

Wills and Estate Planning

FULLY UPDATED 3RD EDITION

THE
ESSENTIAL
GUIDE FOR
AUSTRALIANS

Andrew Simpson

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About the author

Andrew Simpson is a Principal Lawyer at Andrew Simpson Legal. Andrew holds a Bachelor of Arts and a Master of Laws. He has been practising in the area of estate planning, estate administration and elder law for 25 years.

Andrew is the author of a chapter on estate planning and estate administration in the *Australian Master Financial Planning Guide*.

In 2004 Andrew was awarded a Churchill Fellowship and spent time in the United States, Canada and the United Kingdom examining international approaches to estate planning and other aspects of elder law.

In addition to advising clients on the creation and implementation of an estate plan, Andrew also enjoys conducting workshops and information seminars for community groups on estate planning. The questions and comments that have arisen during these sessions have informed much of the book's content

Andrew is married to Jane and has four children.

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To my folks, John and Judith, and my brothers, Philip and Luke, and to Lara and Amalia. I hope you enjoy the references to you and your respective clans throughout the case studies.

Preface

When it comes to estate planning, and particularly the preparation of a will, there are two common themes. Firstly, most people have been planning to make a will for a number of years, but for one reason or another, they have struggled to get themselves organised. In many cases the ultimate call to action is prompted by circumstances: an imminent overseas trip, the death of a close friend or relative or a personal health scare. This is not ideal. In these examples there is usually a time pressure or other emotional challenge that makes the process of will creation more difficult and confronting.

The second theme is that at the end of the estate planning process, most people say ‘It wasn’t as hard as I thought it would be. I should have done it sooner’. This is coupled with a sense of relief that the process is complete and can finally be ticked off the ‘to-do list’.

In the last 25 years, I have spoken to hundreds of groups of people about estate planning. It has been an enjoyable and fascinating exercise. What I have discovered during these sessions is that while most people know what a will is, the process for its preparation is a mystery to many. It is also clear that the term ‘estate planning’ is not well understood. There is not a lot of information available that explains the process in detail. Therefore, many questions remain unanswered. For example:

- Where do I start? Who do I talk to?
- Do I need a lawyer, and if so, where do I find one with the necessary expertise?
- What documents do I need to prepare?

- Is it going to cost me thousands of dollars? Can I do my own estate planning?
- How long will it take?
- What information do I need to provide?

The purpose of this book is to help answer these questions and enable you to face your estate planning with confidence. The book is intended to be practical. Wherever possible, information is explained by the use of case studies, most of which are based on real examples. There are also references to other resources to enable you to take your research further if you wish.

If you have already completed your estate planning, you are to be congratulated. However, remember that estate planning is something that requires review on a regular basis. This book may help you identify areas that you need to revisit.

The book is not written for professionals working in the field. It has been written specifically for Australians with little or no knowledge or technical expertise in the area of estate planning. For this reason, technical language has been kept to a minimum, and a glossary is provided to explain legal terms where they are used.

The scope of the book is intentionally broad. This is because estate planning has many aspects to it and each set of family circumstances is different. There may also be more than one potential solution to your estate-planning issues. That being said, estate planning is relevant to people of all ages regardless of how simple or complicated their financial or family arrangements might be.

The good news is that estate planning is usually straightforward and can be completed in a matter of days if need be. However, a word of caution: the body of relevant law is vast and complex, and the consequences of getting it wrong are significant. The ill feelings and arguments caused by an invalid or ambiguous will can be permanently damaging to family relationships and can also result in costly legal disputes.

This book is not intended as a substitute for legal advice; nor is it a ‘do it yourself’ guide. While it is comprehensive in its discussion, it does not attempt to deal with every possible estate-planning scenario. It is strongly recommended that you seek legal advice in implementing your estate plan.

One final word: if you have been contemplating your estate planning for a long time, remember the age-old proverb: ‘there is no time like the present.’

Andrew Simpson
Melbourne
February 2025

Part I

Understanding estate planning

Chapter 1

What is estate planning?

*Many people despise wealth,
but few know how to give it away.*

Francois de La Rochefoucauld

While most of us would prefer not to think about it, we all face a number of inescapable truths:

1. Whether we like it or not, all of us will die.
2. The timing of our death is unknown.
3. We can't take anything with us when we die!

