

# WHAT IS ESTATE PLANNING?



---

Endeavour House  
Suite 205, Ground Floor  
3 - 5 Stapleton Avenue  
Sutherland NSW 2232

PO Box 48  
Jannali NSW 2226

[www.mckilloplegal.com.au](http://www.mckilloplegal.com.au)

Tel (02) 9521 2455  
Fax (02) 9521 2411

ABN 36 142 541 060

Liability limited by a scheme approved under Professional Standards Legislation and by our Terms of Engagement.  
The directors and employed solicitors of McKillop Legal Pty Ltd ABN 36 142 541 060 are members of the scheme.

## WHAT IS ESTATE PLANNING?

Estate planning is more than just having a Will.

There are ways to implement your estate planning to ensure that the wealth that you have worked hard to accrue during your lifetime is transferred to your beneficiaries on your death in a tax-effective manner and in a way that can also provide them with a measure of asset protection.

There are also other documents that you need to consider putting in place that govern decision making for you in situations where you may not be able to make those decisions, such as illness or in your absence.

Any entities and structures you may have, such as companies and trusts need also be dealt with as part of your personal estate plan and business succession planning as well as your superannuation.

Everyone's estate plan is different and it is important that the documents that are drafted to effect your estate plan are customised to your individual needs and tailored to maximise the benefits your beneficiaries can receive.

Take control of your estate planning and have a discussion with us about your estate planning today. It is far too important to ensure your wishes are adhered to to leave these important decisions up to others.

## WHAT DOCUMENTS FORM PART OF AN ESTATE PLAN?

There are at least 3 documents you should consider as part of your *personal* estate planning, in addition to such things as your superannuation and personal insurances:

- A Will (or a Will with Testamentary Trusts);
- A Power of Attorney; and
- Appointing an Enduring Guardian.

## WILL

A Will is a legal document that details who will take care of your assets and distribute them on your death in accordance with your stated wishes.

Consider these important issues:

- Who you would want to control your estate if you died?
- What would happen to your estate if you didn't have a Will?
- Who would look after your children until they are adults?
- That life insurance proceeds and superannuation benefits are likely not to form part of your estate on your death
- What would happen to your business if you died?
- Who would control your family trust if you died?
- How your family could best receive any inheritance from your estate having regard to such things as
  - their estate planning,
  - asset protection measures, and
  - tax minimisation?

If your Will does not consider the above issues adequately or at all, then your intended beneficiaries could be receiving far less from their inheritance than you might hope and paying more tax than is necessary every year after you die.

If you pass away without having a valid Will in place (dying intestate), then your estate will be divided up without regard to your wishes at all.

We explain more about Wills in more detail below.

### **WILL WITH TESTAMENTARY TRUSTS**

Wills with Testamentary Trusts are a special type of Will and they can save your family thousands in tax each and every year through income splitting opportunities and also provide a level of asset protection to benefit future generations.

We explain more about Wills with Testamentary Trusts below.

### **POWER OF ATTORNEY**

Who would make decisions about your finances or assets if you were unable to (such as if you are in a coma, are unconscious or suffer from mental incapacity such as dementia?). You can appoint an attorney to be able to manage your affairs. If you do not, the NSW Civil & Administrative Tribunal (NCAT) can appoint a person that you do not know to control your assets and make decisions for you.

We explain more about Powers of Attorney below.

### **APPOINTING AN ENDURING GUARDIAN**

Who would make decisions regarding your medical and dental treatment and where you live if you are permanently or temporarily incapable of doing so? If you don't nominate somebody as your enduring guardian, then NCAT can appoint a person to make those decisions, which can include what medical treatment you get or if life support is not maintained.

We explain more about Appointments of Enduring Guardians below.

## **WILLS**

### **WHAT IS WILL?**

A Will is a legal document that outlines how you wish to have your assets distributed on your death. To make a Will, you must be over 18, have proper mental capacity and sign a document in the presence of 2 independent witnesses.

