

Estate Planning

Estate planning involves the organisation of a person's financial affairs in anticipation of death, in order to ensure that your assets are distributed to your intended beneficiaries in an orderly and tax effective manner.

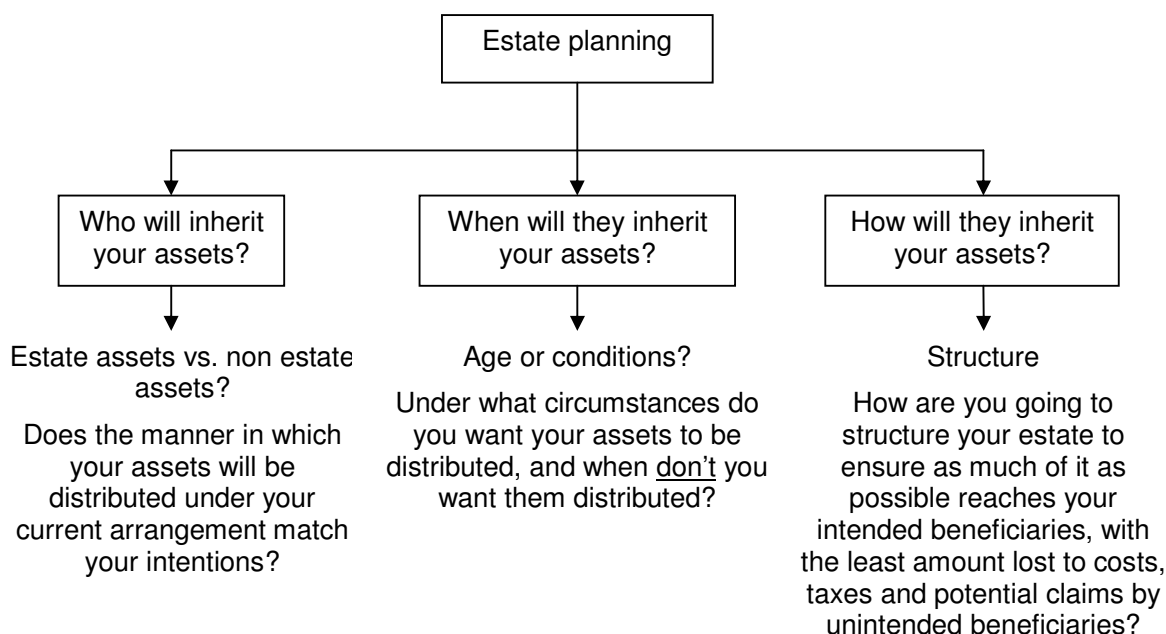
Important disclaimer for estate planning recommendations:

Your adviser, Travis Morien, is not trained and qualified as an estate planning lawyer. Travis Morien, like most financial planners, has no legal training and is only accredited to give general information in the area of estate planning.

Only a lawyer is properly qualified to read, interpret and comment on legal documents such as trust deeds, Wills, power of attorney etc.

Travis Morien therefore can not read your will to comment on the legality of any provisions you have made, or the suitability of your Will to satisfy your current objectives, or engage in any similar activity that could be construed as legal advice.

What to consider with estate planning



Estate planning glossary:

Deceased estate

The "deceased estate" is the assets and property of a person who has died. Until the distribution of the deceased estate to beneficiaries has been completed, the deceased estate is considered to be a trust. A trust is not a legal entity in its own right, but a relationship between a trustee and the beneficiaries.

Testator

The testator is the person who has died and is leaving a deceased estate to beneficiaries.

Beneficiary

A beneficiary is a person who will receive all or part of a deceased estate upon. It is important to consider the consequences if they should unfortunately predecease you.

Personal representative

The estate will be administered by a *personal representative*. Where the deceased appointed a personal representative in his or her Will, the personal representative is called an *executor*.

When there was no Will, or the Will was silent on the matter, the personal representative must apply to the court for a grant of *letters of administration*, more usually called a *grant of representation*. When there was no executor appointed, the personal representative is usually known as an *administrator* and will generally administer the estate according to a statutory formula.

