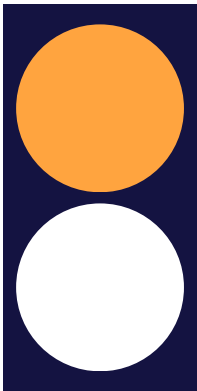


# A GUIDE TO ESTATE PLANNING

DECEMBER, 2023



**Ezra Legal.**  
we're here to help

## Estate Planning

Getting to grips with wills and estates.



It is important to seek professional advice before making any decision relating to your personal assets and finances. Information within this Guide is based on our current understanding and can be subject to change without notice and the accuracy and completeness of the information cannot be guaranteed. We're here to help guide you through the process and offer valuable insights to help you make informed decisions. Please note, this guide does not provide individual tailored estate planning advice and is for guidance only.



# What is Estate Planning?

For most of us, death is not something we like to talk about. And as a result, too many South Australians die each year without a will or die with an out-of-date will that doesn't reflect their wishes.

*Empower your loved ones, even after you're gone.*

*Estate planning may seem daunting, but it's one of the smartest and kindest things you can do to protect your family's future. Our guide provides essential information to help you make informed decisions about your estate plan.*

**Secure your financial future.**

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## Key estate planning considerations

An effective estate plan should:

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| 1. Give you certainty as to how your assets will be managed if you are incapacitated and unable to look after your own affairs. | 4. Protect your assets so that they pass to the right beneficiaries at the right time.  | 7. Protect your beneficiaries' inheritance in the event of divorce or bankruptcy.   |
| 2. Establish how and when it's best to distribute assets to your loved ones.  | 5. Allow your beneficiaries to legally reduce capital gains liabilities on assets and reduce or eliminate tax on income generated from their inheritance. | 8. Guard against undue waste and extravagance due to spendthrift tendencies, age, mental health, drug addictions, gambling or other vulnerabilities of a beneficiary. |
| 3. Cater for the current and future needs of your beneficiaries.  | 6. Allow you to minimise or avoid death benefits tax (which can be as high as 32 per cent) when distributing your superannuation benefits.                | 9. Distribute your assets to your intended beneficiaries, not to an in-law or former spouse, for example.   |

# What are Estate Assets?

When you're planning your estate, it's important to know the difference between estate and non-estate assets. Estate planning is a critical step in making sure all your assets pass according to your wishes. Let us help guide you through the process.



## Estate Assets

Assets that will pass in accordance with your will. They are those assets held in your personal name or as tenants in common with another person.

Generally, estate assets include:

- Personal property, such as a car or jewellery, of which you are the sole owner;
- Financial assets, like a bank account or shares that you own solely;
- Life insurance policies, but only if your estate is the nominated beneficiary;
- Certain other interests, like partnerships or fixed trusts; and
- Real property owned either solely or as a tenant in common with someone else.

## Non-Estate Assets

Assets that you might exercise a degree of control over during your lifetime, but will not (or may not) pass in accordance with your will. These include:

- Assets held as joint tenants.
- Superannuation; and
- Assets in a family trust.

*Many of these situations require special attention.*

For many people superannuation now constitutes a considerable portion of their wealth. This asset passes by means of a binding death benefit nomination, but these must generally be renewed on a regular basis.

Entrepreneurs who own a business either as a sole proprietor or in a partnership must also be mindful of the need for careful succession planning. Separate and apart from the issue of how ownership of the business would be transferred on a principal's death, it may be



important to make a plan to keep the business operating and producing income during the pendency of probate.

### ***Family and other trusts***

*These are often another important source of financial security, the details of which may be poorly understood by beneficiaries, especially several generations out.*

## **Planning Your Will**



Without a will, you might make it harder for friends and family to put your affairs in order after you die. By making a will, you get to choose what happens to your property and assets - and you protect the people you love from stressful negotiations and unnecessary legal fees.

A will is a legal document that clearly sets out your wishes for the care of your loved ones and distribution of your property and personal assets after your death.

### ***Intestacy***

*If a person dies without having made a proper or valid will, that person dies “Intestate” and the Laws of Intestacy apply. The consequences may include:*

The deceased person's wishes about how he or she wants the estate to be distributed will not be known, nor will those wishes be carried out;

There is no “Executor” appointed to carry out the deceased's wishes. It is necessary for (usually the next of kin) to apply to the Court for “Letters of Administration” instead of applying for “Probate”, which may be more complex and more expensive;

The Law dictates what happens to the Testator's Estate and how it is to be distributed. This is usually different from the Testator's wishes, which will only be carried out under the terms of a valid will;

In the absence of an Executor appointed by the Testator, the Administrator must report to the Public Trustee as to his or her Administration of the deceased's Estate, which adds a layer of expense to the process of finalising an Estate.

