

Hamilton Locke Private: *Estate Planning*

August 2024



Welcome to our publication on estate planning, where we embark on a journey to master the art of securing our legacy and protecting our assets. Estate planning is not merely a task to be checked off; it is a dynamic process that evolves with life's twists and turns.

Our experts explore the multi-faceted dimensions of estate planning, offering guidance and expertise to navigate these complexities.

We unravel the ramifications of dying without a will, or intestate and how this situation leaves the distribution of the deceased's assets to be determined by the laws of intestacy, which vary across Australian states and territories. Without a will, the process of appointing an administrator and distributing assets becomes uncertain, complex, and potentially more expensive.

Family trusts are pivotal for managing wealth and ensuring financial security across generations. We dive into the roles within a trust—such as trustees, appointors, and protectors—and emphasise the importance of having clear succession plans to maintain stability. We discuss the lifespan of trusts and the legal intricacies involved in amending trust deeds to ensure continuity.

Superannuation, often misunderstood in estate planning, does not fall under one's will but is managed by the trust deed of the fund. We outline the strict regulations governing superannuation death benefits and the types of nominations available to ensure these benefits are distributed according to one's wishes.

The team at Hamilton Locke Private are ready to guide you through every step, offering tailored solutions to suit your unique needs and aspirations.

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What happens if I die without a Will?

Around half of all Australians have made a Will, leaving around half without a will in place. What are the consequences for those people who don't have a Will, and what happens to their assets when they die?

Firstly, some terminology: a person who dies without a will is said to be 'intestate'. The word 'testate' comes from the word 'testament', meaning 'will' – to die without a will means you are intestate, and your estate is dealt with by the laws of 'intestacy'.

It is helpful to summarise what the key things are that are done through a legal and valid will:

1. **The appointment of an executor:** the person who is legally appointed to administer the estate.
2. **Making specific gifts and naming residuary beneficiaries:** who receives what assets and on what terms?
3. Expressing funeral wishes, appointing guardians of minor children, and appointments and wishes concerning family trusts are also commonly included in wills.

To read more about 'Why is it important to have a will', be sure to read our April 2024 HLP Update

"A failure to make a will means that the appointment of a person to administer your estate and the distribution of your estate will be less certain, more complex, and potentially more costly than if you had made a valid will."

Appointment of an administrator

Where there is a will, an executor is usually appointed. Their duties can start immediately, as they are the person authorised to make funeral arrangements, and to deal with any legal or financial matters that may arise immediately after death. The will can be produced as proof of the executor's authority to act.

If there is no will, there is no person legally authorised to do these things. Where disputes arise amongst family members as to funeral or burial arrangements, these disputes will have no clear answer and in some cases can lead to court proceedings. It can also be difficult to obtain information about assets, or information from other institutions, that may be needed to understand how to deal with a person's estate.

There is also uncertainty about who will apply to the court to obtain a grant of representation, which is necessary in most states and territories to administer most estates. While the courts have some established practices about who is the preferred applicant, this is not always clear to family members, and may also be grounds for a dispute to arise, particularly in places that require notice or consent of other beneficiaries.



What happens if I die without a Will?

Complication can even arise in establishing whether a person has authority to obtain a grant: de facto partners often have to go to great lengths to establish their relationship to the court, including affidavits from themselves and third parties providing a detailed history of their relationship with the deceased. In addition, disputes over the rights of a child to apply can arise if there is uncertainty about whether they were adopted or a question arises regarding paternity.

Distribution of the estate

The distribution of an estate under intestacy is highly dependent on the particular circumstances. The key issues are:

- Where did the person reside as their domicile, and in what places did they own property?
- What family members survived them and are eligible to receive a benefit?

The laws of intestacy, which apply to property of a person who dies without a will, are different in every Australian state and territory, often dramatically. For a person who only owns assets in the state or territory where they live, only the laws of that place will apply, but if a person owns assets in multiple places or even overseas, potentially multiple different intestacy laws can apply to their assets.