The executor of the estate is the person who holds the deceased estate in trust. That person is the trustee for the deceased estate trust. The executor is responsible for administering the deceased estate in the best interest of the beneficiaries.

The Supreme Court can appoint an administrator to deal with the deceased estate in instances such as where there is no valid Will or the person nominated to be executor cannot discharge their duties.

The personal representative, in effect, steps into the shoes of the deceased person and winds up the deceased person's personal affairs. Some other tasks usually performed by an executor include:

- Locating the Will
- Arranging the funeral
- applying for probate
- obtaining a death certificate
- informing government agencies, utilities, financial service providers etc of the death
- locating and assessing the value of all estate assets
- paying debts, taxes and funeral expenses
- transferring assets and paying stamp duty; and
- distributing surplus assets to beneficiaries.

Guardian

Generally, a guardian is a person appointed to legally act on behalf of minor children under the age of 18. A guardian may also be appointed where a disabled person is incapable of managing their financial affairs.

It is important to consider issues of guardianship where there are dependent children, especially in the contingency that both parents were to die.

It is possible under some circumstances to appoint a guardian when there is still one surviving parent. This is often done in the aftermath of a relationship breakdown between the child's parents.

Probate

Probate is the process by which an executor *proves* a Will. When considering whether to grant probate, the State Supreme Court will determine whether:

- the document produced is a Will
- the document was intended by its maker to be a Will
- the testator was legally able to make a Will and was old enough and had the capacity to prepare a Will
- the Will complies with the legal requirements of form; and
- the Will had not been revoked.

Provided the Supreme Court finds that these conditions are met, probate will be granted and the process that leads to the distribution of assets to beneficiaries may commence.

Wills

A Will is an essential part of a financial plan. The purpose of the Will is to make a written legal statement to clarify what you would like to happen to your assets after your death. In order to draw up a valid Will you will have to consult with your solicitor or a professional trustee company.

If you do not have a solicitor or professional trustee company, we will refer you to an appropriate specialist.

Your Will is an extremely important legal document and should be prepared carefully with due consideration to all pertinent issues. Your Will directs your legal representatives to administer and distribute your property after your death in accordance with your final wishes.

Issues that need to be considered in the preparation of your Will include the following:

- Naming the executor of your Wills.
- What will happen in the event of both spouses dying at the same time.
- Deciding who will be the legal guardian of your children once you are deceased.
- Deciding if any assets are to be given as specific items to specific recipients, or if assets are to be sold and the cash distributed.
- Capital Gains Tax and stamp duty considerations, including the tax rates of recipients and the ability to pay any transfer charges.

Non estate assets such as superannuation need to be taken into account when determining a fair distribution of assets.

Only property owned as an individual and held on your own can be dealt with in a Will. If property is held in joint names, such as a family home, it will pass automatically to the surviving partner. This type of ownership is known as "joint tenancy". These items become part of the last survivor's estate in due course.

Superannuation does not form part of your estate. The legal owner is the Trustee of the Superannuation fund and it is held on your behalf. The proceeds of your superannuation would be paid to your beneficiaries at the direction of the Trustee. You should ensure that your nominated beneficiary is up to date.

Cancelling an old Will is simple, just write a new one. The most recently prepared Will is the most valid one, though of course if certain beneficiaries have been cut out of a newer Will this could be challenged in court. (Wills can always be challenged in court, whether the challenge succeeds or not often depends on the drafting of the Will and whether any consideration was given to that beneficiary).

Testamentary Trusts

A testamentary trust is a trust that is created under a Will at the time of a person's death. The primary purpose of a testamentary trust is to manage estate assets to produce income for beneficiaries. A trustee (can be the same person who was the executor of your Will), administers the trust on behalf of beneficiaries.

A number of your wishes may be achieved by establishing testamentary trusts. There are taxation advantages for minor children and protection for bankrupts and spendthrifts.

