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piecing it together

Collaborative Estate Planning

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general advice

Disclaimer

Information provided in this document is general in nature and does not constitute financial or legal advice.

Every effort has been made to ensure that the information provided is accurate, but information may become outdated as legislation and new government announcements are made.

Individuals must not rely on this information to make a financial, investment or legal decision as it does not take into account their personal circumstance.

Before making any decision, we recommend you consult a licensed advisor or legal practitioner to take into account your particular objectives, circumstances and individual needs.

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PART 1

family circumstances

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it's all in the family

who's who in the zoo

It is critical that as an advisor, you know who is in the family tree of the client. This helps identify who the client should provide for [and can even provide insight into potential family members that may be appointed in key roles].

The best way to approach this is to draw a family tree for each client and step through each of the relevant parties with the client.

Your family tree should identify:

- The names and ages of the family members
- confirmation of the status of each person in the family tree [deceased, lost capacity, special needs etc]
- the relationship between the parties [married, divorced, de facto]
- any dependents that are not lineal descendants [ie those people that the testator provides support to]
- the risk status of each person the testator is considering to benefit from their estate.

risky business

Identifying if a beneficiary is high risk is critical to ensuring that person is adequately protected under the client's estate plan. In determining if a beneficiary is high risk, it is best to categorise the risk into one of two categories:

Commercial risk

- the person is a company director
- the person has provided personal guarantees for business or investment debts or liabilities in favour of creditors
- the person has assets that are heavily geared or minimal cashflow to cover any events that may create issues with repayment of loans

Non-commercial risk

- the person is at risk of relationship breakdown
- the person has special needs
- the person is easily influenced
- the person makes poor financial choices
- the person has an addiction of some sort
- the person is minor
- the person lives overseas

challenge accepted

Careful examination of the family relationships also provides background to any circumstances creating the potential for an estate challenge.

More detail about estate challenges can be found in our information sheet on that topic in Part 7.

PART 2

financial circumstances

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acting like an ass...et

the holy trinity

Most people are not aware that not all of their assets are covered by their will. Highlighting this to the client early on helps reduce confusion when it comes to determining how assets can pass.

Working out what is in a client's estate and what is not in their estate is often one of the most critical things when preparing an estate plan.

This is important for many reasons, but mainly:

- identifying which assets may be subject to an estate challenge
- ensuring there is adequate funding for the proposed plan
- confirming what, if anything, needs to be done to address non-estate assets

One of the easiest ways of identifying assets [and helps clients to understand how assets pass], is to separate the assets as follows:

assets personally owned

This includes assets that are held in the cleint's own name.

What fits into this column varies greatly depending on the circumstances.

For example, care should be taken to ensure that any asset in this column, is not subject to a prior right, including, for example:

- Shares in private companies or units in unit trusts subject to an agreement containing an option to purchase by the other stakeholders
- Pre-exisitng mutual wills prescribing how a client is allowed to structure their estate plans
- Jointly owned property. More detail about property ownership structures can be found in our information sheet on that topic in Part 7

Advisers should also be aware of assets or liabilities that may fall within this colum, but are not often remembered, including, for example:

- Life insurance that is held in the client's name [as opposed to being held by a superfund]
- Unpaid present entitlements or loans owing to the client

assets inside structures

This column covers assets inside entities such as trusts, companies, partnerships etc.

What fits into this column varies greatly depending on the circumstances.

For example, care should be taken to ensure that any asset in this column, is not subject to a prior right, including, for example shares in private companies or units in unit trusts subject to an agreement containing an option to purchase by the other stakeholders.

Advisers should also be aware of assets or liabilities that may fall within this colum, but are not often remembered, including, for example, unpaid present entitlements or loans owing to the entity.

superannuation benefits

Superannuation includes all of the client's superannuation benefits, whether they be held though a Self-Managed fund or retail fund.

It includes also:

- Assets your self managed fund holds on bare trust
- Any life insurance taken out by your superfund

It's important to understand that while in most states, only assets held personally can be the subject of an estate claim there are some further exceptions to this that you must be aware of when designing an estate plan for your clients.

Laws pertaining to estate challenges in New South Wales enable a court to include certain property that is not technically part of a deceased estate into the pool of assets that can be subject to an estate challenge. This can be done when either the deceased person or their property has a connection with New South Wales. Care must therefore be taken to ensure that this is discussed in detail with clients who have a connection with New South Wales.

The reality is that while assets may be held inside other structures, this does not necessarily mean they are safe from a challenge of any type. More and more, we are seeing cases where the administration of superannuation funds and the validity of nominations being questioned in court by disappointed beneficiaries.

There are also a myriad of laws and rules around the management of entities such as trusts or companies that can be challenged in court by particular parties.

It is therefore critical to ensure that you consider all of these issues when assisting a client.

outta control!

With each of the columns, it's important to understand how your client can dictate where those assets pass on death or in capacity, or rather, who they want controlling those assets.

The documents that can be used to dictate this, include:

personal	structures	super
+ will + letter of wishes + powers of attorney	Constitutions and trust deeds [and any variations to these that may be required where those documents don't address the client's objectives].	Nominations, constitutions [if trustee is a company] and Superannuation deeds [and any variations to these that may be required where those documents don't address the client's objectives].

