- Restructuring
- Gift and loan back arrangements
- Call options
- Declarations (formal or informal)
- Roll the dice and let the Court decide

# Superannuation

- Not automatically part of your Will
- Power to nominate recipients – ‘legal personal representative’, spouse, children or dependents
- Nominations can be binding or non-binding
- Retail or industry funds – you can do it yourself
- Pension over \$1.6 million?
- SMSF – a lawyer should do it for you to review any governing documents and follow the procedure and consider the control mechanisms
- If SMSF – story time

To avoid all doubt, you should consider preparing a nomination to confirm what happens to your superannuation benefits. If you make this nomination binding, there is no room for ambiguity or dispute.

# Jointly held assets

Joint tenants (think ‘joined by the hips’)

- Rule of survivorship – each person owns 100% (from succession perspective)
- Death of co-owner means surviving co-owner automatically receives asset

Tenants in common

- Each co-owner owns a specific percentage in an asset (e.g. 50%, 99%)
- All percentages add up to 100%
- Death of co-owner means that deceased’s share goes into their Will

It is important to appreciate that assets can be held jointly in different ways. It also needs to be considered if it is better for any assets you hold jointly with another, to be held in one manner over another.

# Trust assets

- Assets in a trust is not yours
- There is a document (trust deed) governing the rules of the ‘trust’
- Those rules dictate who can benefit – it is not for your Will to override those rules by default
- Question becomes who controls the trust
- As there is already a set rule book, if your intentions are contrary to the rule book, complicated changes need to be made
- The rule book needs to be reviewed

Assets held in trusts normally pass through the ‘gifting’ of control. By giving control to the relevant person(s), that person(s) can decide how to deal with the assets in the trust.

# Company assets

- Assets in a company is not yours, a company does not pass away with you
- There is a document (constitution) governing the rules of the company
- The directors enforce the rules and makes the decisions
- Shareholders ultimately benefit from any retained assets in the company and can dictate who the directors are
- The rule book for the company, however, needs to be reviewed to see if it states what happens
- If there are multiple shareholders, then any 'shareholders agreement' also needs to be considered

Assets in a company stays in the company if you pass away. The question, however, is who becomes the shareholder for the company.

# Business and partnership assets

- Depending on the different ways you own assets in a business or partnership, you will need to consider those relevant estate planning issues
- Also, however, given you are dealing with other persons, you should consider what happens if a key person passes away.
- To respect your partner/s, they should also be part of the discussion and all in agreeance.
- Additional documents will be required (shareholders/unitholders agreements, partnership deeds and/or buy sell deeds)

As there are multiple 'unrelated' persons involved, any discussion in relation to the succession should be discussed with all parties.



# Overseas assets/beneficiaries

- Get a Will in that Country!
- Consider tax issues if there are overseas beneficiaries (CGT event K3)
- FIRB and other surcharges for 'foreigners'

# Other issues

- Funeral arrangements (recommended in memo of directions)
- Digital assets (pass under Will or license only)
- Intellectual property (including artwork, music etc.)
- Cryptocurrencies
- Loan accounts
- Liabilities and personal guarantees
- Life interests
- Binding financial agreements
- Other agreements

# Flexibility

- How flexible do you want to leave things?
- The more 'set in stone', the more complicated it is to implement
- War stories
- Practical examples (too particular to a detriment and controlling the uncontrollable)
- Potential alternative – a guideline document?
- Trusting people
- If untrustworthy, keep things simpler, appoint more people or include independent persons?

We have discussed giving assets directly compared to passing control. There are benefits in passing control, but also disadvantages.

# Flexibility – questions to consider

- Do you want to leave some ‘guidelines’ or ‘rule beyond the grave’?
- If ruling beyond the grave, we will simplify things to remove any potential for abuse of power.
- If leaving some ‘guidelines’, do you trust those in control to **not** abuse their power?
- Think – if the persons in control *could* take all the assets for themselves, do I trust them **not** to?
- Should I appoint multiple people or an independent person(s)?
- Importantly, do I trust those in control to consider my guidelines and act in the best manner possible?

This ‘guideline’ document is called a ‘memo of directions’, and we provide you with a template to complete at your leisure.

