

## Estate planning

Estate planning is important to ensure that a person's estate is passed on to their beneficiaries in the most financially efficient and tax-effective way possible.

Estate planning refers to the efficient and tax effective management of a person's estate that balances lifetime enjoyment of assets and income whilst preserving assets for family after death. It should be:

- 1 regularly reviewed
- 2 administratively simple to operate and
- 3 not too expensive to maintain.

The cornerstone of an effective estate plan is a Will.

### Wills

#### What is a Will?

A Will is a legal document that allows you to choose who receives your assets and belongings after you die. A Will can also be used to appoint a guardian to look after your children until they can look after themselves. The person responsible for administering your estate is called an executor.

#### Do you really need a Will?

If you die without a Will it may or may not cause problems for your family, depending upon what assets you have and the way you own them. If you own assets jointly (as joint tenants) they automatically pass to the other joint owner when you die, so you do not need a Will to dispose of them. However, assets held in your own name have to be transferred to someone else. If you want control over who gets them, you need to make a Will.

#### Probate

When you die, your executor may be required to obtain a grant of probate to take possession of the assets of the estate. An executor is given the right to administer the estate through the Will and the grant of probate is evidence of this right. The grant of probate provides the executor with the authority to collect the assets of the estate.

The decision to apply for a grant of probate usually follows a detailed consideration of the nature and value of the assets of the estate. Any institution or organisation holding assets of the

deceased can insist on sighting a grant of probate before allowing the executor to collect the assets.

#### Intestacy - dying without a Will

If you do not leave a Will, your assets go to your next of kin, according to rules outlined in government legislation. You have no control over who gets what, so the result may not be what you intended.

Dying without a Will means you do not get to name an executor, instead an administrator is appointed. Your next of kin have the right to apply to be the administrator. Your spouse has the first right to apply, followed by your children, parents, brothers and sisters.

If there is a Will but no executor, the estate will go to the beneficiaries named in the Will. The beneficiaries apply for Letters of Administration instead of Probate. Making a Will keeps everything simple and definite for your family.

### Power of Attorney

A Will takes care of your estate after your death but you should also ensure that your affairs continue to be looked after in the event that you are unable to do so. This can occur by way of a Power of Attorney.

An 'attorney' is an agent by law. Any person who is legally competent may appoint an attorney to act on their behalf in financial, business and property transactions. The person who appoints the attorney is called the principal and the authority that is given is called a Power of Attorney. Any action the attorney takes, within the authority given, is binding on the principal.

A Power of Attorney is a document signed by a principal appointing a person to be his or her attorney and states what the attorney is authorised to do. In stating what transactions are authorised, the power can be as specific or as general as the principal desires.

**Note: If the attorney is signing documents that affect real estate, the Power of Attorney must be registered with the Department of Lands.**

Once signed, the document is given to the attorney/agent who can use it to prove that he or she is authorised to act on the principal's behalf. The principal is still able to carry out any authorised transactions personally.

## Duration of Power of Attorney

An ordinary Power of Attorney continues only at the will of the principal who therefore remains at liberty to revoke it at any time. Its duration may also be limited by a time or by events specified by the principal in the document. For example, it may cover a specified period of years or a specified absence overseas.

By law, a Power of Attorney is revoked by death, or if the principal no longer has the intellectual capacity to give power to an agent, the Power of Attorney is terminated automatically. This is where an Enduring Power of Attorney comes into play.

## Enduring Power of Attorney

If at the time of giving the Power of Attorney, the principal would like it to continue regardless of the deterioration of his or her mental capacity, he or she signs an Enduring Power of Attorney. This can be done if:

- ▶ That intention is stated in the document
- ▶ A prescribed person witnesses the signature of the principal on the document - for example, a solicitor who is not the attorney appointed under the Power of Attorney and
- ▶ A certificate is attached to the document declaring that the prescribed person explained the effect of the document to the principal before it was signed.

The attorney can then hold Power of Attorney after mental incapacity prevents the principal from conducting his or her affairs. It must be remembered that, except by a special order of the Supreme Court, an Enduring Power of Attorney will have no legal effect if it is given after the onset of mental incapacity.

## Enduring Guardianship

People have been able to plan ahead and appoint a person under an Enduring Power of Attorney to make decisions about their money and property if they lose the capacity to do this for themselves. There has been, however, no similar way to appoint someone with legal authority to make personal or lifestyle decisions on your behalf.

Amendments to the Guardianship Act now provide a way to appoint an Enduring Guardian. You may appoint more than one guardian if you wish and specify which decisions your guardian is able to make for you.

## What is an Enduring Guardian?

An Enduring Guardian is someone you choose to make personal or lifestyle decisions on your behalf when you are not capable of doing this yourself. You choose which decisions you want your Enduring Guardian to make. These are called functions. You can

give your Enduring Guardian as many or as few directions on how to carry out these functions.

An Enduring Guardian cannot make a Will for you, vote on your behalf, consent to marriage, manage your finances or override your objections, if any, to medical treatment.

## Who can appoint an Enduring Guardian?

If you are over 18 years, you can appoint one or more people to be your guardian. When you appoint an Enduring Guardian, you must have the capacity to understand what you are doing.

## Who can be an Enduring Guardian?

The person appointed as an Enduring Guardian must be at least 18 years old. Your chosen guardian should be someone you trust to make decisions in your best interests if you are not capable of making decisions for yourself. Your guardian must act in your best interests, within the principles of the Guardianship Act and the law. You cannot give your guardian a function or a direction that would involve them in an unlawful act.

The appointed guardian cannot be a person providing treatment or care on a professional basis at the time of appointment. More than one person may be appointed whom you may direct to act jointly or separately.

## How to appoint an Enduring Guardian

You should discuss the appointment with your chosen guardian and make sure they are willing to take on this responsibility if you can no longer make decisions for yourself. It would be wise to discuss the functions in detail and ensure that your guardian clearly understands your wishes and any direction associated with any function.

## Testamentary Trust

A Testamentary Trust is a trust established by a Will for the management of assets of a deceased estate. As the trust is set up within a Will, it can only be activated on death.

## Need further information?

If you have any questions about the material covered in this fact sheet, please contact FuturePlus on **1300 883 788** between 9am and 5pm on any business day.

Any advice in this document is of a general nature only and is provided by FuturePlus Financial Services Pty Ltd (ABN 90 080 972 630), an Australian Financial Services Licensee (AFSL No 238445). It does not take into account your particular investment objectives, financial situation or needs. You should assess whether the information is appropriate to your individual investment objectives, financial situation and needs. Before making an investment decision you should seek the assistance of a professional investment adviser. In particular, you should obtain a Product Disclosure Statement for the relevant financial product and consider the Statement before making any decision in relation to the matters set out in this publication.