Again, care should be taken to ensure that any asset in this column, is not subject to a prior right [examples of which are given above].

straight outta jurisdiction

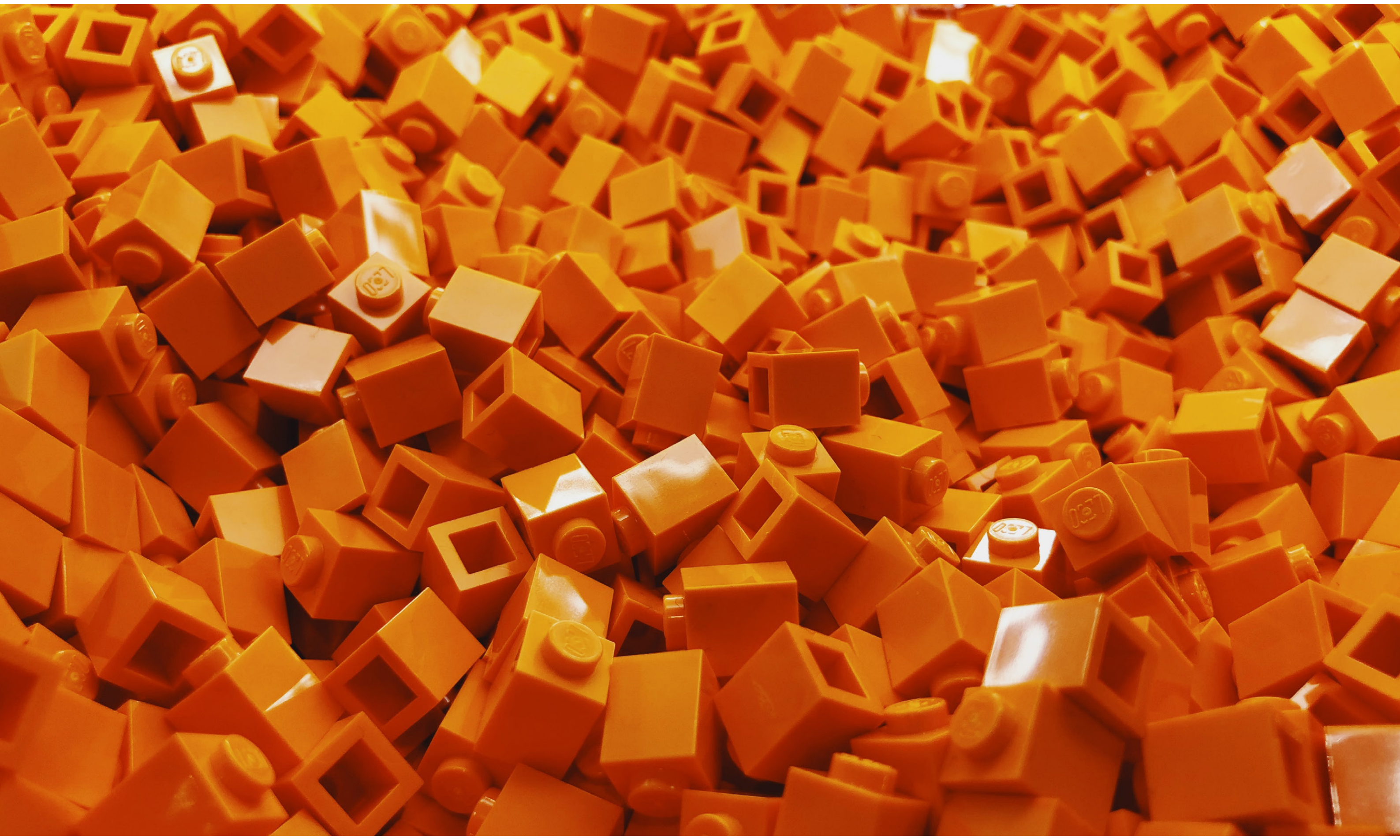
As a rule of thumb [and provided the client has an appropriately drafted will], a will they make in Australia should cover their assets worldwide. This is reinforced by, for example, international law that purports to allow for recognition of international estate planning documents.

While the above may be technically correct, in practice, the conservative view is that a client should have a will in each jurisdiction that they own assets. This is largely based around third parties having their own requirements to interact with the assets of a deceased held by that third party.

The two 'main offenders' when it comes to not supporting overseas wills are usually land registries and share registries. So, while the conservative view is that a client should have a will in each jurisdiction that they hold assets, where there are assets that will require their estate to interact with land or share registries this seems particularly important.

In a similar almost frustrating manner, while each state in Australia is technically supposed to recognise attorney documents prepared in other states, the practical experience is that again, third parties like land registries like to see a local document.

Identifying that the clients has assets overseas or in other states of Australia is therefore critical in ensuring their wider estate planning objectives align for all their assets, wherever they are located.



PART 3

structuring a will

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feeling structured

k.i.s.s or trust up

There are two general ways to structure a will.

The first and more common type, are what are often called "simple wills''. Under this approach, a client's assets are left to the beneficiaries of the estate in their own names.

This can be shown diagrammatically as follows:

When someone passes away, the personally owned assets pass into the control of the administrators of the estate. Often called "Executors'', at law, these people are called the "Legal Personal Representative'' [LPR].

The LPR then goes about managing the estate and when complete, distribute estate funds to the beneficiaries in their own names.

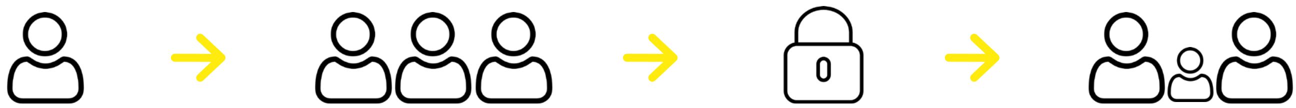
This means that the beneficiaries do not receive any tax planning or asset protection opportunities. It also means that any infants entitled to receive assets, must be able to call upon those assets when they turn 18.

This approach can be appropriate in many scenarios, for example where:

+ the size of the estate is such that any other structure would be unwarranted
+ the risk status of the beneficiaries is low [see part one for more information on risk status]
+ the beneficiaries are permanently located overseas meaning that a trust in Australia would create issues with cross border administration
+ the beneficiaries do not require tax planning strategies. In this regard, any income earned from their inherited assets will be taxed at their marginal rate.

