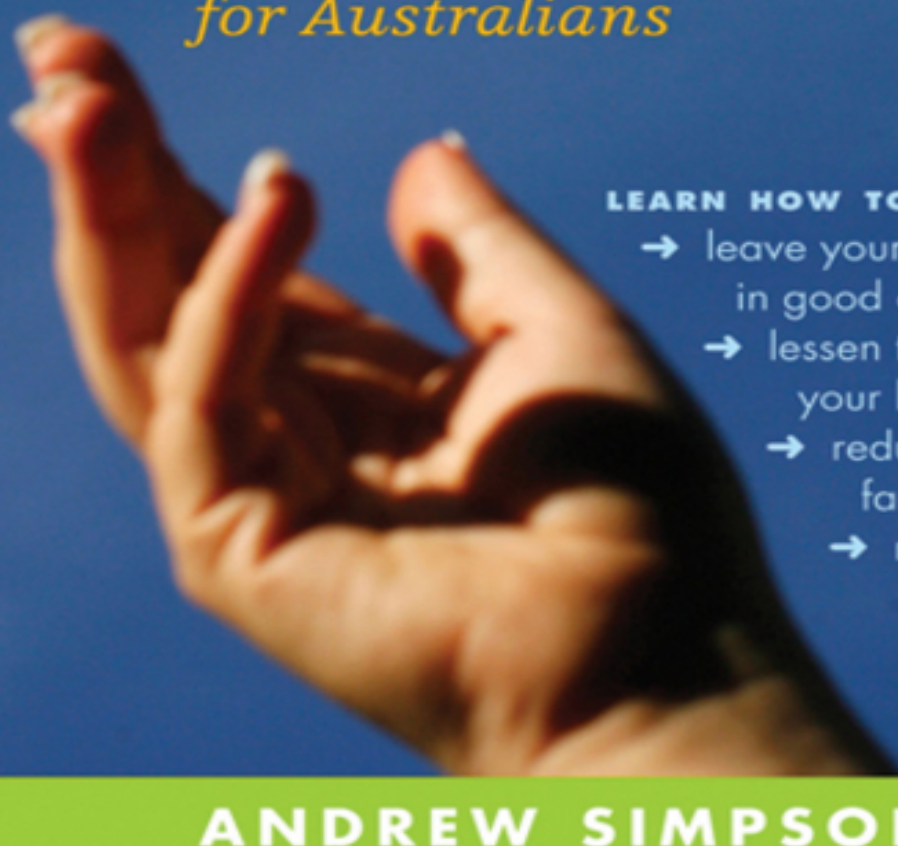




You can't take it with you

*Wills and Estate Planning
for Australians*



LEARN HOW TO:

- leave your affairs in good order
- lessen the burden on your beneficiaries
- reduce the risk of family arguments
- minimise taxes.

ANDREW SIMPSON

You Can't Take It With You: Wills And Estate Planning For Australians

Table of Contents

[Part I: Understanding estate planning](#)

[Chapter 1: What is estate planning?](#)

[Why is estate planning important?](#)

[Features of estate planning](#)

[Estate planning must be tailored](#)

[Estate planning needs to be flexible](#)

[Estate planning must be understood by you](#)

[Estate planning must be reviewed regularly.](#)

[Estate planning is the result of collaboration
between professional advisers](#)

[Estate planning relies on thorough data
collection](#)

[Chapter summary.](#)

[Chapter 2: Estate assets](#)

[What forms part of the estate?](#)

[Estate assets](#)

[Non-estate assets](#)

[Joint tenants versus tenants in common](#)

[Dealing with the succession of non-estate assets](#)

Chapter summary.

Chapter 3: Intestacy.

Common reasons for not preparing a will

How does intestacy occur?

Unwanted consequences of intestacy.

Intestacy rules are inflexible

Unintended distribution of personal chattels and heirlooms

Absence of appointed executor

Unintended recipient

Failure to deal with succession of non-estate assets

Unwanted tax consequences

Absence of protective safeguards

Chapter summary.

Part II: The will

Chapter 4: Planning your will

Personal circumstances

Circumstances of beneficiaries

The importance of flexibility.

Estate-planning objectives

Ownership of assets

Legal requirements for the preparation of a will

Formalities

Testamentary capacity.

Mental illness, delusions and testamentary capacity.