Minors normally pay tax at the rate of 66% for payments over \$416 and then 47% for payments in excess of \$1,446, however, when this income is derived from a deceased estate the adult personal tax rates apply. This could provide dependant children or any future grandchildren with \$6,000 of tax-free income, and provides very significant tax planning opportunities when parents and grandparents already are on the highest marginal tax rate.

Discretionary trusts give the trustee the ability to exercise discretion in distributing assets. There may be access to capital, income tax streaming (deciding which beneficiaries get capital gain income, which get interest and dividend income, which is very useful when some beneficiaries are carrying forward capital losses).

It is important to note that Centrelink may assess the assets of a testamentary trust in its asset tests. If a testamentary trust becomes activated as a result of a person's spouse dying after 31 March 2001, the surviving spouse will be attributed with the assets and income if:

- The surviving spouse directly controls the trust, irrespective of whether they are a beneficiary; or
- An associate has control and the surviving spouse is a potential beneficiary.

There is also the application of a control test and source test that was introduced in January 2002, which could effectively make the income and assets of a trust assessable to a person affected by either of the above two tests.

Additional advantages of testamentary trusts include ability to manage capital gains tax liabilities on investment assets including rental property (sometimes eliminating CGT liabilities to the estate entirely), and stamp duty.

There are a wide variety of testamentary trusts. Fixed trusts offer little or no discretion to the trustee in determining how assets are to be administered, discretionary trusts can offer almost unlimited freedom. It is important to recognise that the great power of testamentary trusts lies in your ability to have any rule or provision you want inserted into the trust deed. You can achieve almost any outcome that you like (provided your arrangements aren't successfully challenged in the family court) by writing the governing rules of the trust as you want them to appear.

Fixed trusts have rigid rules that dictate how distributions are to be made, which is most useful for protecting vulnerable beneficiaries such as the very young, intellectually disabled, drug or alcohol dependent, spendthrifts and those addicted to gambling. There is the potential for a testator to exert a certain amount of power from beyond the grave in setting the rules of a fixed testamentary trust.

There is also an entity called a superannuation proceeds trust, which can have advantages compared to other means on distributing the deceased's superannuation assets.

Deciding exactly which kind of testamentary trust is suitable depends very much on the testator's wishes and the special needs of beneficiaries. This is best discussed with an appropriately qualified solicitor with special expertise in estate planning.

Note that trusts have a maximum 80 year life and can not be used to keep assets away from beneficiaries for ever.

TIP: It is often best to make provision in your Will to make the creation of the testamentary trust optional. If there is no discretion allowed, there is a chance that the estate beneficiaries will have to go through all the motions of having the trust created and administered even if it turned out not to be necessary or economical. If you wish to allow your estate beneficiaries some flexibility in how your estate is administered, give them the flexibility to not create a testamentary trust at all.

Powers of Attorney

A power of attorney can be a useful tool in the organisation of personal affairs. A power of attorney is a legal document in which a person appoints another person to act on his/her behalf in relation to financial and legal matters. Attorney's signature on a document has the same legal force as a person's own.

There are a number of types that you can implement, the common ones are:

- General power of attorney
- Enduring power of attorney
- Enduring power of attorney for Personal/Health matters

The general power of attorney allows your attorney to act on your behalf. This is revoked automatically if the giver becomes incompetent. It is also revoked due to death and bankruptcy. For these reasons a general power of attorney is most often given for a specific purpose or fixed period of time such as allowing another person to handle your affairs whilst you are overseas.

An enduring power of attorney is another type and the main difference between it and a general power of attorney is that it remains valid even if the person becomes incompetent. It is appropriate for all adults to have an enduring power of attorney. The attorney should be someone you can trust to look after your best interests. Your solicitor should be consulted to draft this.

Another form that is an important counterpart of the enduring power of attorney is the enduring power of attorney for Personal/Health matters. This allows the attorney to make medical decisions on behalf of the giver.

The main benefit of a power of attorney is to ensure that your financial affairs can be managed at all times, under any circumstances. If you are incapacitated in some way, it is essential that you are able to meet your financial obligations and that someone you know and trust manages your affairs.

Without a power of attorney, relatives (or friends) would need to apply to the authorities to enable them the power to continue the affairs of their relative or friend.