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| Appointment of Executors | An executor is the name we give to the person (or people) named in your will to administer your estate. Their role is to represent you after your death and to sort out the estate according to your wishes. Their main responsibilities include making the funeral arrangements, obtaining a grant of probate, identifying your assets, paying any debts, sorting out any disputes and/or tax matters, then distributing the estate to the beneficiaries. |
| Contents of your will    | <p>Some wills are straightforward to prepare; others are complex. Either way, you should get advice on the matters to be addressed in your will, including the appointment of executors, and distribution of assets to beneficiaries and the proper execution of your will.</p> <p>You may also need advice about possible inheritance claims, tax and superannuation considerations, and family trusts.</p>   |
| Supporting Documents     | <p>Making or updating a will is the ideal time to consider whether you need a</p> <ul style="list-style-type: none"><li>• Power of Attorney (for others to deal with your property, legal and financial affairs);</li><li>• Enduring Power of Attorney (which operates if and when you don't have the capacity to make decisions).;</li><li>• Advance Care Directives</li></ul>  |

# Updating your will

Changes in circumstances could make your will invalid. For instance, getting married will automatically revoke a will if it was not considered at the time of making it.

Other common changes in circumstance that should prompt you to review your will include:

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| You have had children, or more children since writing your will. | You have established a self-managed super fund.                        | You have started a company or changed your investments.          |
| Your financial situation has changed.                            | You have married, formed a serious partnership, separated or divorced. | You have reconsidered how you would like your assets divided up. |
| You have arranged life insurance.                                |  |  |

# Revoking your will

You can destroy your will but before you do, you will need to make a new will which includes a “revocation” clause to remove any uncertainty regarding your intentions.

# Storing your will

You should keep your will in a safe place and tell your executors where it is kept. If your will is lost or accidentally destroyed and cannot be found after your death, then it might be presumed to have been destroyed by you with the intention of revoking it.



You can keep your will in our safe custody facilities free of charge or alternatively, you can keep your will in your own safe.

We also recommend adding the details of your will to the Law Society of SA wills Register. The wills Register is a secure electronic database holding the location and date of wills held by South Australian legal practitioners or law firms.

The wills Register makes it easier for families to find a deceased person’s will, avoiding unintended and expensive consequences because the law assumes a missing or lost will has been destroyed by the testator.

# Protecting your will from challenge

Most estate applications must be made within six months of probate or letters of administration being granted, which means time is of the essence in relation to estate disputes.

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| <b>Estate disputes</b>      | <p>The aim of estate planning is to save families from getting into estate disputes by supporting them to have the right conversations and make sound plans early on.</p> <p>However, sometimes disputes between executors, beneficiaries and other parties can't be avoided.</p> <p>Most estate applications must be made within six months of probate or letters of administration being granted, which means time is of the essence in relation to estate disputes. If you feel like something isn't right, please seek legal advice as soon as possible.</p>  |
| <b>Invalid wills</b>        | <p>An application can be made to rectify the will if you think there is something wrong with it. Common concerns about wills include:</p> <ul style="list-style-type: none"><li>• The will does not accurately reflect the wishes of the deceased.</li><li>• The will is not the last will made by the deceased.</li><li>• The will has been revoked.</li><li>• The will was not signed by the deceased.</li><li>• The deceased did not understand the contents of the will.</li><li>• The deceased did not have the requisite mental capacity needed to make a will; or</li><li>• The deceased made the will under undue influence or suspicious circumstances.</li></ul> <p>These matters can be the subject of what is known as a "Probate Action" where the Applicant applies to the Supreme Court for orders declaring the will to be invalid and/or other orders.</p> |
| <b>Inadequate provision</b> | <p>If a family member or dependent feels they have been left out of (or not adequately taken care of) by the deceased's estate, they may be able to make a claim to the Supreme Court of South Australia for a larger share.</p>  |

# Trusts and Estate Planning

Challenges that are out of your control can arise when you pass on an inheritance. These may include having a beneficiary who is a minor, a spendthrift or who is otherwise incapacitated. Your beneficiary may also have a former spouse who seeks to make a claim on their inheritance. Fortunately, there are structures that can be used to protect and preserve your beneficiary’s inheritance, whatever the issue.

