

ADVISOR DAY 2021

BACK TO BASICS ESTATE PLANNING | WHAT YOU AND YOUR CLIENT NEED TO KNOW

Presenter:

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What we will cover

The basics – what is a Will EPOA ADH BDBN etc

The statutory rules and the importance of structuring

How to raise estate planning with your clients/employees and demonstrate its importance and to confirm your role as a trusted advisor

Finish with a war story or two if we have time

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The basics

- Who needs an Estate Plan?
- A flow chart

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Who needs an Estate Plan



The Estate Plan basics

- Will
 - Standard Personal Wills
 - Testamentary Trust Wills
- Enduring Powers of Attorney
- Advance Health Directives
- Superannuation - Binding Death Benefit Nomination (lapsing/non-lapsing)

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The more complex

Less common but no less important in certain circumstances

- Specific purpose Testamentary Trust Wills
- Superannuation - Binding Death Benefit Rules
- Advance Transfer Directives
- Inter vivos asset protection structuring and restructuring advice
- Equity Stripping
- Shareholders / Unitholders Agreements
- Deed of Access and Indemnity or other documents that effect your personal risk and so therefore your estate plan

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Wills

Standard Personal Wills

- Most common
- Basis is a one size fits all – which can suit uncomplicated circumstances

Testamentary Trust Wills

- Can be tailored and include directions for specific beneficiaries - Special Disability Trusts, capital controlled trusts

Very useful where beneficiaries require:

- Asset protection from creditors
- Assistance with the management of their affairs
- Protection from family law proceedings
- Ability to distribute monies to minors with better tax treatment
- Stream CGT losses or implications to specific beneficiaries (5 year averaging rule)

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Important considerations for Will preparation

- What are your assets?
- Have we dealt with all personal assets?
- Have we dealt with all business assets?
- Have we dealt with all structures such as trust or companies?
- Will they become estate assets?

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Enduring Power of Attorney

Document that appoints a person/s to make decisions for you if you are alive but no longer capable of making your own decisions.

Personal & Health matters

- Statutory Health Attorneys
- Office of the Public Guardian

Financial matters

- Next of Kin
- The Public Trustee of Queensland
- Financial Management Plan

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Advanced Health Directive

- A formal way of giving instructions for your future health care if you are unable to make your own decisions.
- You are able to give specific instructions about certain medical treatments. For instance, whether or not you want to receive life-sustaining measures to prolong your life.
- You can use it to outline your views about the quality of life that would be acceptable to you. For instance, you might decide to specify that you would like life-sustaining measures withheld or withdrawn in certain situations.

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Super and Binding Death Benefit Nominations

BDBN

- Can be used in Retail / Industry Funds and SMSF's
- Super is a trust – trustees have discretion as to how benefits are paid – limited but discretion exists
- Super benefits do not necessarily form part of the deceased members estate
- Not mandatory for the LPR of a deceased to be appointed as a trustee of the fund
- A BDBN can ensure super benefits are paid in a certain way
- To ensure validity ensure all trustees have notice

IF A SMSF

- Who should be trustee?

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Why should you have an Estate Plan?

Intestacy Rules
Estate Claims

Intestacy Rules

- No Will – where will your assets go?

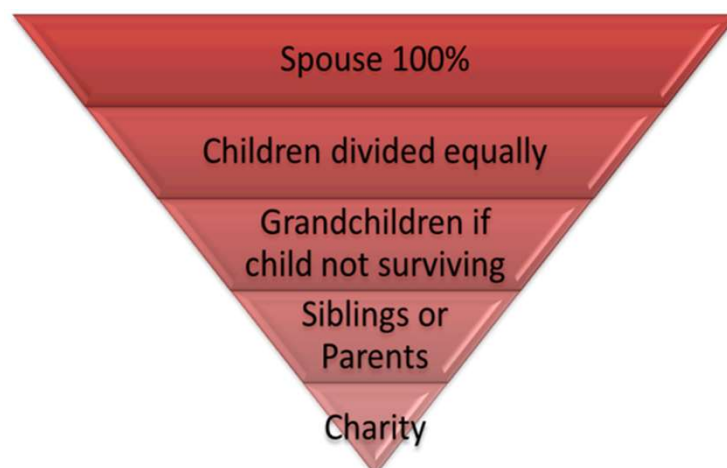
50% of people don't have a current valid Will