Assets not included in the estate

A number of assets do not automatically become part of a person's estate, and therefore must be dealt with separately from the Will.

These include:

Superannuation assets

Superannuation benefits payable in the event of death of the member will not generally form part of your estate. This is because the trustee of the superannuation fund owns the assets and the deceased member is not entitled to payment of the death benefit (i.e. they do not own the proceeds). The requirement that the trustee pay a benefit, if any, is governed by the trust deed and the Superannuation Industry Supervision laws (Part 6 SIS Act and Regulations in respect of payment of benefits).

Do not be concerned about the fact that legally a trustee owns your superannuation assets. The trustee is legal owner, but the fund member is beneficial owner. The trustee is not entitled to do with the funds as he or she pleases, the trustee is legally obliged to ensure that the money is managed according to the provisions set in the trust deed and the SIS act, which direct the trustee to manage the money in the best interests of the beneficial owner.

It is only when the trustee of the fund pays a benefit to the legal personal representative of the deceased member that the superannuation proceeds will form part of the estate of the deceased.

The distribution of superannuation benefits on the death of a member is usually at the discretion of the fund trustee, though making a nomination of beneficiary, as mentioned above in the section on binding nominations makes it more likely that the distribution will be made according to your wishes.

If you wishes your superannuation monies be made available for payment of debts of the estate you will need to nominate payment of part or all of the superannuation monies to your legal personal representative, and also make provision in your Will for the payment of the debts with that money.

Proceeds of life insurance policies

Similar to superannuation, proceeds of life policies, where the deceased was the life insured, generally do not automatically form part of the deceased's estate assets. The insurance provider is required to pay in accordance with the insurance agreement to the nominated recipient. It is only where the deceased, or the deceased's legal personal representative is the nominated recipient that the proceeds would form part of the estate.

If you wish for some or all of the proceeds of the insurance policy to be available to discharge debts of the estate, you will need to nominate your legal personal representative to receive some or all of the life insurance proceeds.

Assets held in joint names

Property owned jointly will not form part of the deceased's estate. The most common forms of joint ownership include joint bank accounts and ownership of the family home as joint tenants between husband and wife. If you have a joint interest, on your death, the property will automatically pass to the other joint owner (or owners). This will occur regardless of the terms of your Will. Ownership as tenants in common differs from joint ownership as each tenant in common owns a certain percentage of the property which they can deal with as they like. As such, joint interests may be distributed by Will.

Assets of companies (including family companies):

Assets held by a company are not owned by shareholders. Your estate will only include any shares they own in the company at the time of their death (subject to any restrictions in the company's Constitution preventing disposal of those shares).

Property held in a family trust:

As with companies, the assets of a trust are not owned by the beneficiaries but by the trustee of the trust. If you are a beneficiary of a fixed trust, i.e. where beneficiaries have fixed entitlements to income and capital of the trust, that interest will generally form part of your estate. However, if the trust is a non-fixed trust (such as a discretionary trust), the beneficiary will usually not have an interest which survives their death. In any case, the provisions of the trust deed of the trust will govern whether a beneficiary may give away their interest in their Will.

If you are the trustee of a family trust, the assets of the trust will again not be included in your estate. This is due to the fact that, although the trustee has legal ownership of the assets of the trust, the trustee of the trust does not beneficially own the assets. Legal ownership of the assets will pass to the trustee appointed to replace you. For this reason, special attention needs to be given to the terms of the trust deed providing for replacement of the trustee.

Options for dealing with superannuation

There are seven ways that super funds can be paid out, subject to the provisions of the super fund's trust deed:

1. Lump sum to deceased member's spouse or de facto spouse;
2. Pension to deceased member's spouse or de facto spouse;
3. Lump sum to deceased member's children including step children and adopted children;
4. Pension to deceased member's children including step children and adopted children;
5. Lump sum to any person who was financially dependent on the deceased member at the time of the member's death;
6. Pension to any person who was financially dependent on the deceased member at the time of the member's death; and
7. Lump sum to the deceased person's estate, where it will be distributed according to the deceased person's Will.