# Memo of directions

- This document allows you to document your intentions and guidelines
- It could be a blank piece of paper, or the template that we provide you
- It allows you to outline your thought process without fear of making things too restrictive with wording able to be 'lax' and personal
- Those looking after your affairs will at least then have a document that they can refer to when looking after your affairs
- It allows you to leave some non-binding directions so those in control can administer things per your intentions or administer things in a different manner if your directions are not appropriate at the relevant juncture (we are not mind readers and do not know what the future entails)

Keep a signed copy of this document with your Will and potentially circulate it to the key persons if you wish as well for their information.

# Will

- Two general types of Will
- ‘Simple’ Will – gives assets that goes into your Will directly to people (maybe with some conditions attaching)
- ‘Testamentary trust’ Will – gives chosen assets that goes into your Will into a special structure that can be utilised for the benefit of a range of people – it offers various added benefits in exchange for a more complex arrangement

We will discuss the advantages and disadvantages of each approach and recommend what should be suitable for you

# What is a testamentary trust

- A ‘trust’ is a relationship where:
  - **somebody** legally (called the trustee)
  - holds **something** (assets in the trust)
  - for **others’** benefit (called the beneficiaries)
- ‘Testamentary’ just means that it is created on after you pass away (and therefore the assets of this trust are assets that form part of your Will)
- Lasts for 80 years in all Australian jurisdictions other than South Australia
- Beneficiary class limited to named persons and lineal descendants
- May exclude foreign persons if property passes into trust

If you do not ‘get’ the concept after these slides, let me know as this structure will not be suitable for use.

# Testamentary trusts



# Protection of testamentary trusts

- At law, the greater the divide between the trustee and beneficiary, the stronger the protection
- Impossible to structure correctly without predicting the future
- At least including an initial set up in Will allows recipients to restructure at the appropriate juncture
- If there is a known threat, then we can structure the testamentary trust from the onset
- Again, the less control beneficiaries have, the greater the protection
- Family law case - *Bernard*

# Benefits and disadvantages

| Advantages                               | How  | Disadvantages                                  |
|--|--|--|
| Asset protection                         | People who may be sued do not receive assets in their name                       | Concept can be difficult to understand         |
| Flexibility and control over succession  | There are mechanisms to allow control to be passed down in various ways          | More thought required when preparing your Will |
| Tax planning opportunities               | Ability to distribute to a range of people (including minors at adult tax rates) | Tax can be tricky to understand                |
| Reduce potential future transaction fees | Potential tax exemptions available (as of date of this presentation)             | Ongoing administration costs once created      |
|  | People who may be sued do not receive assets in their name                       | Concept can be difficult to understand         |

# When to have a testamentary trust?

| Immediately  | On death of both of you  |
|--|--|
| Want spouse to utilise benefits of a testamentary trust          | Spouse has no need for any of the testamentary trust benefits                |
| Spouse will receive substantial assets under estate (\$400,000+) | Lack of assets will form part of your estate                                 |
| Useful if there are minors able to benefit                       | No minors around and no need to have ability to distribute to adult children |

# How many testamentary trusts?

| Single   | Multiple   |
|--|--|
| Unable to clearly split assets   | Ability to clearly split assets between different trusts                     |
| Commonly used when benefiting minors<br>(no need for minors to have separate trusts) | Beneficiaries have increased autonomy  |
| Beneficiaries are able to work together  | Beneficiaries are unable to work together                                    |
| Want for a greater sense of purpose  | Beneficiaries have separate personal risk/tax profiles                       |
| Simpler as only one trust required to be administered                                | Sufficient assets able to form part of estate (\$400,000 per trust at least) |
| Unable to clearly split assets   | Ability to clearly split assets between different trusts                     |

# Your estate plan and our advice

# Personal assets - Will

- Contemplation of marriage or divorce?
- Only governs Australian assets and revokes Australian Wills
- Testamentary trust used?
- Executor?
- Guardians?
- Specific gifts?
- Personal Property\*?
- Everything else?