We have a simple choice: do we plan for this inevitable event, or do we choose to ignore it and hope that everything will somehow work out?

Estate planning is the process of planning and recording your wishes for the distribution of your wealth after death. This definition appears straightforward. For this reason, it is often assumed that 'estate planning' refers only to the preparation of a will. In some cases, it is not this simple. There are aspects of estate planning that go beyond the will. For example, how are family trust assets to be dealt with? What happens to superannuation? How are jointly held assets treated?

In understanding estate planning, the term itself is helpful. It describes the two essential aspects:

1. ‘Estate’—indicates that the process is concerned with a period of time following your death. This aspect is guaranteed: we are all mortal.
2. ‘Planning’—refers to the need to organise your affairs during your lifetime. This aspect is not inevitable. It requires action.

Why is estate planning important?

Wealth creation and wealth preservation tend to be popular pastimes. Most of us aspire to financial security and do what we can to achieve it. The enormous growth in the financial-planning industry in the last 20 years confirms this. However, the distribution of wealth after death has not held the same fascination. This has changed in the last decade or so. The importance of planning the distribution and succession of wealth is now an essential part of personal and financial planning. There are a number of possible reasons for this:

- Overall wealth has increased. This is due partly to the significant increase in superannuation contributions since the introduction of the superannuation guarantee in 1992. It can also be explained by the real estate boom that has occurred in most states of Australia that has seen the median house price in the capital cities increase significantly.
- Australia’s social fabric has changed enormously. The traditional family structure is now no longer the norm. Data from the Australian Bureau of Statistics in June 2016 predicted that the number of couple families without children is projected to become the most common family type in Australia between 2023 and 2029. Statistics have also confirmed that in recent decades trends in divorce and remarriage have contributed to changing numbers of one-parent, step and blended families. As a result, more deliberate planning is required to deal with such diversity.
- The use of alternative investment structures such as trusts, companies and self-managed superannuation funds has increased. The Australian Taxation Office estimates that as at 30 June 2022

there were more than 600 000 self-managed superannuation funds in existence in Australia (an increase of 8% since 2017–18) with more than 1.1 million members.

- Australia's population is ageing. Figures provided by the Australian Bureau of Statistics suggest that 15 per cent of the Australian population is currently aged 65 and over. By 2030 this percentage is predicted to be more than 20 per cent. The number of Australians aged 85 and over is expected to quadruple between 1999 and 2051. The life expectancy of Australians is also increasing. This changing demographic has brought with it novel estate-planning issues that tend to be age specific, such as the consequences of a reverse mortgage and the implications of a move into aged care.

These and other related topics are discussed in part VI.

Features of estate planning

Thorough estate planning has a number of characteristics, outlined as follows.

Estate planning must be tailored

As every person and every family is different, an estate plan needs to be tailored to your specific circumstances. Your estate plan will not be the same as your neighbours'. The view that one plan suits all is a dangerous one. A detailed review of your circumstances will identify unique estate-planning issues that will need to be addressed. Examples of these issues may include:

- family members who require special treatment because of a disability, addiction or other health concern
- antiques, family heirlooms or collectables that need to be dealt with specifically
- business interests
- family circumstances, such as a second marriage or children from different relationships

- potential challenges to your will
- the existence of a self-managed superannuation fund or other trust structure.

Estate planning needs to be flexible

Your estate plan needs to be flexible enough to deal with a change to your circumstances and to the circumstances of your beneficiaries. Wherever possible, you should avoid locking future generations into arrangements that may become restrictive and unworkable. Examples of such arrangements include the creation of life interests, and binding directions requiring the indefinite retention of estate assets.

Case study

Constance leaves a will that directs that her family home is not to be sold until all her children have died. Her intention is to ensure that her children have a home to return to should they find themselves in financial difficulty or experience a relationship breakdown. At her death, none of her children want the house retained and would prefer it to be sold and the proceeds divided. The prospect of maintaining the property for the rest of their lives is not one that appeals to any of them.

Estate planning must be understood by you

It is important that you understand your estate plan, and that it can be understood by others, including your executor and family members who survive you. If you do not understand it, there is a very good chance that others will also have difficulty. Unnecessary complexity and ambiguity may serve to defeat your intentions. Remember, when your will is administered, you will not be present to explain what you intended; your intentions must be clear from the terms of the will. For example, if your will contains a specific gift of personal items such as jewellery or artwork, the description of the relevant item needs to be precise. For a further discussion of personal chattels, see chapter 6.