Lump sum payments

The most common method of taking money from superannuation after death is as a lump sum. When a lump sum payment is made from a super fund as the result of a death, that payment is known as a "death eligible termination payment" or "death ETP".

For the next few paragraphs of discussion, it is worth noting that there are two different definitions of "dependent", one resides in the Superannuation Industry Supervision (SIS) Act, the other in the Tax Act. The differences are as follows:

Dependent includes:	SIS Act	Tax Act
Your legally married or de facto spouse	Yes	Yes
Your previous spouse(s)	No	Yes
Your minor biological, step or adopted children	Yes	Yes
Your child over 18 who is not financially dependent	Yes	No
Any person who is financially dependent on you	Yes	Yes

Only a SIS dependent can receive a payment from a superannuation fund directly. If it is your intention for a person who is not a SIS dependent to receive benefits from your superannuation, the money must be paid to your estate first so it can be handled by your Will.

How a death ETP is taxed depends on whether the person receiving it is a dependent for tax purposes or not. The taxation of death benefit ETPs is as follows:

Type of benefit	Benefit paid to	Tax treatment
Non excessive	Tax dependent	Exempt
	Non tax dependent	Ordinary ETP treatment except post-June 83 component is taxed at special rates, see next table.
	Trustee of estate	Based on commissioner's determination of how the ultimate distribution of benefits will be apportioned between dependents and non dependents. Benefit is apportioned according to this apportionment as above.
Excessive	Any of the above	38%* on post-June 1983 component, 47%* on remainder.

* plus Medicare Levy etc.

Special rates of taxation on Post June 1983 Benefits (other components taxed as normal ETPs)				
		Range of benefits on which rate applies	Ordinary ETP	Death Benefit ETP paid to non tax dependent.
Less than age 55	Taxed element	All	20%*	15%*
	Untaxed element	All	30%*	30%*
Aged over 55	Taxed element	\$0 - \$123,808	0%	15%*
		\$123,808+	15%*	15%*
	Untaxed element	\$0 - \$123,808	15%*	30%*
		\$123,808+	30%*	30%*

* plus Medicare Levy etc.

It is important to take into account the differences between SIS and Tax definitions of dependence because of the different tax rates that apply. When designing an estate plan you may wish to consider distributing super to tax dependents and having non-super amounts sums paid to non dependents.

Once the lump sum has been distributed and ETP taxes paid, the money becomes "ordinary" money (not superannuation) and the money can be used for any purpose, without the restrictions that apply to superannuation (for example you could use the funds to acquire assets which a super fund could not acquire).

Income streams

In many cases, it is more tax effective to distribute superannuation as an allocated pension. As with all superannuation pensions, capital gains and income earned by the pension fund are exempt from tax, tax is paid when money is distributed to the pensioner and as with normal superannuation pensions there may be a deductible (tax exempt) component to the income stream, a rebateable component, on which a 15% tax offset applies, and an excessive component on which no tax offset applies.

Often if the intention is to invest the proceeds of the super fund for the benefit of estate beneficiaries, the most tax effective outcome may be to pay the money as a pension.

The maths are identical to comparing the tax efficiency of a super income stream for a normal pensioner vs. a personal investment, but the principle does bear repeating with an example here.

Assuming that a super fund had \$600,000, and the beneficiary spouse was 65, the minimum and maximum withdrawals from the allocated pension would be $\$600,000 / 15.7 = \$38,216$ and $\$600,000 / 8.1 = \$74,074$. If the investor could earn 7% on the underlying investments the profit

per year would be \$42,000. This is within the minimum and maximum ranges of the pension, so we'll assume for this example that in both cases the amount withdrawn is \$42,000.

At 2004/05 tax rates, the tax and Medicare liability (ignoring tax offsets such as the Senior Australians Tax Offset) would be \$9,402. The pensioner would receive a 15% pension offset on the \$42,000, so the pensioner's tax liability would be reduced by $\$42,000 \times 15\% = \$6,300$. In this case, the pensioner would be \$6,300 better off in the first year. The advantage would increase if the fund had undeducted contributions or if the pensioner drew an amount closer to the minimum withdrawal.