Where a person leaves a spouse and children, most Australian states and territories will effect a division between the spouse and children in some proportion, although in certain cases the spouse may be the sole beneficiary. Even in these cases, complexities can arise:

- Spouses include de facto spouses, however there is often a requirement that the deceased and the de facto spouse have been living together in a relationship for a period of time to be eligible to inherit.
- While natural and adopted children may inherit, stepchildren and foster children will usually be excluded from benefit under intestacy.
- Where a person dies with a spouse and children from a prior relationship, it may eventuate that the children do not receive a benefit where the spouse's entitlements exceed the value of the whole estate.
- If the estate is not easily divisible (e.g. because it comprises the family home) a situation might arise where the spouse and minor children are required to be on title to the property, which can create difficulties in arranging for the property to be sold or issues once the children turn of age and want to access their inheritance.



What happens to my family trust when I die?

Family trusts are a common and important tool for many families to hold investments and for conducting businesses and enterprises – statistics show that there are over one million ‘family trusts’ in Australia.

Family trusts provide a way for families to invest wealth in a flexible and tax-effective way, provide benefits for multiple generations of beneficiaries, and protect wealth from being dissipated by circumstances affecting particular beneficiaries and family members.

Once the family trust is established and funds or assets contributed, the assets are no longer owned by the original contributor or dealt with by their will. So what happens to your family trust when you die?

What is a family trust?

A trust is a legal relationship where a person (a trustee) owns property subject to duties to use the property for the benefit of others (beneficiaries).

A ‘family trust’ doesn’t have a fixed meaning, but usually refers to a discretionary trust established to benefit a particular family group. A discretionary trust typically has a broad class of beneficiaries (usually extended members of a family) who can benefit from the trust, and the trustee has the discretionary power to decide when and in what proportion any distributions are made.

Lifespan of a trust

Family trusts are usually established through the execution of a deed and the payment of a small amount as an initial contribution to the trust by the ‘settlor’ of the trust to the trustee. In some cases, trusts are established by a will and will commence on the death of the person whose will creates the trust.

Once established, a trust can last for up to 80 years in most states (in Queensland, trusts will soon be capable of lasting 125 years, and in South Australia they may last indefinitely). Trust deeds generally must have a provision stating a date or occasion when the trust will end, and often the trustee has a power to end the trust at an earlier date.

The trust does not end when a trustee or beneficiary dies, and its assets do not form part of any person’s estate. The trust will continue to operate until it ends in accordance with the rules contained in the trust deed.

Passing control of a trust

The primary estate planning concern for a trust is who will take control of a trust after a person with control of the trust passes away.

Family trusts often have a number of key roles:

- **The trustee:** who owns the property subject to the trust, and has the duty to manage the property and investments, distribute income and capital, and make important decisions about the administration of the trust.
- **The appointor:** who has the power of appointing or removing a trustee.
- **The guardian or protector:** who has a supervisory role over certain decisions of the trustee, which usually require the written consent of the guardian/protector.



What happens to my family trust when I die?



While every trust has a trustee, not all trusts have an appointor, guardian or protector, and sometimes those roles may have different names or will be combined. In some cases where there is no 'appointor', the trustee will have the power to appoint a replacement trustee (either pursuant to the trust rules or under legislation).

Each of these roles may play an important part in the management of the trust, and therefore the death of any of the persons holding these roles may greatly affect the ongoing administration of the trust.

The trust rules

The trust deed may provide for successors in the terms of the deed, or may allow the holder of the office to nominate a successor. In some cases, an office may cease to exist after the death of the original holder of the office.

If you hold an office in a trust, it is important to consider whether you have the power to nominate a successor and in what circumstances. It is also important to consider the circumstances under which you may vacate your office: while death is an important consideration, loss of decision-making capacity or insolvency are other common situations where an office may be vacated and a successor needs to be appointed. If you only nominate a successor by will, you leave open the possibility that there will be no successor if you vacate your office for another reason.

Where the last surviving trustee dies, it is common that the executor of their will would have the power of nominating a new trustee unless there is an appointor or the trust deed provides otherwise.