Estate planning must be reviewed regularly

Your estate plan should be regularly reviewed. Estate planning is not a discipline that relies on the ‘set and forget’ principle. A five-yearly review

at a minimum is recommended, however there may be circumstances that justify more regular reviews.

Following is a list of circumstances that would justify an estate-planning review and/or a meeting with your adviser to determine whether your estate plan requires amendment:

- marriage, separation or divorce
- entering into or ending a de-facto relationship
- having children (including adopted or foster children)
- the death of a proposed beneficiary
- other major events occurring in your family
- major events affecting your assets, including the disposal of an asset that is referred to in your will
- a change in the need to ensure a gift for spendthrift, intellectually disabled or bankrupt beneficiaries is protected under the will
- a proposed beneficiary qualifying for a means-tested social security pension
- a change to the extent to which your beneficiaries will benefit from other sources, such as jointly held assets, superannuation and life-insurance proceeds, and family trust distributions
- changes to the taxation laws
- the death, ageing or ill health of your proposed executor
- the establishment of a family trust or a new business venture
- the transfer of assets to a business or family trust
- the existence of trust income allocated to a beneficiary that has not been paid to or applied for the benefit of the beneficiary that may require adjustment. For a further explanation of this issue, see chapter 6
- the desire to implement a plan for business succession. Business succession agreements are discussed in chapter 18.

Estate planning is the result of collaboration between professional advisers

Where you have existing professional advisers, thorough estate planning relies on the collaboration and cooperation of all of these advisers. The process is illustrated in figure 1.1.

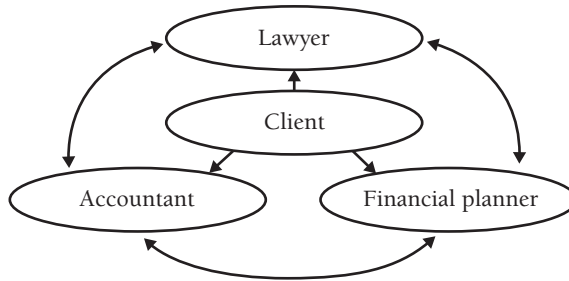


Figure 1.1: the relationship between clients and advisers

Each person shown in figure 1.1 has specific knowledge and skills that are drawn on during the estate-planning process. These are outlined as follows:

- The client understands his or her personal circumstances, beliefs, values and long-term goals and objectives.
- The financial planner has financial and investment expertise and understands the nature of the client's investment portfolio and risk profile.
- The accountant possesses knowledge of the client's business structures, such as trusts, companies and their self-managed superannuation fund (if applicable).
- The lawyer understands the documentation and the legal requirements necessary to give effect to the estate plan and has expertise in drafting legal documents.

Estate planning relies on thorough data collection

Your legal adviser's ability to advise you on your estate-planning needs depends almost entirely on the integrity of the data-collection process.

Your adviser must understand your personal, investment and business circumstances. This can be a time-consuming process, but it is unavoidable if your adviser is to properly advise you. The kind of information that your adviser should be made aware of includes:

- your financial circumstances, including a summary of your assets and liabilities
- the circumstances of your children and other potential beneficiaries, including marital status, occupation, business interests, disabilities or other factors that might affect their ability to manage money
- the existence of family trusts and companies and business interests
- the nature, extent and ownership of superannuation and life insurance cover
- the identity of people who are financially dependent on you.

Prior to your initial meeting with your legal adviser, you should prepare a personal profile document containing information such as:

- your personal details
- your marital status, including previous marriages (if applicable)
- the names, ages and correspondence details of all your children and their proposed guardians (if applicable)
- any special needs your beneficiaries may have that will affect their ability to manage an inheritance
- the executors you wish to nominate
- the existence of enduring power of attorney
- your business structure, including details of your superannuation and life insurance.

The provision of this information will ensure that your adviser is fully informed about your circumstances and will make the process more cost effective. It is also a good idea to give your legal adviser permission to discuss your financial and business affairs with your other advisers.