The alternative approach is to embed testamentary discretionary trusts [TTs] into your will. Under this approach, your assets are left into a TT to manage for the benefit of a range of beneficiaries.

This can be shown diagrammatically as follow:



When someone passes away, the personally owned assets pass into the control of the administrators of the estate. Often called ''Executors'', at law, these people are called the "Legal Personal Representative'' [LPR]

The LPR then goes about managing the estate and when complete, distribute estate funds to trustees of the TT.

This means that the trustees determine which beneficiaries receive what assets and when [allowing greater flexibility for tax planning or asset protection opportunities].

It also means that control of the TT can be passed to younger generations at a pre-determined time.

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This approach has become more popular in recent times due to the asset protection and tax planning opportunities it affords. A will including a TT can be appropriate in many scenarios, for example where:

- The size of the estate is such that it warrants protection from third parties and from the beneficiaries themselves
- The risk status of the beneficiaries is medium to high [see part one for more information on risk status]
- The beneficiaries require tax planning strategies. In this regard:
  - Advice can be obtained at the time [and based on the circumstances at that time] by a professional support team [accountants, financial planners etc] about tax minimisation strategies; and
  - Minor children can receive just over $20,000 of income each year, entirely tax free from estate assets inside the TT.

Ultimately, the approach taken should be based on advice and the circumstances of the clients.

a matter of trust

A common consideration is when any TT should come into effect.

TTs can be established either on the death of one spouse or only on the death of both spouses.

The key considerations in determining when a TT should come into effect are the same as above: are asset protection and tax planning strategies needed by the surviving spouse? If not, there is potential for everything to be left to a spouse in their own names. We generally find that as couples get older, the need for asset protection and tax planning for the surviving spouse is significantly reduced.

powers in numbers?

Another issue that often arises is where there is more than one family unit to benefit and each unit requires asset protection and tax planning opportunities.

There are several considerations when deciding whether to implement a single TT [for all children] or multiple TT [one for each child] will. Some of these include for example:

consideration	circumstances	rule of thumb
the age of the beneficiaries	Some of the beneficiaries are minors	Single TT
	All beneficiaries are adults [or close to being so]	Multiple TT
the relationship between the beneficiaries	The relationship between the beneficiaries is such that they could jointly manage the trust	Single TT
	There is a poor relationship or substantially different communication styles between beneficiaries	Multiple TT
lifestyles of each of the beneficiaries	The beneficiaries are in the same stage or state when it comes to lifestyle	Single TT
	The beneficiaries have vastly different lifestyles	Multiple TT
whether asset protection is a priority	Asset protection is paramount for the beneficiaries	Single TT
	Providing beneficiaries with autonomy over their inheritance outweighs any perceived additional asset protection	Multiple TT
the nature of assets to be divided	Assets in the estate are such that division between multiple parties would be difficult or create conflict	Single TT
	Assets in the estate can be easily divided	Multiple TT
whether children should have control of their inheritance	The same control mechanisms are appropriate for all beneficiaries	Single TT
	Some beneficiaries require different control mechanisms	Multiple TT

Again, the ultimate approach taken should be based on advice and the circumstances of the clients.

guardians

One of the most sensitive topics discussed in drafting a will is deciding who should have guardianship of any minor children.

While it is very clear why this is such an emotional consideration, the reality is that clients should not let indecision on this topic protract their estate planning process.

This is due to the Family Law Court having an overriding consideration when determining guardianship of a minor child – what is in the best interests of the child.

While the court considers the wishes of a deceased parent/guardian in determining what is in a child's best interests, they are not bound by any nomination in a client's will.

Separately, the only 'rule of thumb' we see adopted for appointing guardians is that they should ideally live in the same household. The obvious reason for this is to reduce the burden of constant consultation with other parties for some of the everyday parenting decisions that may have to be made.

wishful thinking

Most people have particular wishes about items they own, usually being either high in sentimental or economic value.

Identifying what assets may fit within these criteria is important in determining how to draft a client's will in a manner that reflects their objectives.

Specific gifts in a will are created by giving an identifiable item to a particular, identifiable beneficiary. This can be contrasted with a 'residuary gift' where any remaining assets you have are attributed to an identifiable beneficiary.

An example of a specific gift would be as follows:
I give my Royal Doulton china set with blue, hand painted periwinkles to Sheridan Bucket.

Significant care should be taken when drafting a specific gift into a will. Not only should particular care be given to ensuring the item is appropriately described [based on the client's wishes in relation to that item], but a threshold issue should be whether to include the specific gift into the will or not.

When determining whether specific gifts of particular assets should be drafted into your will you should consider some of the following issues:

- the objectives of the will maker in relation to the specific item. If they want to be able to determine 'from the grave' what happens to that item, drafting the specific gift into their will creates greater certainty about the fate of that item
- the potential for the item to not exist at the time of the client's passing [either by its changing nature or otherwise]
- the potential for the item to change in value, creating issues around equality, where, for example, beneficiaries are each given specific assets that change in value over time [and the will is not updated]
- funding issues where, for example, specific cash gifts are left, leaving nothing for the residuary beneficiaries if there are insufficient assets in the estate for whatever reason. In this regard, it is critical to determine what assets are in the estate [see Part 2 for more information on determining how an asset is owned]
- the associated physical and financial costs of having to update the client's will when issues relating to the specific gifts change [the item itself changes in nature, value or fails to exist or where circumstances of the beneficiaries and your objectives vary].

Alternatively, many people are moving towards using 'letters of wishes' or similar to provide non-binding direction about specific items. While the certainty around the fate of items is significantly less, this process allows greater flexibility for the circumstances apparent at the time of a client's passing.

