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Additional Information Flyers

Estate Planning

Strategic Wealth Pty Ltd
Level 2, 15 Queen Street
Melbourne Victoria 3000
T 03 8610 1777 **F** 03 9620 7838
E advice@strategicwealth.melbourne
W strategicwealth.melbourne

Wills

Having a valid Will in place gives you peace of mind knowing that your wishes will be followed in relation to your financial and personal matters in the event of your death.

Benefits

- Your estate can be administered faster and with fewer complications because your intentions will be known.
- Your assets are more likely to pass to your intended beneficiaries.
- There is reduced potential for family disputes.
- You have opportunity to manage tax implications and reduce costs for beneficiaries.
- You will have opportunity to nominate a suitable guardian for your young children.

How it works

A Will is a legal document that sets out how you want your assets to be distributed when you die. You must be over 18 and have mental capacity to be able to make a Will.

Some important items that you need to consider when drafting your Will include:

- who should benefit from the estate
- whether special bequests of assets are to be made to specific beneficiaries
- who the executor of your estate should be – this can be more than one person and they should be willing and able to accept the role
- instructions for your burial or cremation.

You may also wish to consider whether to leave assets to your beneficiaries directly or through a testamentary trust or life interest, or if a Guardianship clause needs to be included.

- **Testamentary Trust** – this trust is particularly useful if you have beneficiaries who are young, or who have a disability, or face the potential for a divorce or other litigation, or have problems with the control of money. Your assets will pass into the trust where they can be protected if necessary and may also receive favourable tax treatment in some cases.

- **Life Interest** – a Life Interest can be used if you want to give someone the right to use an asset during their lifetime but have another beneficiary take ownership of the asset. A life interest is commonly used to enable a surviving spouse to continue living in a home with the ownership of the home passing to the children.

- **Guardianship** – if you have young or disabled children, your Will can include the nomination of your preferred guardian for those children. Your guardianship nomination is a declaration of your intentions only and can be overruled by a court if the person you nominate is not in the best interest of the child.

Estate and non-estate assets

Assets that are dealt with through your Will are called 'estate' assets. Examples of assets that are estate assets and which can therefore be covered by your Will include:

- assets held in your own name
- your share of assets that you hold tenants-in-common with another person
- superannuation and life insurance policies in some situations.

Assets that are not dealt with under your Will are called 'non-estate' assets. These assets pass directly to your beneficiary. Any provision in your Will relating to a non-estate asset will be invalid. Your non-estate assets include:

- assets that you own as joint-tenants with another person
- superannuation accounts if the trustee of the fund pays the balance directly to a beneficiary (under a binding nomination or trustee discretion)
- life insurance policies where there is a valid beneficiary.

Challenging a Will

Your Will may be challenged after your death in certain situations. Examples of these situations include:

- the Will was not your last Will, or it is not completed correctly
- you did not have mental capacity at the time you signed the Will
- you were forced or pressured into making the Will
- a person you had a responsibility to provide for believes you didn't leave them a fair share of your assets.

Family provision legislation exists to ensure that certain people are provided for after a person's death. The list of people who can challenge a Will on these grounds can vary across the States but will usually include your spouse, former spouse, children and step-children. It can also extend to other family members or individuals.

Having your Will drafted by a solicitor can reduce the chances of your Will being challenged.

Consequences

- Once in place, you should review your Will every few years or when your circumstances change.
- If you die without a valid Will, you will have died 'intestate' and the distribution of your assets in is determined by State/Territory legislation.
- The tax and Centrelink implications of leaving assets to certain beneficiaries should be considered.
- Even though superannuation and life insurance is often not an estate asset it is important to include provisions for the distribution of these amounts in case they do end up in your estate.
- It is important to ensure that your executor and/or family know where to find a copy of your latest Will and other important documents.

Date: 1 April 2018

Powers of Attorney

A Power of Attorney can give you peace of mind knowing that your affairs can continue to be taken care of in the event that you are incapacitated and no longer able to make your own decisions or take actions.

Benefits

- Your Attorney will be able to deal with your assets as required under certain situations. This can enable payment of your expenses, including medical and ongoing bills.
- Your affairs may be conducted in a manner similar to how you would conduct them by someone you trust.
- The potential for family disputes may be minimised and your affairs can be kept in order.

How it works

A Power of Attorney is a legal document giving your nominated Attorney the right to act on your behalf in certain events. You are only able to sign a Power of Attorney whilst you have mental capacity.