- Incorrect documents
- Divorce
- Marriage
- Change of circumstance

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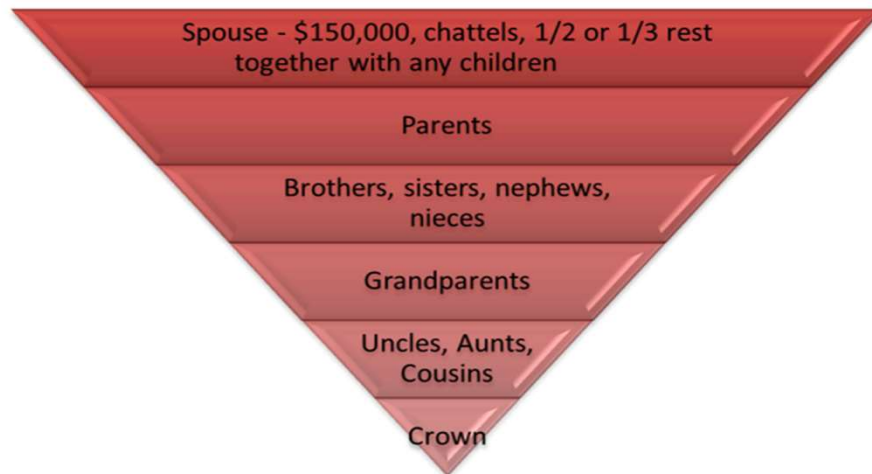
Common estate gifts



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Intestacy Rules



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Statutory rules, structuring and estate assets

Rule of Survivorship

- Joint tenancy v tenants in common

Trusts including Super

- Control

Companies

- Directorship
- Shares

Inter vivos transfers

- Duty
- Capital gain

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How to raise estate planning as a discussion point

- Make it part of your annual review
 - Particularly if you know of a change in circumstance
 - Business change – purchase or sale
 - Family change – marriage/divorce/death/children
 - Health changes
- Listen to comments that might not relate to compliance work
- For example were the following mentioned:
 - Business changes in either work opportunities or staffing or a dispute with a co-owner or even a promotion
 - Health concerns of them or their immediate family
 - Family disputes – or the neighbours family dispute
 - Retirement being a consideration
- If any of those circumstances arise or comments are made, raise with your client and investigate. Ask them to consider their views and feelings on what may happen to the results of their hard work if they don't have their estate plan right
- Offer to liaise with a lawyer so they don't have to have hard conversations on their own

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War stories



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Estate of Heath



- Heath Ledger died in 2008
- Estate estimated at \$20 mill
- Some in trusts
- His will left his estate 50% to 3 sisters and 50% to his parents
- His 3 year daughter Matilda was not included in the Will
- Heath's parents and sisters gifted everything to Matilda without a fight but things could have been very different if they had not agreed to do so. In those circumstances Matilda's mother would have had to bring an application for further provision to ensure her daughter received a share.

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Estate of Jones

- George Jones died on 18 July 2002 aged 76 years.
- He was survived by his wife Kathleen and seven of his eight children and 17 grandchildren.
- The terms of the Will appeared to be reasonably straight forward and importantly his son Laurence was provided for.
- The first litigation in the estate ran from 2003 until 2012. It was an application for further provision brought by Laurence.
- In 2019 an application to the Supreme Court for orders in his estate, 17 years after George's death with the executor as the applicant and 20 respondents being Kathleen, 5 of George's children including Laurence and 14 of his grandchildren.

LESSONS

- Regardless of what you leave a child under your Will, you cannot remove their right to commence application for further provision. Laurence despite receiving a significant asset via the Will still held up the estate for 9 years while it tried to deal with his litigation.
- Which leads to the importance of succession planning. A significant amount of cost and disruption could have been avoided if George had structured his assets differently or passed some of his assets (in particular the land) when he retired from active farming.

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Surprise bonus tale

Doddridge v Badenach [2001] TASSC 34 (8 July 2011)

While this case actually became much better known in legal circles because of the follow on case *Badenach v Calvert* [2016] HCA 18 which decided whether or not the solicitor and his firm were negligent in failing to advise the testator of the possibility of a Family Provision claim and of options available to reduce or extinguish the estate so as to avoid the claim.

The reason I raise this case now is on the facts:

The testator by his will left his whole estate to the son of his deceased de facto partner. The testator's daughter, estranged from him since 1973, brought a successful Family Provision claim. **After 38 years of no contact or relationship.**

The effect of the order substantially depleted the value of the estate and should make all advisors aware of the risk to an estate despite any length or time or lack of relationship.

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