Again, specific advice should be obtained as to what is required in each case. The client's circumstances and objectives will be the key drivers in any discussion relating to how they should structure their estate planning documents to take into consideration their wishes regarding specific assets.

oh, calamity

While not critical to an estate plan [meaning that clients should not let making a decision about it hold up progression of their estate planning], clients should ideally consider the scenario where all of their primary intended beneficiaries are unable to accept a gift left to them.

This most usually comes about where, for example, a significant accident occurs where an entire family unit pass away. Often called a 'calamity clause' [originating from the nature of the event bringing it into effect], these clauses prescribe where assets should be directed where such a 'calamity' occurs.

There are no real rules of thumb when determining how these should be drafted. There are how some considerations, including:

+ The relative wealth contributed by couples [and whether this needs to be considered when dividing assets between respective families in a calamity clause]
+ How you describe the intended calamity beneficiary [including where there are half sisters and brothers, or where the intended calamity beneficiary is a charity]
+ Whether a calamity beneficiary's gift should be divided between other calamity beneficiaries if the original intended recipient has passed away [or alternatively, whether it should go to that person's children]

The key thing to remember here is not to let a client's indecision on this topic protract their estate planning process.

being governed

As noted in Part 2, working out what is in a client's estate and what is not in their estate is often one of the most critical things when preparing an estate plan.

Review of their structuring arrangements is key to confirming what, [if anything], needs to be done to address non-estate assets.

Part 2 of this guide should be carefully reviewed before assisting clients with their arrangements for assets outside their estate.

PART 4

dealing with superannuation

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feeling super

why

As set out in Part 2, superannuation benefits [Super] will not automatically form part of the assets that are directed via the terms of a client's will.

Subsequently, advice is required to ensure that a client's superannuation arrangements are appropriate based on their objectives. Often, separate steps may be required to ensure Super is appropriately managed under a person's wider estate plan.

super powers

There are two key things that need to be considered in determining the treatment of Super:

- Who a person can nominate
- What sort of nomination[s] can the person make

Generally speaking, a client can nominate any of the following parties to receive their Super:

- Their spouse
- Their child
- A person that is financially dependent on them
- Their ''legal personal representative''. As noted earlier, this is the person appointed to manage their estate [often called an ''executor'']

While the laws around Super allow any of the above to be nominated, it is important that the client is aware of the potential tax effects of how they leave their Super and to whom. A part of the estate planning process also includes consideration of the tax implications for the beneficiaries of a client's Super.

A person can ''nominate'' any of the above people in a series of different ways, depending on the terms of the governing rules for the superannuation fund.

self-managed?

Most self-managed superannuation fund [SMSF] deeds allow binding nominations [meaning the trustee must follow the nomination] and non-binding nominations [meaning the trustee has discretion regarding the provision of Super].

Again, most SMSFs also allow for pension arrangements, including reversionary pensions [where the client can nominate a person to receive an income stream from their Super].

Some funds also allow for: Most self-managed superannuation fund [SMSF] deeds allow binding nominations [meaning the trustee must follow the nomination] and non-binding nominations [meaning the trustee has discretion regarding the provision of Super].

Again, most SMSFs also allow for pension arrangements, including reversionary pensions [where the client can nominate a person to receive an income stream from their Super].

Some funds also allow for:

- "tiered'' nominations, whereby a client can nominate a "back up'' nomination where their first nomination fails
- other types of agreements in relation to Super, which largely appear to override any other type of nomination [including binding nominations]
- an entrenched nomination, where a member's nomination is "built into'' the deed for their SMSF and variation to the deed is required to change the nomination

With the significant increase in the value of Super, challenging the validity of superannuation nominations [and indeed, other things affecting the validity of the governing rules of the superannuation fund] has become commonplace alongside estate challenges.

Subsequently, advice is required to ensure that a client's superannuation arrangements are appropriate based on their objectives. Often, separate steps may be required to ensure Super is appropriately managed under a person's wider estate plan.

It is therefore important, that as a part of a client's broader arrangements, that the validity and compliance of their superannuation arrangements are carefully managed to avoid this being a sword for disgruntled beneficiaries to use.

chasing re-tail

Where a client has their Super held in a ''retail fund'', careful considerations must be made regarding what might be best practice versus what the terms of the retail fund allow.

In particular, many retail funds do not allow for tiered nominations or even for non-binding nominations.

In addition to this, clients need to be aware that any sort of nomination [or lack thereof] that creates discretion for the trustee of the Super fund may result in a delay in the payout of Super to the beneficiaries. This can be a very practical consideration for many families.

stay flexible - too much of a stretch?

Generally speaking, flexibility in superannuation arrangements is championed by those in the estate planning field because of the options it provides to receive any Super in the most appropriate manner, [including in a manner that minimizes any tax implications for beneficiaries.]

In this regard, while flexibility may be desired, advisors need to be aware of any limitations around a client's superannuation arrangements.

Great care must also be taken to ensure that flexibility is appropriate in the circumstances. Examples of where more rigid superannuation arrangements may be appropriate include:

+ there are taxation implications of other options [of which the beneficiary or those managing your super may not appreciate]
+ any delay in the provision of Super may materially affect intended beneficiaries
+ where circumstances indicate an estate challenge may be likely [and direct nominations to individuals may help assets bypass the pool of assets open to being challenged];
+ the client otherwise wants certainty regarding the passing of their Super.

Appreciating the client's circumstances and objectives in relation to Super is critical to ensuring any advice provided around Super distribution on death is appropriate.

know your limits

It is most important that advisors are aware that the preparation and advice regarding the appropriateness of superannuation nominations is legal in nature and not something an advisor should take on without advice from a qualified legal practitioner.