# Will - executor

- Role
  - Jointly
  - Maximum four
  - Abuse if one goes rogue
  - Charging clauses
- Initial:
- Backup:

# Will – guardian (if required)

- Initial:
- Backup:



# Will – specific gifts

- Given unencumbered or encumbered?
- Given with any income it produces/without any income it produces?
- Backup persons?
- Delayed distribution (e.g. child doesn't receive until certain age)
- Charities:
  - name them
  - at discretion of executors
- Insufficient funds
- In-specie tax consequences
- Life interest and right to occupy (complexity)

# Will – specific gifts

# Will – Personal Property\*

Separately deal with common household items so that they do not need to be divided equally between multiple people. These assets are also directed towards individuals rather than other entities (such as testamentary trusts)

**Will – everything else**

# Will – testamentary trust

- How many?
- Primary beneficiary?
- Beneficiaries – default is bloodline for the primary beneficiary
- Trustee?
  - Executor or someone else?
- Appointor?
  - Executor or someone else?
  - Suggest align Trustee and Appointor initially?
- Special rules (if memo of directions not enough)?
- Standard terms otherwise provided to allow for flexibility of future tax planning

# Enduring power of attorney

- Applicable while living
- Allows people to make financial and personal/health decision on your behalf
- Doesn't deal with serious health issues – advance health directive
- Allows you to provide comments about your personal views and wants that your attorney needs to consider
- Otherwise, our practice is to allow your attorney the maximum flexibility required to make decisions on your behalf on the basis your attorney is required to notify and provide updates to certain people
- We will provide EPA explanatory guide with some takeaway information today for you

# Enduring power of attorney

- Regarding financial decisions – your attorney can do any financial transaction you can do (bank account, home, investments). Duties exist, however, specific power can be given to financial attorney:
  - Allowing them to enter into conflict transactions
  - Allowing them to make gifts on your behalf
  - Allowing them to update your superannuation nominations
- Regarding personal/health decisions – your attorney can choose where you live and what you do
- Our practice is to require your attorney to notify people before commencing the exercise of their power. Further, they must notify certain people on the following basis:
  - For financial matters – provide 2 updates a year and retain significant records of their dealings on your behalf\* (we also allow your attorney to charge professional fees given this onus to account formally)
  - For personal matters – if they are changing the people you can interact, where you live or if you are undertaking a procedure that would ordinarily require consent forms to be signed

# Enduring power of attorney

- Attorney duties:
  - Must apply general and health care principals prescribed under law (in short, requires your attorney to respect your rights)
  - Must act honestly and with reasonable diligence in your best interest
  - Must consult with any other attorney appointed at the same time and ensure your interest is not negatively affected
  - Must not inappropriately disclose confidential information
  - Must invest in 'authorised investments', being investments that a prudent person would enter into or an investment approved by a tribunal
  - Must keep accurate records and accounts of all dealings and transactions
  - Must keep their property separate from your property
- We provide some flexibility by allowing your attorney to make conflict transactions, however, those transactions must be made having taken the above duties into consideration



# Enduring power of attorney – who?

- Someone you trust
- Someone able to follow the duties as required and account accordingly
- Breaching the attorney duties could result in criminal liability, paying compensation and accounting for profits
- Can appoint multiple people at one time
- Consider if jointly (maximum 4 can act jointly), severally, by majority or some other combination (for example, 2 out of 4)

# Enduring power of attorney – who?

# Advice in relation to other assets

- Superannuation
- Joint assets
- Trusts
- Companies
- Broader entity advice – financial statements, governing document review and entity power of attorney
- Business/partnership assets
- Overseas assets
- Estate challenge strategies

Recommendations documented via a 'to-do' list

# When to update your arrangements

- Change of name
- Mentioned person(s) dying or suffering a disability
- Changes in relationship status to anyone named in your estate planning documents
- Changes to your personal circumstances with certain people (i.e. being estranged with people)
- Wanting a mutual Will
- If you would like changes to the structure or gifts under your Will
- Buying property jointly with others and not understanding what happens to the property on your passing
- Establishing new structures where you do not know how control passes

# Next steps

- Draft documents
- To-do list prepared
- Second meeting to explain documents, answer queries or make additional changes
- Second meeting can walk through documents, as documents may be very detailed
- If you read documents and no changes required to documents, then please let us know in advance and we can arrange for documents to be signed during the second meeting
- Note further items in To-do list may still need to be actioned

# Contact details

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