If you pass away without having a valid Will in place (called 'dying intestate') then the provisions of the *Succession Act 2006* (NSW) will apply and your estate will be divided up without regard to your wishes.

### **EXECUTORS**

An executor is the person you appoint by Will to deal with your estate on your death and to ensure that your wishes are carried out. Often, people appoint 2 executors or provide for an alternate executor so that if one person is not willing (for example, due to age or infirmity) or able (for example, if they are dead or incapacitated) to act, then the other/alternate executor can act.

### **WHAT CAN A WILL INCLUDE?**

Any asset that you own can be dealt with in your Will, whether bank accounts, motor vehicles, boats, jewellery or any other item. Particular items can be left to particular people, the whole of your estate can be left to one person or to several people in various fractions or percentages and conditions of gift can be imposed, such as paying out encumbrances such as mortgages.

Real property (houses and land) that is owned as 'joint tenants' (as is often the case for married couples) cannot be left by Will because when one joint owner dies, it automatically passes to the surviving owner. Where land is owned as tenants in common, it can be transmitted by Will.

Life insurance and superannuation benefits are not able to be dealt with by a Will where beneficiaries have been already nominated by policy owner. If the estate is nominated as beneficiary or no nomination has been made, the proceeds will usually be paid to the estate and distributed under the Will however, the trustee or the insurer may have discretion as to who to pay the benefit to. Your financial advisor would be able to advise you in relation to any nominations.

Often, certain wishes are expressed in Wills such as those relating to cremation or burial and directions regarding guardianship of infant children.

### **WHEN IS A NEW WILL REQUIRED?**

If you get married or if you get separated or divorced from your spouse or partner or if your family circumstances change (for example, through a birth or a death or if you have a significant change to your finances), you should make a new Will.

Your Will should be regularly reviewed (every few years at least) to ensure it still reflects your current wishes.

Consider whether your beneficiaries would benefit from having Wills with Testamentary Trusts as they can offer a level of asset protection from creditors and taxation advantages such as income splitting. This is particularly useful where your beneficiaries are in business and have asset protection measures in place, if they are 'at risk' or where you have income producing assets.

See the section on Testamentary Trusts below for further information.

## TESTAMENTARY TRUSTS

### WHAT IS A TESTAMENTARY TRUST?

A Testamentary Trust is simply a trust established by a person's Will. As opposed to more "simple" Wills, where beneficiaries receive the benefit of any gift *personally*, with a Testamentary Trust, the beneficiaries receive the benefit of the gift but rather than having it *legally* owned by them personally, a trustee holds the relevant asset *in trust* for them.

Wills incorporating Testamentary Trust are recommended by many lawyers, accountants and financial advisors for various reasons, including asset protection and taxation advantages.

### ASSET PROTECTION

Because of the *legal* ownership being different to the *beneficial* interest, Testamentary Trust can offer beneficiaries significant and important advantages such as asset protection. As the trustee of the Testamentary Trust owns the asset (not the beneficiary personally), creditors and trustees in bankruptcy of the relevant beneficiary cannot gain access to the asset.

Often, beneficiaries are in business for themselves and have implemented asset protection measures so as to keep their assets safe from claims by third parties. The last thing that beneficiary may want is to receive an inheritance in their personal name, effectively undoing all of their efforts to safeguard their assets.

Testamentary Trusts can be drafted so as to have the beneficiary effectively control the trust and for that control to be relinquished on the occurrence of certain events such as bankruptcy, or marital separation, with a nominated person to act in the role of trustee whilst that incapacity remains.

### TAXATION BENEFITS – INCOME SPLITTING

Rather than taking a gift in a personal capacity as would usually be the case with a "basic" Will, with a Will that incorporates Testamentary Trust, beneficiaries have the ability to split income earned among other people in their family such as spouses, children, grandchildren or any other company or trust in which they have an interest.

