

ESTATE PLANNING ASSET PROTECTION INSTRUCTION SHEET

Modern estate planning involves more than drafting Wills, but rather includes pre death structuring, superannuation considerations and in certain cases private company and discretionary family trusts. As such, estate planning should be treated as an important part of your family's financial plan, ensuring that those closest to you receive their share of your estate exactly as you intended and without any unforeseen costs and taxation bills.

In this letter, we will introduce you to the key issues you need to consider in estate planning including making and maintaining a Will as well as certain taxation considerations associated with passing on your assets. This letter should be read and considered together with the enclosed instruction forms.

Estate planning documents

Commonly the following documents need to be prepared as part of an effective estate plan.

1. Will

A Will controls all assets that consist part of your estate. Typically, this may be property, bank accounts, shares and life insurance proceeds (in circumstances where you own the life insurance policy on your own life).

Your Will will not control jointly controlled property that is owned by you as a joint tenant with another person if you predecease the other joint tenant. Jointly held property that is owned by you as tenants in common with another person will be subject to the terms of your Will irrespective of whether you predecease the other joint owner or not. It is therefore important to be aware of how jointly held property is owned.

Similarly, your superannuation death benefit may or may not be subject to the terms of your Will. This will be dependent upon the terms of your superannuation death benefit nomination and the terms of the superannuation fund.

In preparation for your Will, you will need to consider the following issues:

- What assets you own?
- Who would you like to receive each of these assets?
- Is there any person that you believe may be dissatisfied with the division of your estate? (if yes, then this may require additional advice and considerations as there are complex rules that provide who can challenge your estate and what those persons may or may not be entitled to).
- Do you want any of your beneficiaries to receive an income stream or a lump sum of money? If so, a trust could be established and the money invested by the trustees.

Postal Address: PO Box 2717, Taren Point NSW 2229

T: (02) 9247 1111 | **Fax:** (02) 9247 2222 | **E:** office@samaraslawyers.com.au

W: www.samaraslawyers.com.au

- What will happen if a beneficiary dies before you? If this occurs, how should your estate be divided?
- Who do you wish to be the executor of your estate? Do you wish to appoint a person in the alternative to act as the executor in the event your first nominated executor is unable to act in that role? Your executor is responsible for carrying out all of your directions in your Will and ensuring that all your assets and liabilities are dealt with in accordance with the terms of your Will.
- Do you have children under the age of 18? If you and your spouse were to die whilst the children were under 18 years of age, then who do you wish to be their guardian?
- Do you wish to incorporate a testamentary trust into your Will? A testamentary trust can provide significant benefits for your estate beneficiaries. Two key benefits of testamentary trusts are discussed below.
- Who do you wish to be the trustee of a testamentary trust established for your beneficiaries? The trustee is responsible for the day to day management of the trust and distributing benefits to your beneficiaries.

A testamentary trust is a trust that is established under the terms of your Will, and it can potentially enable you to reduce your family's income tax and also provide a valuable strategy in providing asset protection for your estate beneficiaries.

i. Testamentary Trusts and children

Testamentary trusts are often used to fund long term goals, such as the education of children or grandchildren. If assets are invested directly in a child's name (being a minor), harsh tax treatments can apply. Children who do not earn an income but who receive more than \$416 in interest from investments are taxed at 66% for amounts between \$416 and \$1,307 and at the top income tax rate (i.e. 45% plus Medicare levy) for amounts thereafter.

This tax treatment, however, does not apply when the income is distributed from a testamentary trust. Instead, the normal tax structure will apply, allowing the child to receive \$18,200 tax-free and pay ordinary income tax rates for amounts over that threshold.

In addition, a properly structured testamentary trust allows you to provide income streaming benefits for your family. For example, if you were to die and you were survived by your spouse and two children under the age of 18, but gifted all your estate to your surviving spouse, then (subject to any other income derived by your spouse) the income derived by your spouse from your estate assets will become subject to taxation once more than \$18,200 is derived. If your spouse earns \$80,000 per annum, then every dollar derived by your spouse as income from the investment of your estate will be subject to taxation at a rate of 38.5%.

By comparison, if your estate was gifted to your family through a testamentary trust, then (subject to any other income derived by your spouse) the income derived by your family from your estate assets will only become subject to taxation once more than \$54,600 is derived or \$36,400 if your spouse was earning an income of \$80,000 per annum.

ii. Testamentary Trusts and Asset Protection

Subject to the terms of the testamentary trust, the structure of your current asset holdings, and your estate planning objectives, a testamentary trust can be structured to protect the inheritances to your estate beneficiaries. This protection may apply in circumstances where your beneficiaries are subject to either family law property settlements or business or commercial asset issues (this could arise

either from the beneficiary being a director or company, or due to their professional vocation).

2. Family Trusts

Commonly, people who set up family trusts consider that the property of the trust is their own and should be distributed according to their Will. This is not the case. The trustees own the property and will hold the property according to the terms of the trust deed.