The main structure used to protect and preserve your wealth when planning your estate is a ‘testamentary trust’. This is created by a will and can be effective in providing a greater level of control over the distribution of assets to beneficiaries in two key ways:

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| <b>Protecting assets from waste and extravagance by beneficiaries.</b>   | <b>Reducing tax paid by your beneficiaries from income earned from their inheritance.</b>   |
| Beneficiary’s inheritance can be protected from excessive waste by giving the inheritance through a protective testamentary trust. This means the inheritance is totally controlled and managed by someone else – the trustee. | Testamentary trusts are also used to minimise tax. For example, if a beneficiary takes their inheritance in their personal name, they will pay tax on the income generated from their inheritance at their personal marginal tax rate. However, there may be significant tax advantages in taking an inheritance through a testamentary trust, particularly where the beneficiary has: <ul style="list-style-type: none"><li>• a high personal marginal tax rate</li><li>• a partner on a lower income</li><li>• children or grandchildren with no, or lower, taxable income.</li></ul> |
| This is a particularly popular structure for those with very young beneficiaries or beneficiaries who may not be deemed responsible enough to manage their own inheritance.  | To minimise the amount of tax paid, income generated from the inheritance can be split and streamed to beneficiaries of the trust who have a lower marginal tax rate.   |
|  | Income distributed from a discretionary testamentary trust to any minor beneficiaries, such as children or grandchildren, has further potential for significant tax savings. This allows the beneficiary to distribute income more tax-effectively.   |



# Taxation and Estate Planning

It's true that actual death duties have been abolished, but that doesn't mean that your beneficiaries won't have to pay taxes on your estate. For example, if your heir takes your inheritance in his or her personal name, then income generated from the inheritance will be taxed at your heir's personal marginal tax rate.

## *Reducing tax using income splitting*

*There may be significant tax advantages in taking an inheritance through a testamentary trust, particularly where the beneficiary has:*

- a high personal marginal tax rate;
- a partner on a lower income;
- minor children and grandchildren; and/or
- a tax free threshold
- children or grandchildren with no, or lower, taxable income.

The trust could be used to facilitate 'income splitting', minimising tax by ensuring that the heir 'splits' off their inheritance to lesser-earning relatives who pay less (or no) tax.

# Taxation, super and estate planning

There are also tax implications because not everyone is entitled to receive superannuation death benefits tax-free. For example, if your children are older than 18 and financially independent, they will only receive their share after the applicable taxes have been deducted.

Someone can only receive your superannuation death benefit tax-free if they are:

- Your spouse or de facto.
- Your ex-spouse or ex de facto.
- Your child aged under 18 years of age.
- Any other person with whom you have a close interdependent relationship.

# Other considerations

If you have a family business, your tax implications will be different than taxes for a non-business owner.

Capital losses and family debts can also affect taxes substantially.

*By finding the right legal and financial structures, you'll be able to reduce your taxes and create an effective estate plan*

# Superannuation and death

**Many people don't realise their superannuation entitlements form an important part of the estate planning process.**

For many of us, our superannuation is one of our biggest assets, so it's important that any death benefit goes to the people you want it to go to. So, it's important to understand the terms of your fund's trust deed and any current and valid death benefit nomination you may have put in place.

Depending on your super fund, you can usually make decisions about your superannuation death benefit rather than leaving it up to the trustee of the superfund to do it for you.



A death benefit nomination is how you formally advise the superannuation fund of your wishes for distributing your super after you have died. You can nominate one or more of your dependents to receive your superannuation death benefit, or you can nominate your legal representative to distribute the benefit as part of your estate.

Completing a binding death benefit nomination means the superannuation fund must distribute the benefits exactly as per your wishes and has no discretion to vary or override them.

It's important to know some superannuation funds don't allow you to make binding death benefit nominations, which means the trustee of the superannuation fund gets to distribute any benefits as they consider appropriate in the circumstances. We can help you check whether this is the case for your super and consider potentially switching super funds if it's not in line with your plans for your estate.

An appointed Enduring Power of Attorney can also act on your behalf in relation to superannuation if the rules of your super fund allow it. We can make changes to your superannuation entitlements or make a death benefit nomination on your behalf in the event that you cannot do so for yourself due to mental incapacity.

You may even decide to create a superannuation proceeds trust, which is a special type of testamentary trust.

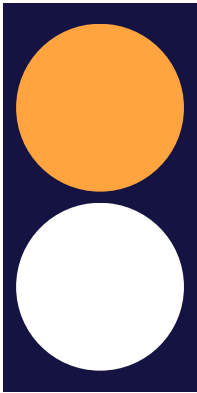
# Lifetime planning

An effective estate plan should give you certainty as to how your assets will be managed if you are incapacitated and unable to look after your own affairs, and ensure your wishes are carried out as you had planned.