Regardless of what advice is provided regarding how Super should be managed, advisers will need to facilitate the provision of the deed for any SMSF a client has an interest in and any related documents, such as nominations and pension documents.

Being generally across the Super arrangements of a client prior to any estate planning meeting will ensure that any discussion around Super can be made with reference to the client's current arrangements, including the limitations [if any] of their super funds.

PART 5

powers of attorney

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got the power

same, same... but different

Powers of attorney are documents that appoint people to make decisions about a person and their assets while they are still alive. Enduring Powers of Attorney [EPAs] are powers of attorney that continue to operate after a person has lost capacity to make decisions for themselves.

Helping a client to understand the difference and the need for EPAs is incredibly important. Not having an EPA in situations where a person loses capacity can have equally dire results to not having a will when passing away [and sometimes, worse results].

Explaining to them that the powers can be separated so that they have different people to act as financial attorneys to those they wish to appoint for more personal or medical types of decisions can be a critical part of the estate planning discussion.

Clients also need to understand the difference between an EPA for personal or medical matters and a document that governs end of life decisions [often called 'health directives']. While each State has its own version of health directive [with the name and form varying in each State], it seems largely consistent that the document is a medical document to be made in consultation with a person's medical practitioner.

You should discuss with your client about approaching their medical practitioner if they wish to document their end of life decisions.

power in numbers

As noted above, while each State in Australia is technically supposed to recognise attorney documents prepared in other States, the practical experience is that third parties like land registries like to see a local document.

It is therefore critical to identify if clients have assets in other States to ensure their wider estate planning objectives align, wherever their assets are located.

it's all about form[s]

Each state has its own form that are intended to represent the legislation in that state. Specifically, the forms usually reflect the manner and order your attorneys can act in, including any limitations on the number of attorneys [or back up attorneys] you can appoint.

Below is a very basic summary of the nomination limitations in terms of numbers and manner of acting for each state:

jurisdiction	financial matters	medical matters
QLD	Unlimited number of initial and back up attorneys. Can act individually, jointly or by majority.	Unlimited number of initial and back up attorneys. Can act solely, jointly or by majority.
NSW	Unlimited number of initial and back up attorneys. Can act individually or jointly.	Unlimited number of initial attorneys. Can act individually or jointly. One individual back up attorney only.
VIC*	Unlimited number of initial attorneys. Maximum 3 back up attorneys per initial attorney. Can act individually, jointly or by majority.	Maximum one initial and one back up attorney.
WA	Maximum of 2 initial attorneys and 2 back up attorneys. Can act individually or jointly.	Unlimited number of initial attorneys and back up attorneys. Can act individually or jointly [if more than one attorney, they must act jointly] or alternately.
TAS	Unlimited number of initial attorneys. No Back up attorneys. Can act individually or jointly.	Unlimited number of initial attorneys. One individual back up attorney only. Can act individually or jointly [if more than one attorney, they must act jointly]
SA	Unlimited number of initial attorneys. No Back up attorneys. Can act individually or jointly.	Maximum of 3 initial attorneys. Can act individually, jointly, by majority or successively.
NT	Maximum of 4 initial and back up attorneys in total allowed. Can act individually, jointly or alternately.	Maximum of 4 initial and back up attorneys in total allowed. Can act individually, jointly or alternately.
ACT	Unlimited number of initial and back up attorneys. Can act individually, jointly or by majority.	Unlimited number of initial and back up attorneys. Can act individually, jointly or by majority.

** Note: Attorney documents are technically separated so that financial and personal decisions are governed by one document and medical by another.*

losing capacity

Clients should be made aware that the financial powers in an EPA can come into effect, generally speaking, either immediately on signing the document or when the person is declared to have lost capacity.

Many providers suggest that the document be marked to come into effect 'immediately' for various reasons, including:

- Allowing an attorney to act when the person is out of state or the country
- The person begins suffering from dementia in a manner that creates a 'grey area' regarding whether they have capacity or not
- The person suffers another disease or disablement impairing them and they don't want their family to have to go through the process required to prove someone has lost capacity.

There is some concern in the public however that the granting of the immediate right to act can result in the document being misused. Some of the suggestions that can be made to limit the practical risk of this, include:

- Secure storage of the document so that it is not easily accessable to the attorneys [as attorneys will need an original or certified copy to rely on the document]
- Limiting the information you provide to people you appoint as attorneys to only notifying them where the documents are stored [as opposed to telling them all the details including when the power commences]
- Where possible, not registering the document with any third parties so that it can be revoked at any time, without much difficulty.

Ultimately, any decision regarding when the financial powers in an EPA should come into effect should be made carefully with specific advice for your circumstances.

increasing your power

Clients should be informed that they can increase [and indeed decrease] the actions attorneys can take in most States. In this regard, there is generally an area in most EPAs where people can set out specific wishes in relation to the powers an attorney has and their instructions regarding their care.

Great care should be taken when including any restrictions or additional powers in the documents as these can have potential to create very practical issues.

Four common, additional powers estate planning lawyers often place into EPAs include:

- The ability to act in conflict of interest [so that, for example, a spouse can transfer a family home to their own name]
- A clause providing for fees to be charged [where for example, a professional acts on the person's behalf or to ensure that an attorney is compensated for their efforts]
- The ability for the attorney to give gifts on the person's behalf [noting that these must be reasonable in accordance with the law]
- Granting an attorney the ability to involve themselves in changes to a person's superannuation arrangements [where, for example, there is a change in law or circumstances warranting this]

In addition to the above potential includes, where a client is required to have more than one EPA [for example, they have to have another document in another State], wording will need to be included to address the conflict between the documents.