Powers of Attorney are very important documents. If you become incapacitated without a Power of Attorney, a person from the Guardianship Board may be appointed to make your decisions, and this person may not be aware of how you like your affairs to be managed. It can cause stress for your family or friends if they are unable to access your funds to cover expenses, such as medical and other ongoing bills.

There are a variety of Powers of Attorney available. The ones that are appropriate for you will depend on your circumstances and what decisions you think are important in the event that you lose capacity to make those decisions yourself. The broad concepts are discussed below, but the types of documents you can choose from may depend on the state in which you live, as rules and available options can vary.

- **General Power of Attorney** – allows the Attorney to make financial or legal decisions on your behalf whilst you retain mental capacity. These decisions may include signing legal documents, selling property or doing banking. This power is often used for a specified period of time (such as while you are holidaying overseas). Actions can be limited to certain assets (such as a particular bank account) or broad powers can be granted to enable the Attorney to deal with all financial and legal affairs.

- **Enduring Power of Attorney** – allows the Attorney to make financial or legal decisions on your behalf, even if you become mentally incapacitated. It is important to think ahead and have this power in place in case it is needed.

- **Medical Power of Attorney** – allows the Attorney to make medical decisions on your behalf (such as agreeing to or refusing surgery) in the event that you become incapable of making those decisions.

- **Enduring Power of Guardianship** – allows the Attorney to make day-to-day lifestyle decisions on your behalf in the event that you cannot make these decisions yourself. Lifestyle decisions may include deciding where you will live or health care issues.

When choosing your Attorney, you can appoint a trusted friend or family member solely, jointly, or in conjunction with a solicitor or professional trustee company. The person you choose must be comfortable with taking on this responsibility and you should consider any family conflicts. To help relieve this burden, it

can be a good idea to explain your wishes with your Attorney in advance or ask the Attorney to consult other people when making decisions.

Revoking a Power of Attorney

A Power of Attorney can be revoked at any time by simply tearing up the document. However, it is preferable to put the revocation in writing so it is clear to the Attorney that their power has ended. A copy of the revocation letter should also be sent to all relevant organisations (such as banks, etc).

In the event of your death, all Powers of Attorney automatically cease and the executor of your Will takes over responsibility.

Consequences

- You should review your Power of Attorney regularly to ensure it continues to be appropriate for your circumstances.
- It is best to seek legal advice and have the Attorney documents drawn up by a solicitor.
- Legislation relating to Powers of Attorney varies between Australian States and Territories. If you move interstate it is important to review any existing Powers of Attorney and they may need to be redrafted.
- A Power of Attorney can only be signed whilst you have legal capacity so planning ahead is important. In some cases this may need to be verified by a doctor or solicitor. You can cancel or change your Power of Attorney at any time whilst you continue to have legal capacity.

Date: 1 April 2018

Advance Care Directive

An Advance Care Directive can give you peace of mind knowing that those caring for you will know what your wishes for medical treatment and care if you are no longer able to make or express your own wishes. You may also be able to name someone to speak on your behalf.

Benefits

- It provides a clear decision-making framework when trying to establish care decisions.
- Allows you to document your preferences/instructions for your health care, end-of-life, living arrangements and/or personal matters, should your decision making ability be impaired.
- Allows you to appoint decision makers to make these decisions on your behalf, if you are not in a position to make decisions yourself.
- Your affairs may be conducted in a manner similar to how you would conduct them.

How it works

An Advance Care Directive is a legal document detailing your wishes, preferences, and instructions for your living arrangements, personal matters, future health care, and end-of life decisions should your decision-making ability be impaired. The document may also allow you to appoint a decision maker to act on your behalf should you not be in a position to make decisions for yourself.

This document does not cover financial or lifestyle decisions so it is important to have an advanced care directive in conjunction with your Will and Enduring Powers of Attorney and Guardianship.

When choosing your substitute decision-maker, you can appoint a trusted friend or family member solely, jointly, or in conjunction with a solicitor or professional trustee company. The person you choose must be comfortable taking on this responsibility. To help relieve this burden, it can be a good idea to explain any wishes you have with your chosen person and your family in advance.

You can revoke or change the directive by making a new Advance Care Directive.

Consequences

- You should review your Advance Care Directive regularly to ensure it continues to be appropriate for your circumstances.
- Legislation relating to Advance Care Directives/Powers of Attorney varies between Australian States and Territories. You should seek legal advice to have the power correctly drafted for the relevant state legislation.
- An Advance Care Directive can only be signed whilst you are competent to do so. You can enforce a new Advance Care Directive at any time (thereby revoking any existing Advance Care Directive) whilst you are competent to do so.
- This Advance Care Directive is not a Will. It also cannot be used to make financial or legal decisions. It is recommended you think about appointing an Enduring Power of Attorney and an Enduring Power of Guardian to make decisions about your future finances and legal matters.