As such, if you have a family discretionary trust, the terms of the trust deed must be reviewed to ensure that the succession of control (and ownership) of the family trust can be structured to be consistent with your estate planning objectives. In addition, the financial statements for the family trust must be reviewed to ensure that there are no additional issues arising from the financial structuring of the family trust.

3. Enduring Power of Attorney

An enduring power of attorney is an important document whereby a person or persons are nominated to act on behalf of the person who is giving the power of attorney where that person is alive but has lost the legal capacity to make decisions for themselves. If a person does not have an enduring power of attorney and they were to lose legal capacity, then the NSW Office of the Protective Commissioner is appointed as that person's attorney and has legal control over all of that person's assets, including jointly held assets.

The duties and responsibilities of an attorney are governed by the *NSW Powers of Attorney Act*. In short, this document is financial in nature and allows your attorney to make decisions on your behalf and sign contracts on your behalf that relate to your financial affairs. The attorney has very strict responsibilities to act in the best interests of the person who has nominated them.

Powers of attorney may be broad in scope, permitting a person to represent you in any undertaking, or it may be narrow in scope, specifying precisely what can be performed on your behalf. Please consider the breadth of powers that you would be providing to your attorney when completing the attached instruction sheet.

4. Enduring Guardianship Authority

An Enduring Guardianship Authority is very similar to an Enduring Power of Attorney, the most significant difference being that the Enduring Guardianship Authority allows you to nominate who will be able to make certain medical and lifestyle decisions for you in the event that you were to lose mental capacity. Broadly, if you do not have an Enduring Guardianship Authority and you subsequently lose legal capacity, this would mean that the law will dictate who is to make certain medical and dental decision and lifestyle decision for you.

In respect of certain medical and dental decisions, the law set out the following person (in that hierarchy) to have the right to make the medical and dental decisions on your behalf:

- (a) Your spouse, if he/she is of full capacity, otherwise,
- (b) A person who has been looking after you (not for remuneration purposes); otherwise
- (c) Your close friend or relatives; otherwise
- (d) A guardian appointed by the Guardianship Tribunal.

In respect of your lifestyle issues, it is then up to a guardian appointed by the Guardianship Tribunal to make those decisions.

Having an Enduring Guardianship Authority in place will ensure that you choose the person or persons responsible for making these medical/dental and lifestyle decisions.

SECTION 1: PERSONAL DETAILS

1.1 Your Details:

Name:

Address:

Occupation:

Phone No:

Email:

1.2 Spouse/Partner Details:

Name:

Address:

Occupation:

Phone No:

Email:

1.3 Children’s Details: (continue over page if more than 3 children)

Child 1 Son Daughter Age _____

Name: _____

Address: _____

Relationship Status: Married De facto Single

Occupation: _____

Child 2 Son Daughter Age _____

Name: _____

Address: _____

Relationship Status: Married De facto Single

Occupation: _____

Child 3 Son Daughter Age _____

Name: _____

Address: _____

Relationship Status: Married De facto Single

Occupation: _____

SECTION 2: ESTATE ADMINISTRATION

2.1 Who would you like to act as Executor of Your Estate

(Remember you can nominate people to act solely or jointly with others)

1st Choice:

Name:

Address:

Relationship to you:

2nd Choice:

Name:

Address:

Relationship to you:

2.2 Are there any people you would like to list in your Will who your Executor can contact to assist them in carrying out their duties?

Accountant:

Name:

Address:

Financial Planner:

Name:

Address:

Name:

Investment Adviser:

Address:

Stockbroker:

Name:

Address:

Insurance Adviser:

Name:

Address:

Solicitor

Name:

(generally Samaras
Lawyers unless you
state otherwise):

Address:

SECTION 3: PERSONAL ISSUES

3.1 Who would you like to nominate to be guardian of your minor children?

1st Choice: Name:

Address:

Relationship to you:

2nd Choice: Name:

Address:

Relationship to you:

3.2 Do you have a preference for:

Burial

Cremation

No preference

3.3 Do you have a particular venue at which you would like to be buried or cremated?

Yes Please specify:

No

3.4 Do you have any particular things that you would like to happen as part of your funeral arrangements (e.g. religious, music, flowers, dealing with ashes)?

Yes Please specify:

No

3.5 Is your body available for:

Organ transplant purposes

Medical and scientific research purposes

None of the above

SECTION 4: DISTRIBUTION OF ESTATE ASSETS

4.1 Please list any specific gifts that you would like to make:

4.2 Who owns your residential home:

Who do you want to receive your interest in your residential home in the event of your death?

Spouse

Children

Mix of Spouse and Children

Your estate (to form residue - see question 4.6)

Life estate and remainder interest
Please specify

Other (Please specify)

4.3 Is there a life insurance policy on your life outside of superannuation?

Yes

No

If yes, who will receive the life insurance proceeds in the event of your death?

Spouse Directly

Children Directly

Mix of Spouse and Children

Your estate (to form residue – see question 4.6)

4.4 Do you have any assets in superannuation?

Yes

No

If yes, who will receive your superannuation death benefit in the event of your death?