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| <b>Powers of Attorney</b>                      | Appointing a Power of Attorney gives someone else the right to make decisions about your financial and legal affairs on your behalf. The person appointing a Power of Attorney is called the 'Principal' and the person appointed by the principal is the 'Attorney'  |
| <b>General Powers of Attorney</b>              | Someone appointed by you for a specified time and ceases if you become incapacitated.   |
| <b>Enduring Powers of Attorney</b>             | Someone appointed by you to make financial or legal decisions on your behalf if, in the future, you lose the capacity to make decisions.  |
| <b>Advance Care Directives</b>                 | An ACD sets out your wishes for your potential health care, medical treatment, living arrangements and other personal needs should you be unable to make those decisions for yourself.  |
| <b>Binding Financial Agreements (BFA)</b>      | <p>A BFA is a private contract between two people that formalises how a couple's property, assets, superannuation and liabilities will be divided in the event of a relationship breakdown. There are some circumstances where a BFA could be highly beneficial in the context of estate planning:</p> <ul style="list-style-type: none"><li>● 'Second Timers' – when a couple start a new relationship and one or both bring assets to the relationship.</li><li>● When parents are preparing to retire and intend to hand over the family business to a child and their partner.</li><li>● Family loans/gifts – where parents have provided financial assistance to their child and their partner for a deposit on a house.</li></ul> |
| <b>Business succession and estate planning</b> | Estate planning can ensure that a family-run business and the assets within that business are transferred to the intended people at the appropriate time. It involves a complete consideration of assets and liabilities, ownership structures and insurances and the of use estate planning tools such as buy/sell agreements, trust structures and wills to resolve complications and ensure that clarity and unity exist for the client and their successors with regard to business succession.   |
| <b>Life insurance</b>                          | Life insurance proceeds need to be dealt with upon death. Life insurance may be held either inside or outside superannuation and it is important to specifically set out how life insurance proceeds are to be paid to beneficiaries.   |
| <b>Arranging your funeral</b>                  | <p>The legal personal representative, whether this be an executor appointed under a Will or an administrator of an estate, is responsible for making the necessary funeral arrangements.</p> <p>The funeral wishes of the deceased as stated in a Will are not legally binding, meaning the legal personal representative is not legally bound to follow them. The wishes may very well be able to be carried out, however factors such as the cost and practicality to carry out the wishes will play a role in determining what ultimately takes place.</p>   |

# HOW CAN EZRA LEGAL HELP?

DECEMBER, 2023



Our team of estate planning lawyers have years of experience in the area of estate planning, but also in probate matters and litigation involving contested wills. This means that they know what to look out for when preparing your will to help avoid unnecessary stress and expense for your loved ones.

They will help you develop a long-term strategy that reduces stress on your family, removes the need for disputes in the future and provides you with certainty and peace of mind.

**We will help you to:**

|  |   |  |
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| Create a clear, legally binding estate plan - including:           | Make any changes over time  | Make sure your wishes are followed in the event of your death                    |
| <ul style="list-style-type: none"><li>Wills</li></ul>              | <ul style="list-style-type: none"><li>Storing your will safely and securely</li></ul> | <ul style="list-style-type: none"><li>Advance Care Directives</li></ul>          |
| <ul style="list-style-type: none"><li>Powers of Attorney</li></ul> | <ul style="list-style-type: none"><li>Superannuation nominations</li></ul>            | <ul style="list-style-type: none"><li>Appropriate funeral arrangements</li></ul> |

*If you have been thinking about planning your future, you're in the right place.*

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| <b>Experience</b>  | <b>Expertise</b>  |
| Since 2005 Ezra Legal has been providing advice on all areas of estate planning    | We have over 50 years combined experience in the area of estate planning                  |
| <b>Reliability</b>   | <b>Trust</b>  |
| We'll help you weigh-up your options by giving you straight-up, no-nonsense advice | We are honest and reliable, going the extra mile to ensure our clients are 100% satisfied |

**Contact Ezra Legal for an initial discussion:**

T: (08) 8232 6100

E: [reception@ezralegal.com.au](mailto:reception@ezralegal.com.au)

*"The way Ezra Legal assisted Mum and Dad to organise their assets in the best interests of themselves and their sons showed real foresight and gave me and my brother peace of mind when, sadly, their health deteriorated. So-much-so that I had no hesitation in engaging Michael Fabbro and his estate planning team when it came to getting my own affairs in order."*

*Jonathan, eldest son of Edward and Jenny*