Chapter summary

Estate planning is not just the domain of the asset rich; it affects everybody, regardless of their circumstances. Hopefully, this introduction has assisted you in understanding some of the fundamental principles behind the process. You should now be ready to consider some of the specifics. The purpose of chapter 2 is to assist you in identifying what assets form part of your estate and what assets do not.

Chapter 2

Estate assets

Nemo dat quod non habet.

No-one gives what they do not have.

Understanding what assets you own is the necessary first step in the estate-planning process. Without this knowledge, you will be unable to make decisions about who gets what after your death. Many of us assume that by preparing a will, we will be able to give away all the assets that we own, control or have an interest in. For many of us this is not necessarily the case, and our ability to give away assets depends entirely on the nature of the asset and its precise ownership arrangements.

It is for this reason that your legal adviser will usually insist on reviewing copies of relevant documents such as trust deeds and titles, and will want to speak with your other advisers.

What forms part of the estate?

Following is an explanation of the assets that form part of your estate.

Estate assets

Generally, assets owned in your personal name form part of your estate, and can be disposed of by your will. These include:

- real estate
- personal chattels (including jewellery, antiques, furniture and clothing)

- shares, bonds and debentures
- cash investments
- loans made by you to the trustee of a trust
- income and capital allocated to you from a trust
- an interest in assets held with another person as tenants in common. The term ‘tenants in common’ is explained later in this chapter.

Non-estate assets

Assets that are controlled but not owned or wholly owned by you are referred to as ‘non-estate assets’. Non-estate assets cannot be disposed of by your will. They include:

- assets that are owned jointly with another person (usually described as ‘jointly held assets’)—most commonly, the family home
- the unallocated assets of a family trust
- superannuation, subject to member direction and trustee discretion
- life-insurance proceeds (depending on the ownership)
- account-based pensions or annuities that have a reversionary beneficiary
- business interests.

Case study

After years of procrastinating, Bert and Ethel have finally decided to attend to their estate planning. Their previous wills were made in 1971 when they were newlyweds. Circumstances are now very different. Their financial adviser has strongly suggested that it is time

to review and update their estate planning. Bert and Ethel have three adult children and three major assets:

1. their family home
2. an investment unit
3. a beach house on the coast.

After much thought and deliberation, Bert and Ethel decide to draft wills leaving one property to each of their children.

What Bert and Ethel have forgotten is that when they purchased the investment unit and the holiday house, their accountant advised them to purchase both properties in a family trust for asset-protection purposes. It is not until their lawyer makes contact with the accountant and undertakes a title search for each of the properties that she realises that the only piece of real estate owned by Bert and Ethel is the family home. This caused Bert and Ethel to rethink their plans. As they don't own the investment unit and the beach house, Bert and Ethel are unable to give them directly through the will.

Case study

Oliver is about to start a new business. As part of his preparations for the new venture, he creates a family trust and transfers substantial cash reserves from his own name to the trustee of his family trust. He prepares a short agreement documenting the transaction. The nature of this agreement has important asset-ownership consequences. For example:

- If the document is a loan agreement, the transferred funds remain part of Oliver's personal estate. The funds will be distributed as part of Oliver's estate.
- If the agreement is a deed of gift, the funds cease to be owned by Oliver. In this instance, the funds are not governed by the terms of Oliver's will. Like Bert and Ethel, Oliver will not be able to dispose of this particular asset through his will.

It is important to ensure that you fully understand your asset-ownership position. Do not rely solely on your memory—you must be precise about your ownership arrangements.

It is also important to provide copies of all relevant documents to your adviser for review and confirmation of asset ownership. This will ensure accurate advice and will make the process more cost effective. You should provide your adviser with the following documentation and information:

- copies of earlier wills
- trust deeds for trusts and superannuation funds
- trust balance sheets
- your last personal tax return
- superannuation death benefit nominations
- the constitution for private companies
- details of life-insurance cover and its ownership
- title searches for real-estate assets
- any other relevant documents, such as shareholder/ unitholder agreements and buy/sell agreements.

Joint tenants versus tenants in common

Co-ownership of a property is divided into two categories:

1. joint tenancy
2. tenancy in common.

Understanding the difference between the two is essential. The defining features of a joint tenancy are as follows:

- All joint tenants have an interest in the whole asset.
- The surviving joint tenant has a right of survivorship. Upon the death of one joint tenant, the remaining joint tenant (or tenants) continues to hold the total ownership of the property.