Corporate officeholders

There are advantages in having a corporation as trustee of a trust, including:

- Changes of control of the trustee can occur by changing the shares in the trustee company and appointing directors, without having to execute transfers of the assets of trust.
- Corporate trustees can result in greater asset protection.
- Corporate trustees can assist in the administrative aspects of the trust, including to ensure personal and trust assets are kept separate.
- The constitution of the corporate trustee can be crafted to provide for different governance strategies for the trust.

While corporate appointors are less common, there are potential opportunities available.



What happens to my superannuation when I die?

It may surprise you to learn that your interest in your superannuation fund is not an asset that you can directly dispose of on your death by your will.

Superannuation funds are a type of trust, meaning that your superannuation investment is owned by a trustee. Each fund has a set of governing rules, contained in a trust deed, which typically contain rules on how a benefit will be paid when a member of the fund dies.

The rules for payment of death benefits are fairly consistent, due to the laws regulating most superannuation funds, but each fund has unique rules which must be considered.

This article is primarily focused on non-self managed superannuation funds – keep an eye out for future articles on SMSFs.

Who can receive death benefits

The law provides that only **dependants** or a **legal personal representative** can receive death benefits. What do these terms mean?

A dependant can be:

- A spouse (including a de facto spouse or domestic partner) of the deceased;
- A child (including an adopted child or stepchild) of the deceased;
- Any person who is a financial dependant of the deceased;
- A person who lives in an interdependency relationship with the deceased.

If the governing rules of the fund allow, any dependant may be eligible to be paid a death benefit directly from the fund. Other family members (such as siblings or parents) who are not financially dependent are not eligible to receive death benefits, and any nomination made in their favour will be invalid.

A legal personal representative (or **LPR**) means the executor or administrator of the deceased's estate. If a death benefit is paid to an LPR, they must distribute the death benefit pursuant to the will, or otherwise according to law.

How will my death benefit be distributed?

Generally, most fund rules will allow a member to nominate beneficiaries in a way that is binding on the superannuation trustee. This is called a 'death benefit nomination'.

If no valid nomination has been made, there are two common situations:

- The rules may require payment to a specific person, usually the LPR – generally the trustee will have no discretion if the rules require this.
- The rules may give the trustee discretion to choose for itself which persons (your dependants and your LPR) should receive the benefit.

The second scenario is much more common but is far from universal.



What happens to my superannuation when I die?