Ultimately, the decision to add or restrict powers should be made in consultation with an estate planning lawyer, but advisers should be equipped to help guide clients through the process of determining how an EPA should operate.

sign here

Assisting clients with signing their documents can be a great value add. There are very specific and often complex signing requirements for EPAs so having the awareness of the issues involved and the layout of the documents will greatly assist an adviser to step a client through this.

Of particular note is that most States require a 'qualified' witness to signatures in the document. What a 'qualified' witness is, varies from State to State, with New South Wales having the highest bar by requiring a person with some connection to the legal system to witness documents.

To ensure this process is as smooth as possible, your estate planning legal practitioner should either assist you and the client directly or provide you with detailed signing instructions so that you can assist your client with this.

PART 6

process considerations

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time to process

losing capacity

With the increase in estate litigation and the proliferation of the aging population, advisors need to be aware of the issues around capacity and estate planning.

Ensuring [and appropriately documenting] that a client has capacity to sign their documents is the best defence possible, both for future estate claims based on a lack of capacity, but also for any issues associated with liability.

It is strongly recommended that advisors have standard processes in place to safeguard both the client and adviser. Such processes can include, for example:

- Holding a series of in person meetings over time to gauge the client's comprehension
- Requiring clients to obtain independent medical advice regarding their capacity to enter into estate planning documents, where a client is over a certain age, when capacity is questionable or where an estate challenge is possible
- Exclusion of people that may benefit under the documents during any meeting, particularly those where instructions are given
- Thorough and appropriate record keeping

it's a sign

As noted above, EPAs have some very strict signing requirements. While not as cumbersome, wills also have formal signing requirements to make the document valid [and avoid having to answer questions about it validity later].

Assisting clients through the signing process is critical to overseeing the completion of the core estate planning process. Similar to EPAs, your estate planning legal practitioner should either assist you and the client directly or provide you with detailed signing instructions so that you can assist your client with this.

We recommend that advisors consider facilitating the signing process by organising the client to attend the office and assist with the process of signing and witnessing [where a legal practitioner is not present].

Any signed documents [or at least copies of them] should be forwarded to the legal practitioner that prepared the documents, to check they have been validly executed.

stuck in the stor-age

Appropriate storage of original estate planning documents is critical to ensuring the longevity of a client's estate planning arrangements.

Clients need to be aware of the potential risks involved in keeping their documents at home, including, for example:

- Damage or destruction to the documents by other persons
- Damage or destruction to the documents by natural disaster
- Misuse of the documents by other persons
- Misplacement of documents

As such, it should be recommended to clients that all original documents are kept either with your office or with the office of another professional, such as their legal practitioner. Where documents are stored offsite, clients should be made aware of the potential delay in requesting documents.

It is usually recommended that clients consider passing on to the key people named in their documents, the details of where their documents are stored so these can be easily located if something happens that they need to be relied on.

eat, sleep, review, repeat

You should assist clients with reviewing their estate planning documents regularly to ensure that the documents are still appropriate for their changing circumstances and objectives.

If at any time a client would like to update their documents or you or the client have any question regarding their appropriateness, you should contact a legal practitioner for their comments.

In assisting with reviewing a client's circumstances, the following events should trigger a proper review of their documents with a potential view to updating them [as required]:

- the death or inability to act of anyone nominated in the documents
- the client or a person in the documents changes their country of residence
- the client or a person named in the document has a change of name
- there is a significant change in the client's circumstances [e.g. significant asset changes, marriage, divorce, entering or ending de facto relationships or have children and can include changes in business or structuring arrangements and a change in personal liability] for the client or person named in the documents

We recommend a checklist approach is taken to reviewing client's circumstances and reporting to their legal practitioner, as appropriate. See Part 8 for a list of items that could be added to your own internal checklist.

who's bill

One of the practical issues advisors need to consider is the approach they take to costs and billing.

Often it is asked whether advisors should be charging a fee for their facilitation. The short answer is ''it's up to you'', however it is common that advisors do [to compensate them for their time and effort involved in bringing everything together].

Other advisers either consider it purely as a value add and some have accounted for it in their fixed retainer. One of the more common approaches we see [due to the streamlined appearance form a client perspective] is to 'bundle' any legal costs with your costs for facilitation of the process.

Critical to this approach however is that your licensee allows you to adopt this approach. As such, we recommend contacting your licensee to discuss any approach you wish to take before doing so.
Where tax advice is provided as a part of the estate planning process, advisors should be aware that clients can claim a percentage of the legal fee [proportionate to the tax advice] as a deduction.

We recommend clients speak with their legal representative and accountant to confirm what proportion they are able to deduct based on their circumstances [and the advice provided].

Another process consideration that advisors must think about is how to facilitate the payment of the legal fee by the client. Many providers require upfront payment of some kind [or at least authorization to take payment] in order to progress. Many online providers require this in order to keep the costs of the legal service competitive.

Again, we recommend you speak to your licensee before adopting any approach.

PART 7

information considerations

businessdepot.com.au/legal

what part of my estate can be challenged

estate assets

In most States in Australia, only those assets that belong to you personally can be challenged in an estate challenge.

Depending on the circumstances, this can generally mean that the following assets may not be affected:

- superannuation benefits
- assets held inside trusts
- assets held as joint tenants

special rules for New South Wales

For those that live or have assets in or connected with New South Wales, separate rules apply ['notional estate rules']. The notional estate rules allow a court to consider assets that do not generally form part of your personal estate [such as those listed above].

The notional estate rules also allow a court to order estate assets to be 'clawed back' in certain circumstances.

what can i do

the bad news

The 'bad news' is that due to the imposition of legislation in each State regarding estate challenges, there is nothing you can do to prevent a person that is eligible from challenging your estate.

the great news

There are steps that may be available to minimise the likelihood of a successful estate challenge. Please contact us if you would like to talk to one of our estate planning lawyers regarding the options available to you.