[Homemade wills](#)
[Chapter summary](#)

[Chapter 5: Appointment of executors](#)

[Duties of an executor](#)

[Locating the will](#)
[The funeral](#)
[Location of assets](#)
[Protecting the assets](#)
[Applying for probate](#)
[Payment of debts and liabilities](#)
[Defending the will against a challenge](#)
[Taxation](#)
[Distribution of the estate](#)
[Notifying relevant authorities](#)

[Appointing more than one executor](#)
[Appointing a professional executor and trustee](#)

[Costs of a professional executor](#)
[Attributes of an executor](#)

[Administration where there is no will](#)
[Death of an executor](#)
[Removing an executor](#)
[Chapter summary](#)

[Chapter 6: Contents of the will](#)

[Name and address of the will maker](#)
[Revocation of previous will](#)
[Appointment of executors and trustees](#)

[Payment of debts and testamentary expenses](#)
[Distribution of residue estate](#)

Powers of executors and trustees

Special requests

Who gets what

Gift of investment assets

Ademption

Encumbered assets

Capital gains tax consequences of specific gifts

Distribution of personal chattels

Appointment of guardians for minor children

Guardianship clauses

Timing of gifts

Disclaimer of an estate interest

Adjusting beneficiary entitlements

Trust allocations

Superannuation

Gifts and loans

Gifts to charity

Gifts to tax exempt organisations

Gifts to tax deductible organisations

Chapter summary

Chapter 7: Updating, revoking and storing your will

Will revocation

Revocation by subsequent will or codicil

Revocation by writing and declaration of intention

Revocation by destruction

[Missing will deemed to be revoked](#)
[Revocation by marriage](#)
[Revocation by divorce](#)

[Storing your will](#)
[Chapter summary](#)

[Chapter 8: Protecting your will from challenge](#)

[Challenge to your will for lack of provision](#)

[Grounds for ordering further provision](#)
[Disentitling conduct](#)

[Agreements not to challenge](#)
[Strategies for defeating a claim](#)
[Time limits for bringing a claim](#)
[Myths regarding claim for provision](#)
[Invalidity of a will](#)

[Undue influence](#)
[Fraud](#)

[Challenging validity](#)
[Chapter summary](#)

[Part III: Trusts and estate planning](#)

[Chapter 9: An introduction to trusts](#)

[Why use a trust?](#)
[Parties to a trust](#)

[Settlor](#)
[Trustee](#)
[Beneficiaries](#)
[Appointor](#)

Guardian
Unitholders

The trust deed
Construction of the deed
Other sources of powers of the trustee
Elements of the trust

Intention
Subject matter
Objects

Lifetime of a trust
Determining the vesting date
Amending a trust deed
Avoiding a resettlement
Chapter summary.

Chapter 10: Types of trusts

Discretionary trusts

Advantages of discretionary trusts
Disadvantages of discretionary trusts
Estate-planning implications of discretionary trusts
Succession of the trust's controlling roles
Review trust deed
Appointing a substitute appointor
Consent requirements
Loans and unpaid allocations

Unit trusts

Advantages of a unit trust
Disadvantages of a unit trust

[Hybrid trusts](#)

[Estate-planning implications of unit trusts and hybrid trusts](#)

[Succession](#)

[Loans and unpaid entitlements](#)

[Chapter summary](#)

[Chapter 11: Testamentary trusts](#)

[What is a testamentary trust?](#)

[Considering the use of a testamentary trust](#)

[Beneficiary-controlled testamentary trusts](#)

[Simple will versus beneficiary-controlled testamentary trust](#)

[Trust deed of discretionary will trust](#)

[Control of a discretionary will trust](#)

[Is the trust mandatory?](#)

[Definition of beneficiaries of beneficiary-controlled testamentary trusts](#)

[Lifespan of a beneficiary-controlled testamentary trust](#)

[Creation of multiple trusts](#)

[Succession of a beneficiary-controlled testamentary trust](#)

[Advantages of beneficiary-controlled testamentary trusts](#)

[Disadvantages of beneficiary-controlled testamentary trusts](#)

[Chapter summary](#)

[Chapter 12: Capital protected and protective trusts](#)

[Capital-protected trusts](#)

The 'spendthrift' beneficiary.

The blended family.

Mutual wills

Protective trusts

Disability and vulnerability.

Financial needs and funding

Terms of the trust

Control of the trust

The Centrelink treatment of all needs protective trusts

Special disability trusts

The exemptions

The parameters of a special disability trust

Reasonable care and accommodation needs

Surplus income of trust

Arm's-length and regulatory requirements

Estate-planning implications

Chapter summary.

Chapter 13: Proceeds trusts

Child support trusts

The tax benefit

Features of a child support trust

Estate proceeds trusts

The tax benefit

Features of an estate proceeds trust

Superannuation proceeds trusts

Determination by trustee of payment of superannuation benefits

Definition of beneficiaries

Distribution of income

Capital requirement

When to create a superannuation proceeds trust

Chapter summary.

Part IV: Taxation and superannuation

Chapter 14: Taxation and death

What is capital gains tax?

Calculating the cost base

Capital gains tax on the disposal of estate assets

Death before 20 September 1985

Death after 19 September 1985

Main residence exemption

Income tax

Income derived during the administration — who pays the tax?

Income derived after administration is complete — who pays the tax?

Chapter summary.