Where an estate has income producing assets such as an investment property, under a more "simple" Will, the person who received that gift would have the income earned from that asset added on top of the income they already receive from their employment or investments. This could mean that they go into the next marginal tax bracket and pay significantly more tax.

A Testamentary Trust allows the income earned to be split amongst the various family members, many of whom are likely to either not be working (so the tax free thresholds become available) or earn lower incomes (and are therefore in lower taxation brackets).

Children that receive income from a Testamentary Trust are taxed at marginal rates as if they are adults (as opposed to normal trusts, where they are taxed at unearned income penalty tax rates) so for a family with a non-working spouse and several children, significant income can be received whilst very little or no tax may be payable on the Testamentary Trust income.

We provide a simple example of how a Will with Testamentary Trusts (as opposed to a more simple Will) can help save tax in our case study below.

## **POWERS OF ATTORNEY**

### **GRANTING A POWER OF ATTORNEY**

The *Powers of Attorney Act 2003* (NSW) provides for a person to appoint another person (the “attorney”) to make financial and contractual decisions on their behalf. The document granting a power of attorney is a prescribed form under the Act.

A *general* power of attorney does not require a solicitor’s certificate but ceases to be of effect if you lose mental capacity (like where you are in a coma or suffer from dementia).

An *enduring* power of attorney on the other hand continues to be effective if you were to suffer such an incapacity. For this reason, an *enduring* power of attorney must be explained to you and witnessed by a lawyer. We usually recommend an *enduring* power of attorney so that if some event happened to you that affected your capacity, your attorney would still be able to assist you.

If you are suffering from any illness, have deteriorating health, are going overseas or interstate or just want peace of mind, appointing an attorney to manage your affairs is generally a good idea.

### **HOW DOES IT OPERATE?**

The nominated attorney has the ability to decide whether or not to accept that role by signing it.

You can choose when your power of attorney is to take effect. It can be restricted to only take effect if a registered medical practitioner certifies that you are of unsound mind, upon some other event (such as whilst you are overseas) or it can operate immediately (for convenience).

You can give the power of attorney for specific purpose (for example to assist with the sale or purchase of a specific property or to attend an auction and bid on your behalf), for a specified time (for example, between 2 dates) and you can give directions on how powers are to be exercised (such as not to bid above a certain level or to only sell for a certain reserve price).

An attorney may not use the principal’s monies or assets for gifts or benefits to the attorney or third parties unless this is specifically authorised in the document granting the power of attorney

### **ENDING AN APPOINTMENT**

Provided you remain of sound mind, you can revoke a power of attorney at any time by signing a form of revocation and notifying the attorney in writing of the revocation.

The New South Wales Civil & Administrative Tribunal can review or revoke a person’s appointment as a power of attorney and can make a financial management order appointing a new attorney (or attorneys) or by appointing a representative of the NSW Trustee & Guardian if it is considered that your attorney not making appropriate decisions on your behalf.

### **DO I HAVE TO REGISTER THE POWER OF ATTORNEY?**

A power of attorney must be registered at the Department of Lands if it is being used for dealing with land, such as selling, transferring, mortgaging property and the like.

## **APPOINTMENT OF ENDURING GUARDIANS**

### **HOW DO YOU APPOINT AN ENDURING GUARDIAN?**

You can choose who can make decisions on your behalf regarding your medical and dental treatment and decide where you live if you are not capable of doing this for yourself. These are known as “functions”. The easiest way to do this is to appoint an enduring guardian.

The appointment of an enduring guardian takes effect only if and when you become unable to make personal or lifestyle decisions for yourself, such as where you are in a coma, are unconscious or suffer from mental incapacity like dementia.

### **WHO CAN BE APPOINTED?**

An enduring guardian must be at least 18 years of age but cannot be a person who, at the time of the appointment, provides you with medical treatment, accommodation, support or care to you as a professional.