Spouse Directly

Children Directly

Mix of Spouse and Children

Your estate (to form residue – see question 4.6)

4.5 Do you have any annual leave or long service leave entitlements?

Yes

No

If yes, who will receive your leave entitlements in the event of your death?

Spouse Directly

Children Directly

Mix of Spouse and Children

Your estate (to form residue - see question 4.6)

4.6 Who do you want to receive the residue of your estate?

(Those assets that form part of your estate and which have not otherwise been specifically dealt with by you (eg. gifted to a nominated person) will form the residue of your estate.)

1st Choice:

Spouse

Children

Testamentary Trust (please proceed to Section 5)

Mix of Spouse and Children:

Other

Please specify:

Please specify:

2nd Choice:

(If 1st Choice cannot be achieved eg. if you nominate person X as first choice but person X has predeceased you)

Spouse

Children

Testamentary Trust
(please proceed to
Section 5)

Mix of Spouse and Children:

Other

Please specify:

Please specify:

4.7 If all of your intended beneficiaries for the residue of your estate predecease you, how would you like the residue of your estate to be distributed?

Split between other family members? Please specify:

Split between other people? Please specify:

Charities? Please specify:

Mix of above? Please specify:

Other? Please specify:

SECTION 5: TESTAMENTARY TRUST TERMS

Under your Will you could establish one testamentary trust or multiple testamentary trusts.

How many testamentary trusts are being established under your Will?

Number of Trusts: _____

If multiple testamentary trusts are to be established, questions 5.1 to 5.8 should be answered for **each** testamentary trust. If multiple testamentary trusts are to be established and those trusts are to have **different** terms you will need to obtain additional legal advice on the structure of these trusts.

5.1 Name of Testamentary Trust: _____

5.2 Percentage of residue of estate to be distributed to this testamentary trust?

_____ %

5.3 Trustee

(Remember you can nominate people to act solely or jointly with others)

1st Choice: Name:

Address:

Relationship to you:

2nd Choice: Name:

Address:

Relationship to you:

5.4 Appointor (*this is the person with ultimate control of the Testamentary Trust*)

(Remember you can nominate people to act solely or jointly with others)

1st Choice: Name:

Address:

Relationship to you:

2nd Choice: Name:

Address:

Relationship to you:

5.5 Principals (ie. capital and income beneficiaries)

Are the principals of the trust to be:

Spouse only

Children only

Mix of Spouse and Children

Other

Please specify:

5.6 Other Beneficiaries (ie. income only beneficiaries)

Is the class of other beneficiaries to be:

Narrow – to include only your family bloodline and related entities; or

Broad – to include your extended family, spouses and in-laws of your descendants and related entities.

5.7 Exclusions

Is anyone to be specifically excluded from benefitting from the testamentary trust?

Yes Please specify:

No

5.8 Termination of Trust

Is there an earliest time before which the testamentary trust should not be allowed to terminate?

Yes Please specify:

No In which case termination of the testamentary trust will simply be at the discretion of the trustee or governed by the common law of trusts.

**ENDURING POWER OF ATTORNEY
INSTRUCTIONS TO PREPARE DOCUMENT**

1. Your Details

Name:

Address: _____

Occupation: _____

Phone No: _____

Email: _____

Person(s) Being Nominated As Your Attorney (in order)

(Remember you can nominate people to act solely or jointly with others)

2.

1st Choice: Name: _____

Address: _____

Relationship to you: _____

2nd Choice: Name: _____

Address: _____

Relationship to you: _____

- 3. Would you like your attorney to have the power to use your assets to continue to make on your behalf “reasonable” gifts that you had been in the habit of making?** Yes _____
No _____

(NB: The gifts that the attorney could make on your behalf would only be in favour of a defined class of persons including relatives and charities that you had a history of making gifts to and the value of the gift must be reasonable having regard to the value of the gifts that you had been making.)

- 4. Would you like your attorney to have the power to use your assets to benefit other people (most commonly those persons who are currently financially dependent on you)?** Yes _____
No _____

If Yes, are these persons:

Spouse

Children

Others

Please specify:

Name:

Address:

Relationship to you:

**ENDURING GUARDIAN
INSTRUCTIONS TO PREPARE DOCUMENT**

1. Your Details

Name:

Address:

Occupation:

Phone No:

Email:

Person(s) Being Nominated As Your Guardian (in order)

(Remember you can nominate people to act solely or jointly with others)

2.

1st Choice: Name:

Address:

Relationship to you:

2nd Choice: Name:

Address:

Relationship to you:

3. In the event that you are so incapacitated that you are being kept alive only by artificial means of life support and medical opinion is that you have no reasonable prospects of recovering from that condition, do you wish to:

give a specific direction to your guardian to cease all artificial means of life support; or

give a specific direction to your guardian to continue all artificial means of life support;

OR

leave any decision as to ceasing or continuing the artificial means of life support to your guardian.