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LAWYERS

Five common misconceptions about Estate Planning

An estate plan involves more than signing a Will and leaving it in a safe place. An effective Estate Plan requires consideration of several matters and ongoing review of them to ensure it reflects your testamentary wishes and covers unexpected events.

My Estate Plan is contained by my Will

Having a Will is a great start to planning your estate however a Will alone does not:

- Deal with your death benefits that become payable on your death such as the proceeds of your superannuation account and any life policies;
- Appoint a trusted person to look after your financial and property affairs when you are away or if you are incapacitated;
- Appoint a guardian to make health and lifestyle choices on your behalf if you are incapacitated, taking into consideration your morals and values;
- Maximise the value of your estate through effective tax planning to improve the net outcome for your beneficiaries;
- Minimize uncertainty and expense for your family by reducing the likelihood of a family provision claim by a disgruntled family member;
- Provide for business succession planning or if required the winding up of a business.

There are a number of legal documents which together can form part of your overall Estate Plan and provide cover for unforeseen events that could result in that you could no longer manage your affairs. These include appointing an attorney under a Power of Attorney and a guardian under an Enduring Guardian document.

Only the rich need an Estate Plan

Theis certainly not the case. No matter what your financial status is, an estate plan enables you to appoint a trusted person to administer your assets when you pass, ensure your hard-earned assets are left to beneficiaries chosen by you and not others, maximise the gifts and benefits your leave to your loved ones through appropriate taxation strategies, and prepare for unexpected crises (illness and incapacitation) by appointing somebody you trust to deal with your affairs when you cannot.

Your Estate Plan needs to consider who matters, what you have now, what you may have in years to come, and what your final wishes will be. You need to give substantial consideration about the people you would like to benefit from your estate and how you can maximise the value of your assets for your beneficiaries.

Jointly owned property can be left to whomever your wish

Incorrect! Property owned jointly with others does not form part of your estate. The rights of survivorship means that upon the death of an owner of a jointly held asset that asset automatically vests in the surviving owner/s and any contrary intention expressed in a Will is void.

Considering the impact of the right of survivorship is very important when estate planning particularly as jointly held assets such as real estate or substantial bank accounts can often comprise the bulk of the estate's value. For spouses and de facto partners, this may be ideal as many would simply wish the surviving partner to benefit. However, there are many situations where joint ownership is not appropriate such as property held with certain other family members, non-family members or other entities, or property that remains jointly held after divorce or separation.

As part of your estate planning, you should be reviewing how all your assets owned with others (real estate, bank accounts, investments) are held and if necessary, sever the joint tenancies so that your share of these assets can be separately held by you and left to whomever you wish.

Superannuation forms part of my estate

Superannuation does not automatically form part of your estate assets for distribution under your Will. Death benefits, comprising the superannuation account balance and any life insurance payments, are usually paid to a dependent' determined by the super fund trustee, or in accordance with a Binding Death Benefit Nomination (BDBN) if one has been made by the deceased fund member.

In most cases, fund members can nominate their intended beneficiaries by completing a BDBN. Without a valid BDBN, the beneficiaries are usually paid to a dependent decided by the super fund trustee or otherwise, to the estate. This may not reflect the deceased member's intentions.

Fund members should also consider the way death benefits are taxed in the hands of the nominated beneficiary. Usually, a spouse or partner will be considered a tax-dependent under taxation law and accordingly, receive death benefits tax free. However, whilst adult children can receive death benefits under the relevant superannuation laws, they are usually not 'tax-dependents' according to taxation laws and will need to pay tax on certain components of the benefits paid. Accordingly, reviewing your superannuation to determine whether you have in place a valid and updated BDBN is also an important step in estate planning.

My current Will was prepared to cover all future circumstances

This is not necessarily always the case. While many Wills are generally drafted to provide flexibility with respect to the nature and value of assets held, and to provide for future generations (unborn children) and substitute executors and beneficiaries you should still review your Will regularly and *always* when your personal and financial circumstances change significantly.

Be careful of specially-named assets. A gift in your Will of a specific asset of considerable value which is disposed of during your lifetime will fail and may cause an unintentionally unequal distribution amongst beneficiaries. It will more than likely create a degree of angst in the "deprived beneficiary" and potentially lead to a claim being made by them against the estate.

Updating your Will to include a testamentary discretionary trust can provide flexibility in distributing your assets and protects your estate from unintentional distributions to estranged partners or creditors of insolvent or bankrupt

beneficiaries. A testamentary trust also helps to protect vulnerable beneficiaries such as those with a disability and those who may have developed drug, alcohol or gambling problems since your last Will was made.

Flagging to review your Will each year, for example when your annual tax return is prepared, makes good sense. In many cases, no changes will likely be needed but it's good practice to make this a regular habit. If you separate, divorce, your executor dies or your financial or personal circumstances change significantly you need to seek legal advice immediately to see how these changes impact your existing Will and, where necessary, have a new Will prepared and signed.

Effective estate planning takes time and careful consideration however doing so can ensure that your testamentary wishes can be fully implemented. If you or someone you know would like further information about any of the above matters or wish to discuss estate planning or making or reviewing a Will, please contact Lisa Delalis or John Bateman of our office 02 4731 5899 or email willsestates@batemanbattersby.com.au.