If the pension is commuted to a lump sum within six months of death or three months of probate, the lump sum is taxed as a death ETP, if it is commuted outside of six months of death or three months of probate, the lump sum is taxed as an ordinary ETP.

If the pension is commenced from a super fund which was in accumulation mode, pensions are subject to RBL assessment. If the pension is paid to an adult beneficiary (18+) it will be assessed against the recipient's RBL. The income stream will be taxed just like any superannuation pension, if there is an amount in excess of the RBL the pension will have a non-rebateable portion.

If the amounts involved are in excess of the lump sum RBL, standard RBL management strategies such as investing half the RBL value of the income streams in complying pensions can be employed.

One of the advantages of pensions for children is that minor beneficiaries are not subject to RBL assessment. This means that the entire income stream is rebateable even if the amounts involved were greatly in excess of the pension RBL (which could easily happen if the fund member had bought large insurance policies within the fund for example).

Just like income paid from any deceased estate, children are taxed at adult tax rates, not the special rates normally paid by minors on "unearned" income. The combination of adult tax rates and the benefit of a 15% tax offset on the entire income stream regardless of how large make pensions for children a very tax effective strategy to use.

If the super fund is already in the pension phase the pension will more or less continue as before with no new RBL assessment and the same rebateable portion as previously. A deductible amount may apply if there are undeducted contributions in the fund.

If the super fund was in the pension phase and the pension is commuted to a lump sum by the new estate beneficiary, the lump sum will have an excessive component if the pension had a non-rebateable component. The lump sum will otherwise be taxed as a death ETP.

Binding death nominations

Superannuation is not an estate asset because you are not the legal owner of your superannuation (the legal owner is the super fund trustee), therefore superannuation is not an asset covered in a Will.

The taxation of superannuation death benefits depends on who receives the money. If the beneficiary is a tax dependent of the testator, generally no tax is payable on the fund proceeds up to the pension RBL. The super fund trustee may even be able to claim back any contributions tax that was paid by the fund.

If the beneficiary of the payment is not a tax dependent, the money will be generally taxed as an Eligible Termination Payment (ETP). There is a difference between death ETP tax and normal ETP tax in that death ETPs don't have a tax free threshold on the Post 83 component, so beneficiaries pay 15% ETP tax right from the first dollar of withdrawals, there is no \$112,405 of tax free income.

Because of the differing tax treatments, it is wise to plan one's estate planning properly and ensure that if at all possible superannuation be paid to dependents so there usually will be no tax to worry about.

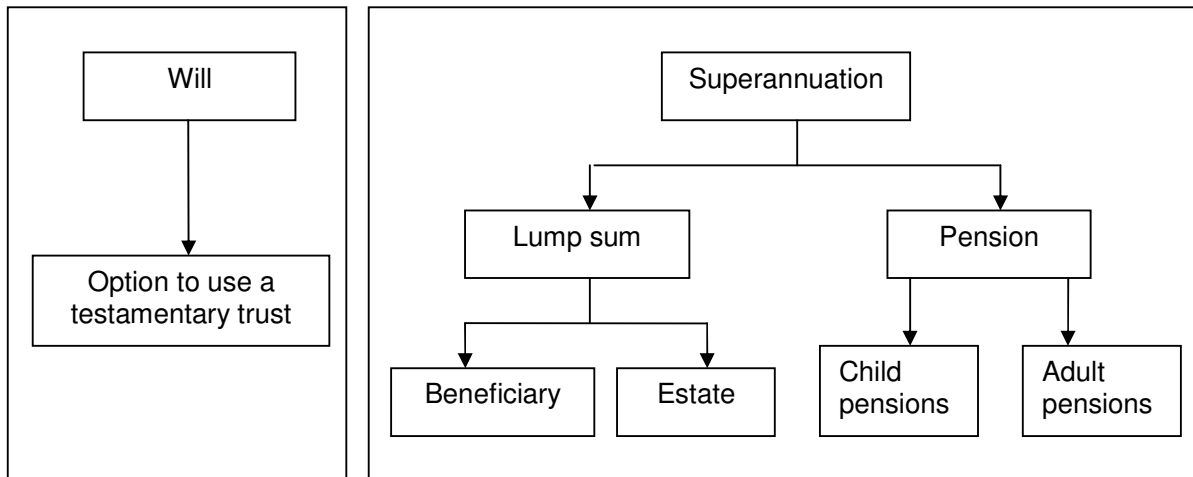
Superannuation needs to be dealt with separately from the estate, and unless a binding nomination is made to a superannuation trustee, the trustee has discretion as to how the assets are to be distributed (usually it is paid to the estate, though various other options are available).