Where appropriate, couples should also consider seeking advice from a family law specialist about whether they should put in place a financial agreement to confirm any agreement that they have reached regarding the division of assets on separation and death. If you would like us to provide you with contact details of family lawyers, please let us know.

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using the roadmap

general

This document is designed to provide prospective clients with broad information about estate planning and the process adopted by businessDEPOT Legal in assisting you with your estate planning needs.

disclaimer

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why have an estate plan

who decides

Without a will the Government decides who receives your estate and in what proportions, called the 'rules of intestacy'. These rules vary from State to State, but broadly, an estate will be distributed to the spouse and children of a person who dies without a will.

A failure to obtain professional estate planning advice in relation to the disposal of your estate and non-estate assets may result in any one or more of the following happening after your death:

+ your beneficiaries not receiving the share of your estate and non-estate assets that you intended
+ the government taking part of what you intended your beneficiaries to have due to the imposition of unnecessary tax or stamp duty
+ someone other than your beneficiaries taking their inheritance due to a beneficiary suffering a business failure, being made bankrupt, having a divorce or relationship breakdown, becoming addicted to drugs or gambling or becoming mentally or physically disabled

how is a testamentary discretionary trust different

At businessDEPOT Legal, we take a holistic view of your estate planning needs.

Estate planning is so much more than 'just wills'. Estate planning involves looking at what happens in the event of your death or on the loss of your capacity to both your personal assets and those held through other structures you have an interest in such as trusts and companies.

Care should be taken when preparing your estate planning documents to ensure each address your wider interests [direct or indirect] as a part of your broader estate plan.

help us to help you

It is important to obtain advice from and have your will prepared by a solicitor. Home-made wills can be troublesome, even when prepared with the aid of a pre-printed will kit. A mistake in drafting a will may, at worst, be impossible to correct, and at best, only corrected through the intervention of the court.

who should manage

what is an executor

An executor is the person appointed by your will to take charge of your affairs on your death. This person must ensure that your assets are collected, debts are paid and your estate is distributed to the beneficiaries named in your will.

It is not necessary to appoint a relative, nor is it usual to appoint a solicitor or accountant. The person you appoint as an executor must be completely reliable, honest and have a reasonable commercial sense.

If you appoint more than one executor, they will be required to act jointly in administering your estate. One executor would not be able to make decisions without the consent of the other. Appointing two executors jointly can provide your estate with the checks and balances to better ensure that your estate is administered properly.

The person should not be of such an age or state of health that they are unlikely to survive you.

your executor

You may appoint more than one executor, however no more than four executors can be appointed.
It is common for each spouse to appoint the other as executor. However, you should also make provision for a "back-up" executor in case your appointed person cannot act.

To ensure your estate is robust enough, we recommend you appoint a further back up executor to act if your first executor cannot act.

beneficiaries

who decides

When deciding who should receive your assets if you have passed away, you should consider some of the following:

- whether you wish to make any specific gifts of personal property to any person. You should be aware that if the item gifted has ceased to exist, has been sold or disposed of at the date of your death, the gift may fail. Therefore, you may wish to make the gift a general one to avoid this risk
- whether you wish to make any gifts of money to any person
- how to distribute the balance of your estate
- if your children are your beneficiaries, the age they are to take their inheritance

It is common [although not mandatory] for a couple to each leave their estate to the other spouse, and if that spouse has already died, to any children in [and to their children if they predecease you].

It is possible to draft wills that include testamentary discretionary trusts [TDT's] that have a wide range of asset protection and tax planning opportunities. Information about TDTs and how these might be appropriate to consider in your estate planning documents can be provided on request.

If the children are minors and there are no TDTs in your will, then it is usual to provide that the executor will hold the estate on trust for the children until they reach 18 years of age or older. The executor usually has powers to advance money to the children if necessary for their daily living expenses including medical, education and other needs.

If you wish to make similar provisions in your will you will need to consider:

- who the executor will be
- who the guardian for the children will be [not necessarily and preferably not the same person as the executor]
- who the beneficiaries will be in case your spouse and your children do notsurvive you [e.g. the whole family is killed in an accident].

Of course, you are free to determine who your beneficiaries will be.

who can claim an interest in your estate

When considering appropriate beneficiaries, please bear in mind that certain people can apply after your death to claim part of your estate if you do not make any or adequate provision for them. As a general rule surviving spouses, children [including adult children] and people who are financially dependent on you during your lifetime may make a claim

If a claim is made and it is successful, the court has the power to alter how your estate is distributed, not withstanding any contrary directions in your will.

We have attached a general outline giving guidance on when a person might be eligible to make a claim against your estate. Specific advice should be sought about the effect of a successful claim and avenues for reducing the changes of a successful challenge.

what happens if the main beneficiaries are not alive

There may be some scenarios, however unlikely, that you and each of your intended beneficiaries are unable to receive their share of the estate due to having predeceased you.

We recommend that you prepare your documents to include a 'catastrophe' clause setting out who you would like to receive your estate, should you and each of your main, intended beneficiaries have not survived.

specific gifts

what are specific gifts

Specific gifts are identifiable assets [including money] to specific persons or entities.

These gifts ensure that particular assets can be directed to a particular beneficiary.

It is important to note that specific gifts are treated differently from your residual estate when calculating the amounts beneficiaries are to receive under your will. As such, care should be taken when setting out specific gifts in your will.

personal items and your

Specific gifts are identifiable assets [including money] to specific persons or entities.

These gifts ensure that particular assets can be directed to a particular beneficiary.