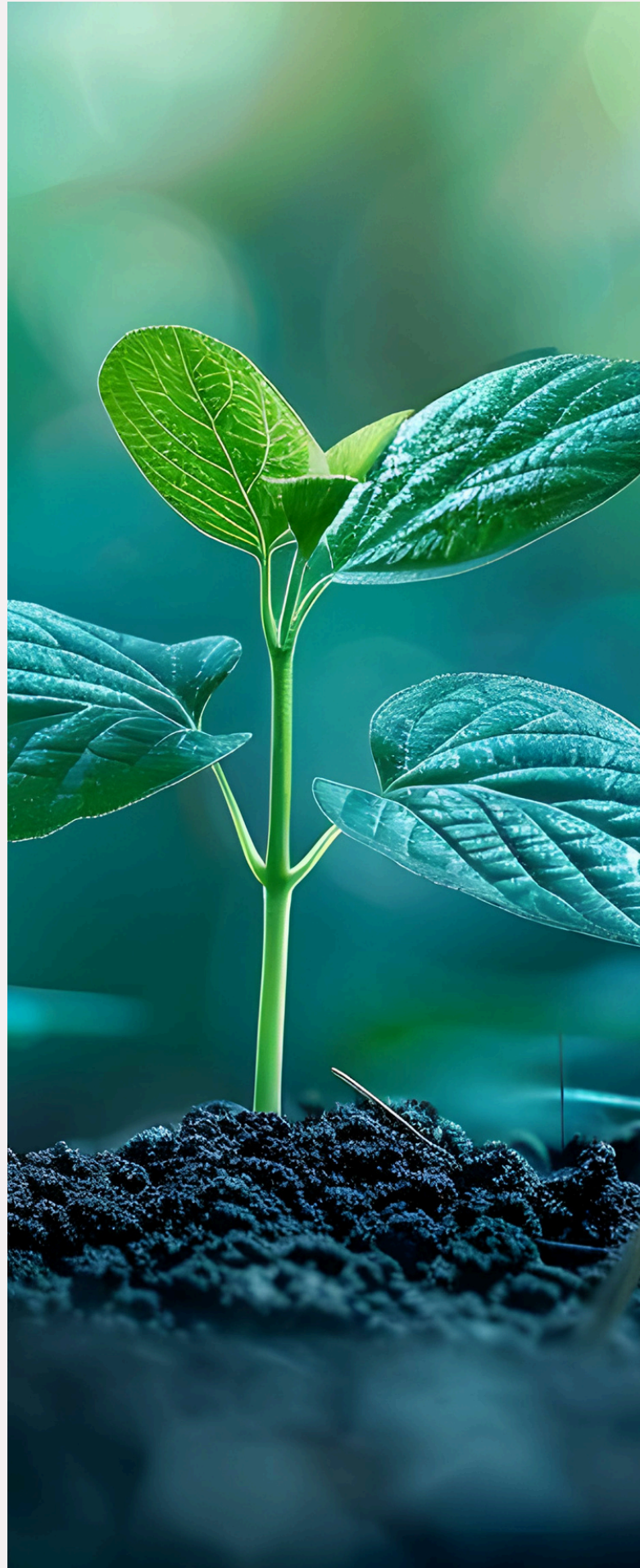
If a trustee has discretion to choose the beneficiaries itself, it is usually not required to follow any non-binding wishes you have left, or have regard to the distribution in your will. Usually, trustees will look to benefit those who are actually financially dependent on the deceased.

If the other dependants are unsatisfied with a trustee's decision, they may make a complaint to the superannuation fund, or apply to the Australian Financial Complaints Authority (AFCA) to request a different distribution. AFCA may only vary the trustee's decision if the decision was not fair and reasonable.

Types of death benefit nomination

The types of nomination available depend on the rules of the fund. Common types of nomination include:

- **Non-binding death benefit nomination:**
Sometimes called a 'preferred beneficiaries nomination', this is a request to the trustee which is non-binding.
- **Binding death benefit nomination (BDBN):**
These are nominations made in a prescribed way in the superannuation law, which are binding on the trustee provided that the correct procedure is followed. By law, these nominations lapse after three years.
- **Non-lapsing BDBN:** more superannuation funds now offer non-lapsing nominations, which last indefinitely unless revoked.