You can let a super trustee know how you wish to have your estate assets distributed by completing a "binding death nomination". These nominations allow you to specify how you want your super to be distributed, though the traditional nomination elapses after three years, and needs to be renewed.

Recently, some superannuation providers have started accepting binding death nominations that do not lapse.

In some cases a binding nomination may not be the best vehicle to use as the trustee's discretion can be useful in some special circumstances, particularly when there are asset protection/risk issues with a particular beneficiary.

Ideal structure of estate



TIP: sometimes for asset protection and other reasons it may be best to give your intended beneficiaries interest-free loans instead of leaving assets directly to them in your Will. In the event of the beneficiary going bankrupt, the estate would be able to recall the loan and become a creditor. In this way, some funds may be able to be clawed back rather than being completely lost to the trustee in bankruptcy. This also eliminates the need for an equalisation clause in the Will, it is more difficult for a disgruntled potential beneficiary to challenge a gift than a loan. Naturally the loan should be appropriately documented with a legal loan agreement.

What is the general procedure?

When a person dies, the Executor, or Administrator, will deal with the assets of the person's estate. This will generally involve:

- collecting in all of the estate assets
- paying any debts (including income tax)
- sharing out the estate assets between the people who are entitled to it (this will either be in accordance with the person's Will or the applicable State intestacy laws).

An Executor is the person, or persons, named in the Will who the deceased wishes to administer his or her estate.

An Administrator is the person or persons appointed by the Court to administer the deceased's estate where the deceased did not leave a Will, did not appoint an Executor in the Will, or the named Executors are unable or unwilling to perform the duties.

The appointment of an Administrator is part of the process of obtaining a grant of Letters of Administration, discussed below.

The person or persons appointed Administrator are usually one of the persons entitled under the Will or intestacy.

Before the Executor, or Administrator, can deal with the assets, the Probate Office of the appropriate State Supreme Court must have either:

- where there is an Executor, granted Probate. Probate is an order of the Court saying that the Will is "valid" (discussed below) and that the Executor has the right to administer the estate
- where there is an Administrator, granted Letters of Administration. Letters of Administration may be granted where there is a Will, in which case the assets are distributed in accordance with the Will. Alternatively, where there is no Will, the administrator will distribute the estate assets according to the laws of intestacy.

When is a Will a "valid" Will?

In general, a Will must be:

- in writing
- signed by the Will maker with the intention of giving effect to the Will
- the Will maker's signature must have been witnessed by two witnesses who do not receive gifts under the Will
- the Will must have been signed by the two witnesses in front of the Will maker.

If these requirements are not met, the Court has a discretion as to whether or not to grant Probate (i.e. confirm that the Will is valid). If the Court doesn't confirm that the Will is valid, the estate may be distributed according to the laws of intestacy.

Generally, if the deceased married after making the Will, it is automatically revoked at the date of the marriage (unless the Will expressly states that it was made in contemplation of marriage).

Also, if the deceased divorced after making the Will, any gift to the former spouse in the Will, is revoked when the divorce becomes legal (unless the Will expressly states it was made in contemplation of divorce). Note that this rule does not apply in Tasmania, where the whole Will is revoked on divorce, or in Western Australia, where divorce has no effect on the validity of a Will.