Date: 1 April 2018

Superannuation death benefits

Nominating a beneficiary to receive your superannuation benefits upon your death gives you peace of mind knowing that the funds will be paid according to your wishes.

Benefits

- Upon your death, your superannuation can be paid faster and with fewer complications than if it has to go through your estate or wait for trustees of the fund to make a decision.
- Your superannuation is more likely to pass to your intended beneficiary.
- Family conflicts may be avoided.

How it works

The trustee of a superannuation fund has the discretion to decide who should receive the balance of your account upon your death. However, it can only be paid to someone who meets the definition of 'superannuation dependent' or to your estate. A superannuation dependent is defined as:

- your current spouse (legal or de-facto, including same-sex)
- your child (including step-children and adopted children)
- someone who was financially dependent on you at the time of your death
- someone who was in an interdependency relationship with you at the time of your death.

To provide more estate planning certainty, you may be able to make a nomination on your account to bind the trustee to follow your wishes or to give the trustee more guidance. The limitations on who can be a beneficiary remain the same.

Your beneficiary will receive the benefit as a lump sum but if they are a tax dependent (see definition below) they may be able to choose to take a pension instead. If a pension is paid to a child under age 25 it must cease when that child reaches age 25, unless they meet the disability requirements. The resulting lump sum is tax-free.

If your benefit is paid to your estate, it will be dealt with according to the terms of your Will.

Beneficiary nominations

There are a variety of nomination options which can be used so that your superannuation bypasses your estate and is paid directly to your nominated beneficiary. This can give you more confidence that the right person will receive your benefit.

- **Binding nomination** – this nomination is binding on the trustee of your superannuation fund providing it is valid at the date of your death. To be valid, the nomination must be in writing, signed by you and witnessed by someone over the age of 18 who is not a beneficiary. Most binding nominations only last for three years, however it is a good idea to review your nomination regularly (preferably annually) to ensure the nomination continues to be appropriate. If your superannuation is in a self-managed fund, the requirements to be a valid binding nomination will depend on the trust deed requirements. A binding nomination only binds the trustee as to who will receive the benefit; it may not bind the trustee as to whether the benefit should be paid as a lump sum or pension.

- **Non-binding nomination** – a non-binding nomination means that the trustee of your super fund will consider your nomination but retains discretion to override it. The trustee will attempt to identify all potential beneficiaries and make their own decision about who is the most appropriate beneficiary. This can take time to decide and to follow the correct processes.

- **Reversionary nomination** – this type of nomination is only available for superannuation pensions. The trustee will be bound to continue paying the pension to your nominated beneficiary after your death. Your beneficiary may have flexibility to stop the pension and convert it into a lump sum if desired, depending on the pension type. You can only nominate a reversionary when you start a pension and may not to stop and restart the pension to make changes.

Taxation of death benefits

The tax payable on a superannuation death benefit depends on whether or not the beneficiary meets the definition of 'tax-dependent' and whether the benefit is paid as a lump sum or pension. The tax on a pension paid from an untaxed (unfunded) superannuation scheme is higher than if paid from a taxed (funded) scheme.

The definition of a tax-dependent is slightly different to superannuation dependent, with a tax-dependent being:

- a spouse of the deceased (current or former spouse, including legal, de-facto or same-sex)
- a child of the deceased who is under age 18 or under age 25 and still dependent (including step-children and adopted children)
- someone who was financially dependent on you at the time of your death
- someone who was in an interdependency relationship with you at the time of your death.

A non-tax dependent will pay a higher rate of tax and can only receive the death benefit as a lump sum.

If your life insurance is held inside your superannuation account the claim proceeds will be paid into your account and will also form part of your superannuation death benefit. This can result in an untaxed element being created. The untaxed element attracts a higher rate of tax on lump sums paid to a non-tax dependent.

Tax rates on death benefits paid as a lump sum		
Tax component	**Paid to a dependent**	**Paid to a non-tax dependent**
Tax-free	Nil	Nil
Taxable (element taxed)	Nil	15%*
Taxable (element untaxed)	Nil	30%*

** Medicare and other levies may also apply*

Tax rates on death benefits paid as a pension		
Tax component	**Either deceased or beneficiary are age 60 or over**	**Both deceased and beneficiary are under age 60**
Tax-free	Nil	Nil
Taxable (from funded scheme)	Nil	Marginal rate less 15% offset*^
Taxable (from unfunded scheme)	Marginal rate* less 10% offset	Marginal rate*^

** Medicare and other levies may also apply.*
^ Once the beneficiary turns age 60, a pension from a funded scheme is tax-free while a 10% tax offset applies to a pension from an unfunded scheme.