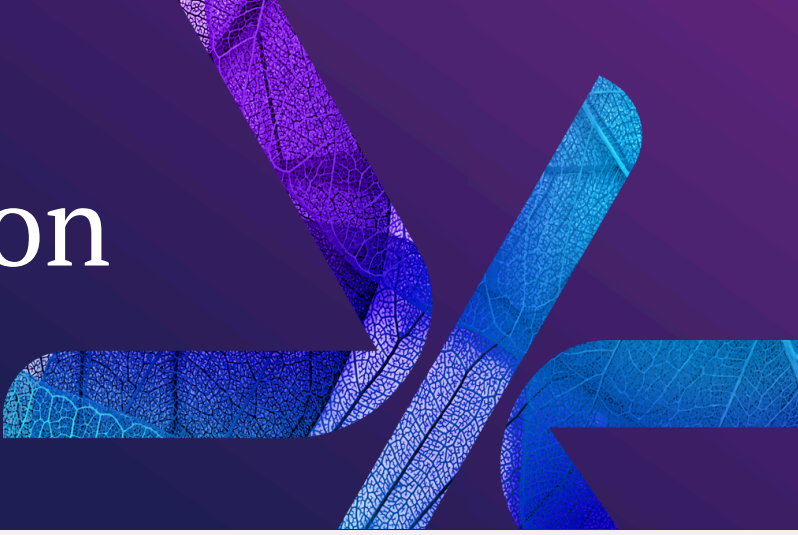


Things to watch out for when making a nomination

- 1 Most binding types of nomination have witnessing requirements, and will require two adult independent witnesses. If you have made a nomination online, or by phone, this is unlikely to have been a binding nomination. A nominated beneficiary cannot be a witness.
- 2 If making a non-binding nomination, the trustee may have regard to your wishes but is usually free to disregard them entirely.
- 3 BDBNs lapse every three years unless confirmed or renewed – you should be mindful of regularly updating the nomination, which may not be possible if you lose mental capacity in old age.
- 4 Non-lapsing BDBNs are much preferred, however, fund rules commonly include conditions on making these nominations which can be overlooked: these may include that a nomination is made invalid if after the nomination is made the member marries, divorces or separates from a spouse, has a child, if a nominated beneficiary dies, or some other circumstance.
- 5 While funds have an obligation to advise you if your nomination cannot be accepted (due to it not being witnessed correctly or incorrectly filled out) they usually will not advise you if you have attempted to nominate a non-dependant or if you have triggered a condition that will invalidate your nomination.
- 6 When making a nomination, you must have the mental decision-making capacity to do so. A death benefit nomination is not the same as making a will, and the standard of mental capacity is not necessarily the same as the capacity required to make a will.
- 7 If you lose mental capacity, your attorney for financial matters may be able to make a nomination on your behalf, however this is very circumstance dependent. Ideally, your enduring power of attorney would expressly state in what circumstances your attorney may make a nomination, and the governing rules of your superannuation fund would state in what circumstances they will accept a nomination made by an attorney or administrator.



About Hamilton Locke Private



Our experienced Private Clients Services team offers a range of legal solutions spanning wills, estates, succession planning, wealth transition, tax, and real estate tailored to your unique circumstances. We will work collaboratively with you to build a deep understanding of your goals and objectives, now and into the future, and prepare solutions aligned closely to these.

Each day, our team works with family businesses of all shapes and sizes spanning many industry sectors to manage their legal needs and requirements, allowing them to start planning for a successful transition now or in the long term.

Why is it important to manage your affairs now?

Family-owned businesses account for approximately 70% of all Australian and New Zealand businesses. The wealth held by the owners of these businesses will be transferred to younger Australians generations over the next 20 years, and herein lies the challenge – transitioning this wealth can be complex and fraught with risk.

Taking the time to invest in effective estate, succession, and tax planning may save you and your family unnecessary conflict and administration when the time does come for a seamless transition.

Why work with us?

Our team are not just lawyers; they are business owners too. They understand the day-to-day complexities of running a successful business and know how challenging it can be to plan effectively.

When you are focused on growing your business, taking the time to manage your personal affairs can be daunting. Our team can help and guide you through this, and work with you to achieve your desired outcomes.

By engaging Hamilton Locke to assist you with your personal legal needs, you will also be able to easily and cost-effectively access our comprehensive range of corporate legal solutions.

Our Services

We have a highly experienced cross-functional team who will take the time to understand your business, your family dynamics and to deliver technically excellent legal solutions that you will understand.

Our services include:

1. Estate and Succession Planning

- Wills including Testamentary Discretionary Trusts
- Enduring and General Powers of Attorney
- Succession Planning and Business Transition Planning
- Advanced Health Directives
- Trusts advice

2. Tax and Structuring

- Asset Protection and Structuring Advice
- Entity Establishments
- Restructuring including Tax and Duty Advice
- Cross-border transactions

3. Estate Litigation

- Proprietary Estoppel Claims
- Challenging a Will including Family Provision Applications
- Disputes between executors, administrators, or beneficiaries
- Power of Attorney Disputes

4. Real estate and property

- Rural, Residential and Commercial Property Transactions
- Property Development
- Renewable Energy and Carbon Projects
- Landholder Compensation Negotiations

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