Chapter 15: Death and superannuation

Recipients of death benefits

Dependants

[Interdependency relationships](#)
[Determining financial dependency](#)
[Legal personal representative](#)
[Determining and locating dependants and the legal personal representative](#)

[The decision to pay death benefits](#)

[Trustee discretion](#)
[Death benefit nominations](#)

[Non-binding death benefit nominations](#)
[Binding death benefit nominations](#)

[Advantages](#)
[Disadvantages](#)

[The trust deed](#)
[Taxation of superannuation death benefits](#)

[Components of a superannuation benefit](#)
[Payments to death benefits dependants versus non-death benefits dependants](#)
[Lump sum death benefit](#)
[Income streams](#)
[Payment to legal personal representative](#)

[The relevance of your will](#)
[Death benefit challenges](#)

[Process for challenge](#)

[Future control of self-managed superannuation funds](#)
[Chapter summary](#)

[Part V: Lifetime planning](#)

Chapter 16: Powers of attorney.

What is a power of attorney?

Types of powers of attorney

Legal and financial decisions

Enduring vs general powers of attorney.

Joint or several authority.

Medical treatment decisions

Australian Capital Territory.

New South Wales

Northern Territory.

Queensland

South Australia

Tasmania

Victoria

Guardianship/lifestyle decisions

Legal requirements

Use of a power of attorney.

Supervision

Revocation

Jurisdictional questions

Witnessing requirements

Chapter summary.

Chapter 17: Cohabitation and financial agreements

Cohabitation agreements

Binding financial agreements

Chapter summary.

Chapter 18: Business succession and estate planning

Surviving business partners and shareholders
Forms of funded business succession agreements

Involuntary departure agreements
Voluntary departure agreements

Shareholder and unitholder agreements
Other issues to consider

Treating the children equally.

Ownership and disposal of your business
Taxation issues
Chapter summary.

Chapter 19: Life insurance

Why do I need life insurance?
Don't just insure the breadwinner
When should I consider life insurance?
Life insurance and business proprietors
Will my superannuation cover me?
How much life-insurance cover do I need?
Income protection — policy definitions
Chapter summary.

Chapter 20: Planning ahead — arranging your funeral

Record all personal details
Funeral expenses
Content of funeral service
Pre-arranging your funeral

Chapter summary.

Part VI: Estate planning and elder law

Chapter 21: Centrelink and estate planning

Qualification for age pension

Marital status

Income and assets tests

Ordinary income test

Assets test

Granny flat interests

How is a granny flat interest created?

Documenting a granny flat interest

Matters to be considered

Social security rules and granny flat interests

Value of assets

Chapter summary.

Chapter 22: Centrelink and the treatment of private trusts and companies

Treatment of private trusts and companies

Is the private trust or company considered an asset for Centrelink purposes?

Is the entity a designated private trust or company?

The control test

The source test

Is the pensioner an attributable stakeholder?

Definitions

[Determining the value of assets](#)
[Allowable liabilities](#)
[Surrender of control](#)
[Application of provisions to testamentary trusts](#)
[Estate-planning consequences](#)
[Chapter summary.](#)

[Chapter 23: Reverse mortgages](#)

[What is a reverse mortgage?](#)

[Absence of negative equity guarantee](#)
[Definition of 'default'](#)
[How much will you owe?](#)

[How will a reverse mortgage affect my
Centrelink entitlements?](#)

[Advantages of a reverse mortgage](#)
[Disadvantages of a reverse mortgage](#)
[Other alternatives](#)

[Downsize](#)
[Borrow from a family member](#)
[Disposal of other investment assets](#)

[Estate-planning implications](#)
[Chapter summary.](#)

[Chapter 24: Aged care](#)

[Transition into aged care](#)
[Am I eligible for aged care?](#)

[Aged Care Assessment Team assessment](#)

[Types of care available](#)

[Community aged care package](#)
[Extended aged care at home](#)
[Residential care](#)

[Fees and charges](#)

[Basic daily care fee](#)
[Income-tested fee](#)
[Accommodation charge](#)
[Extra service fees](#)

[Accommodation bonds](#)

[How much is the bond?](#)
[Is the family home included in asset assessment?](#)
[Accommodation bond payment options](#)
[Accommodation bonds and pension entitlements](#)
[Retention amounts](#)

[Gifting of assets prior to entering aged care](#)
[Estate-planning implications of aged care](#)
[Chapter summary](#)

[Chapter 25: It's up to you now](#)
[Appendix A: state-by-state intestacy provisions](#)
[Appendix B: step-by-step estate planning guide](#)

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Andrew Simpson



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Andrew Simpson is a principal with Moores Legal in Melbourne and is head of its estate planning, structuring and superannuation department. 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 15 years.

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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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Preface

When it comes to estate planning, and particularly the preparation of a will, there are a number of 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 15 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

December 2008

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. The Australian Bureau of Statistics concluded in *Australian Social Trends, 2003* that couple families with children are forming a smaller proportion of all families. These statistics 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 there are more than 360 000 self-managed

super funds in existence in Australia, with more than 690 000 members.

- Australia's population is ageing. Figures provided by the Australian Bureau of Statistics suggest that 12 per cent of the Australian population is currently aged 65 and over. By 2030 this will almost double to more than 22 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 following.

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
- 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 by figure 1.1:

Figure 1.1: the relationship between clients and advisers