Death benefit pension cap

From 1 July 2017, death benefit pensions will be capped at $1.6 million. Where the death benefit itself exceeds (or causes) the beneficiary to exceed their pension cap, part of the benefit will need to be cashed

out of superannuation. Where potential death benefits are large, not all of the benefit may be able to be taken as a tax effective income stream.

A death benefit pension cannot be commuted back to an accumulation superannuation account and can never be combined with the beneficiary's own superannuation balance.

Consequences

- Not all superannuation funds offer the opportunity to make a binding death benefit nomination. You should check with your superannuation fund.
- If trustee discretion applies and disputes arise in relation to who is to be a beneficiary it can take a long period of time to resolve the dispute as the Superannuation Complaints Tribunal may need to mediate or decide.
- The validity of a binding nomination is only verified after the member's death. It is important to seek advice to ensure it is correctly completed and effective.
- You or your spouse may exceed your transfer balance cap.
- In certain circumstances, a binding nomination can be overruled by a court order. This risk can be minimised if your binding nomination is considered in conjunction with your Will.

Date: 1 April 2018

Testamentary trusts

A testamentary trust is established within a Will to allow an inheritance to be paid to a group of people rather than to one person directly. Someone is nominated as trustee to manage the trust and the group of people who can be potential beneficiaries is also nominated.

This separation of control and benefits may provide taxation advantages as well as protect assets from legal action involving a beneficiary and/or from being misused by a beneficiary.

Benefits

- Assets may be protected for beneficiaries who are unable to manage their own finances, such as a disabled child or a spendthrift beneficiary.
- Assets may be protected for beneficiaries who are at risk of bankruptcy or divorce.
- Income and capital can be distributed to beneficiaries in a tax effective manner, particularly if you have young children in your family.

How it works

A testamentary trust is a trust created by your Will, so it does not come into effect until after your death. The Will can direct that all or some of your estate assets are transferred into the trust.

The trust is usually structured as a discretionary trust which gives the trustee full discretion about distributions to beneficiaries.

You can choose anyone to be trustee, including the executors of your Will, your spouse or partner, or your children. The trustee has effective control of the trust, so you should nominate a person who you know and trust will act in the best interests of the beneficiaries. You can nominate more than one person and specify whether they can act alone or if decisions must be made together.

Some things to consider when establishing a testamentary trust include:

- whether to establish one or more testamentary trusts (each trust can have a different trustee)
- who should be trustee
- the method of appointing replacement trustees
- whether to limit beneficiaries to your descendants only or also include their spouses
- whether some beneficiaries should be restricted to benefiting from income and others to capital.

For full flexibility you may wish to give the executor of your Will the discretion not to set up the trust with the consent of the beneficiary based on circumstances at the time.

Because the assets of the trust are not owned personally by the beneficiaries it may provide some asset protection to the beneficiaries from actions by creditors, ex-spouses or litigation.

Tax advantages

The primary purpose of a testamentary trust is to manage estate assets to produce income for beneficiaries however a testamentary trust can also provide tax benefits.

The trustee generally has discretion to control the distribution of capital and income to beneficiaries. The decision can take into account a beneficiary's tax rate at the time to make distributions in a tax-effective manner.

Where income is distributed from a testamentary trust to children under age 18, it will be taxed at adult tax rates instead of the penalty tax rates that often apply to a child's income.

Centrelink implications

It is important to consider the impact of a testamentary trust on any person involved with the trust if that person is also receiving (or expects to receive) an income support payment from Centrelink or Veterans' Affairs (DVA).

If you nominate a Centrelink recipient as appointer, trustee or beneficiary of your testamentary trust, all of the trust assets and income will generally be assessed to that person. This may impact their entitlements. As such you may wish to consider excluding these people from any involvement with the trust.

Consequences

- You should consider the cost of administering a testamentary trust, particularly if a professional is appointed trustee as there will be a cost for this service.
- The capital gains tax exemption that applies to a family home does not apply if a home is owned by a trust.
- You should review your Will on a regular basis to ensure it continues to reflect your wishes and changes to your situation are incorporated.

Date: 1 April 2018