The appointed enduring guardian should be someone that you trust absolutely as they have significant powers. Although an enduring guardian must act in accordance with the provisions of the *Guardianship Act 1987* (NSW), you should be satisfied that the person you appoint will act in your best interests.

You can appoint more than one person to act as your enduring guardian – either jointly (together) or separately. You can also appoint alternative enduring guardians in case something happens to your first nominated enduring guardian. For example, people often appoint their spouse and have their children as their joint alternate enduring guardians.

### **WHAT DECISIONS CAN AN ENDURING GUARDIAN MAKE?**

You can give your enduring guardian the discretion to make all decisions for you when you are not able to make them for yourself or alternatively, you can limit your enduring guardian’s functions such as to consenting to certain procedures, limiting their discretion as to the type of nursing home or care facility you want to reside in or requiring specialist consultation or consultation with relatives regarding decisions about your care and treatment.

You cannot give your enduring guardian a function or direction which would require an unlawful act, such as assisted euthanasia. You can provide specific directions regarding turning off life support, ‘do not resuscitate’ orders, assisted ventilation, artificial nutrition and hydration etc.

### **ENDING ENDURING GUARDIANSHIP**

An enduring guardian’s appointment comes to an end when you die or if you revoke the appointment however, you can only revoke it provided you still have mental capacity.

The New South Wales Civil & Administrative Tribunal can review or revoke a person’s appointment as an enduring guardian and can make a guardianship order appointing a new guardian or appointing a representative of the NSW Trustee & Guardian if it is considered that your guardian not making appropriate decisions on your behalf.

## TESTAMENTARY TRUST CASE STUDY

How you document your estate planning wishes can make a massive difference to the finances of your family following your death.

Consider this not uncommon scenario:

- You and your partner have 2 minor children, both still at school.
- You are a professional, working full time on \$140,000 pa.
- Your partner works part time but also has a good income and is in the top tax bracket also.
- You own a \$1.5M home subject to a \$500,000 mortgage
- You own an investment property subject to mortgage, which is being met by the rental income it generates.
- You both have in place personal insurances, including life insurance of \$1,200,000 over both of your lives.
- You pass away and your estate and life insurance proceeds goes to your partner.

The following is an oversimplification of taxation arrangements and amounts and is not taxation or accounting advice – You should seek specific advice as to taxation matters from a registered tax agent noting that tax rates and thresholds can and do change over time.

### IF YOU HAVE A BASIC WILL ONLY

If you had a basic Will, gifting all of your assets to your partner, then your partner would be able to pay out the mortgage on the home and invest the \$700,000 balance of the life insurance proceeds.

Assuming, for the sake of this example only, that this money could generate say \$40,000 per annum, this additional income would be added to your partner's income from part time work and is taxed such that the ATO takes \$18,600 and your partner keeps only \$21,400. Accordingly, your partner could only retain just over half of the \$40,000 each year. There are ways to minimise the tax that is effectively thrown away.

### IF YOU HAD A WILL WITH TESTAMENTARY TRUSTS

If you had a Will with Testamentary Trusts, then the trustee has the ability to minimise the amount of tax that your family would lose. The \$40,000 received from investing the \$700,000 could be split amongst the 2 children so that each received \$20,000.

As children that are under 18 are taxed at marginal rates on income they receive from a testamentary trust, they do not pay any tax on this income and therefore, the full \$40,000 is kept and can be re-invested or spent and the family saves \$18,600 in unnecessary tax each and every year.

## **WHY McKILLOP LEGAL?**

McKillop Legal is a boutique, family owned and operated legal practice based in the Sutherland Shire.

We are expert in estate planning, business succession and commercial issues that impact on you, your family and your business interests.

When you deal with McKillop Legal, you deal directly with a principal - a trusted knowledgeable adviser who can work with you, your accountant, financial advisor and other experts to ensure the best possible outcome for you and your family.

Contact us for a no-obligation, confidential discussion about how we can assist you and your family with a proper estate plan.