Important considerations in choosing Executors

The role of the executor is an important one, as the executor must call in the assets, pay off the debts and distribute the estate assets to the beneficiaries. It is important to appoint an executor who is reliable, honest, capable of dealing with professional advisers and who will have the interests of the beneficiaries at heart. You may wish to consider appointing co-executors, including a professional trustee company.

The executor is responsible for the investment of estate funds on behalf of the beneficiaries in a trustee capacity. As trustee, he or she must invest the funds so that their value does not fall. The regulations vary in each state, but the "prudent person test" is the broadest definition that may apply. This allows the personal representative to invest in any kind of investment, so long as it is prudent having regard to all of the circumstances. You can also make reference to investment powers in your Will if you so desire.

The Executor's role is a very important one. You should consider the following points when appointing an Executor.

- Are they likely to outlive you?
- Will they have time to do what is needed?
- Will they be impartial if there is a dispute?
- Do they have some understanding of your assets?
- Are they trustworthy?
- Have you discussed their appointment with them and are they happy to do the job?
- Have you considered appointing a solicitor, accountant or the Public Trustee as an alternative?

Dealing with debts

Debts of a deceased person are payable out of their estate before the distributions are made to beneficiaries. Debts with specific security (eg. family home) are generally paid out of the security assets. If a debt is unsecured, however, the specific laws of each state will usually specify the order in which gifts under the Will are reduced by the payment of debts. This may distort the wishes of the deceased. However, if the Will specifically state how the debts are to be paid, those wishes will generally be followed.

People with large debts, in particular, should consider making specific provision for those debts in their Will.

For example, assume your only estate asset is the family home, which is left to your spouse by Will. You then make a binding nomination for your superannuation to be paid to your children. If you have significant debts, the house may need to be sold in order to meet them. This would probably be contrary to your wishes. Alternatively, you might pay some of the superannuation money to the estate to provide for the payment of the debts.

How can distributions under a Will be challenged?

There are two situations in which a Will may be challenged.

Firstly, the Will may be challenged on the grounds that it is flawed or invalid. Grounds for challenging a Will in this way include:

- that the Will doesn't satisfy formal requirements such as being in writing, signed and witnessed (although there may be circumstances where Wills not satisfying the formal requirements may still be accepted)
- that the deceased lacked sound mind, memory and understanding at the time of making the Will
- that, at the time of making the Will, the deceased was affected by fraud and undue influence
- that the deceased did not know and approve of the contents of the Will.

There are also additional circumstances where specific gifts in the Will may be void, for instance:

- where gifts are made to a witness or a witness' spouse
- where the Will contains a gift to a former spouse and the Will was made before the deceased terminated the marriage (this does not apply in Western Australia).

The second type of challenge, known as a Family Provision claim, accepts that the Will was validly made, but seeks to have the distribution of assets under the Will varied. A Family Provision challenge is on the basis that the client failed to make adequate provision for the proper maintenance and support of the widow, widower and children of the deceased.

What if there is no Will?

When someone dies without having a valid Will in place they are said to have died intestate. There are two reasons why this may occur, never having prepared a valid Will, or a Will becoming invalid due to a number of circumstances such as marriage or divorce.

Intestacy laws are much more complicated and time consuming than administering an estate under a Will. Intestacy laws, which may differ from state to state, generally set out a formula by which it is determined who is entitled to the estate assets. It is usual that the person entitled must have survived the deceased (sometimes for a fixed time period). The formula may result in the deceased's estate assets being distributed in a way the deceased did not wish. In addition, assets may need to be sold for the distribution to occur (which may be prevented where specific gifts are made in a Will).

The applicable intestacy laws will depend on the state (or states) in which the deceased's estate assets (or part) are located.

Where the laws of more than one state apply, such as where the estate assets are located in more than one state, additional complexities arise.

Under intestacy laws, the way in which your assets will be distributed will generally depend on your personal circumstances.

If the deceased died without a valid will (intestate), letters of administration need to be obtained from the Supreme Court appointing someone to administer the deceased estate.

In such situations, the assets of the deceased person are distributed in accordance with the succession laws of the States and Territories of Australia. Generally, that means the estate passes to the deceased person's next of kin.