It is important to note that specific gifts are treated differently from your residual estate when calculating the amounts beneficiaries are to receive under your will. As such, care should be taken when setting out specific gifts in your will.

what can my attorney do

Attorneys have powers set out in legislation for each State in Australia detailing what an attorney can do. You may give your attorney power to make decisions about:

+ personal/health matters
+ financial matters

You cannot give your attorney power to make decisions about:

+ special personal matters such as decisions about your will, appointing someone as your attorney, voting at elections or consenting to adoption or marriage
+ special health matters such as donation of body tissue, sterilisation, pregnancy termination, research or experimental health care, or certain psychiatric or other health care
+ authority to withdraw or withhold life sustaining medical treatment. If you wish to give instructions about this type of decision you will need to make an Advance Health Direction which you complete with your doctor.

At businessDepot Legal, we recommend your attorney document also include specific provisions allowing your attorney to make decisions for the circumstances at the time. We are happy to discuss with you which, if any, of these additional powers may be appropriate.

We also recommend you consider discussing end of life arrangement with your usual medical practitioner. They can assist you with preparing appropriate documentation relating to your end of life decisions.

preparing for your estate planning meeting

what you should bring

Where possible, the team at businessDEPOTLegal will work collaboratively with your other advisers. We are also happy to work with your other advisers outside the businessDEPOTfamily.

Where further background information is required, we will contact you to arrange this to be provided prior to the meeting.

what to expect

Broadly speaking, your estate planning meeting is designed to discuss:

+ Your estate planning objectives
+ Our recommendations in relation to your estate planning objectives.

Clients should prepare for the meeting by discussing some of the people they see as being fit to play key roles in their estate planning, so that the meeting can focus on the legal issues involved.

Many of the issues discussed cannot always be resolved within the meeting itself. Clients should be prepared to take issues home to discuss with their families and other advisers to ensure they have had adequate time to make an informed decision about all issues.

scope of work

businessDEPOT Legal

At businessDEPOTLegal, we provide set fees for the preparation of estate planning documents.

Our fees are provided to you as our client, on the terms of our costs agreement that will be provided.

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what is testamentary discretionary trust

what is a trust

A trust is a legal relationship where someone ['the trustee'] holds an asset for the benefit of others.

A trustee can be natural persons [up to a maximum of 4] or a company and has the day to day decision making powers over the assets of the trust. The trustee is considered to be the legal owner of the assets and subsequently, their name will appear with any third parties as owning the assets.

The assets are then deemed to be 'trust property' and must be held in accordance with particular terms. The terms of a trust can be found in:

- the 'trust deed' which is similar to a rule book setting out the rights and obligations of the parties to the trust
- Trust laws relevant to the jursidction of the trust
- a combination of both

The range of people that are able to benefit from a trust are called the 'beneficiaries'. Beneficiary categories can be very narrow or very broad, depending on the circumstances. Most trusts have a very broad range of beneficiaries for asset protection and tax planning reasons.

Trusts can also include an additional role often called 'Appointors', 'Principals' or 'Guardians'. Often referred to as 'God' of the trust, this person usually has the ultimate control of the trust by getting to determine who is the trustee. However the actual powers of a person in this role vary according to the terms of the trust deed. More information can be provided about the appropriateness of this role during a meeting with your estate planning lawyer.

what is a 'bare' or 'fixed' trust

The primary features of a 'bare' or 'fixed' trust are as follows:

- the trust will generally have a very limited range of beneficiaries with each beneficiary entitled to a fixed amount of the assets of the trust. The trustee does not have a discretion to allocate assets between the beneficiaries, often creating practical or taxation issues
- the trust does not offer the same asset protection [or tax flexibility mentioned above] afforded by a approriate crafted TDT, due to the fixed entitlement of the beneficiary to the assets of the trust if they attain the nominated age
- the trustee will be unable to protect the beneficiary if it is not appropriate for them to obtain control of the trust assets at the relevant time [for example, due to issues with bankruptcy, addiction or their own financial immaturity] by being provided instructions from a will creator about when control of the trust should be handed over to children
- In this regard, any entitlement under a will intended for anyone under the age of 18 is held by the trustee of the will until they obtain 18 years of age. If care is not taken regarding the drafting of a will, regardless of the age nominated by a will creator for a beneficiary to take control of their inheritance, the beneficiary can access their inheritence on their 18th birthday.

Generally, none of the above rules are applicable where the asset passes to a testamentary discretionary trust ['TDT'].

how is a testamentary discretionary trust different?

A TDT is a trust that is established via someone's will. The trustees, beneficiaries, assets and trust deed will be set out in the person's will that establishes the TDT.

TDTs are often used for the benefits they provide to the people intended to benefit from a person's estate. By having a broad range of discretionary beneficiaries and powers, the trustee of a TDT will have complete discretion about allocating assets of the TDT.

There is also more flexibility in determining the appropriate point in time to hand over control of a TDT to a beneficiary, taking into account the circumstances and what is appropriate at the relevant time.

Features that can be achieved through appropriate drafting of the trust deed can include:

+ assisting with providing additional protection for beneficiaries from third parties in the event of circumstances such as relationship breakdown or bankruptcy
+ protection of the wealth for the benefit of minor children, beneficiaries with special needs or spendthrift beneficiaries including ensuring those assets are not included in the pool of assets assessed for government sourced pensions
+ flexibility for tax planning, for example, to distribute assets of the trust to tax advantaged persons.

Care is taken to ensure the terms of the TDT accurately reflect your objectives and circumstances, including consideration of who should be able to control and benefit from the trust.

should i have a tdt in my will

generally

The appropriateness of using TDTs in your estate planning should be discussed with your estate planning lawyer.

Where possible, the team at businessDEPOT Legal will work collaboratively with your other advisers.

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tenants in common

Tenants in common each hold their share of the property discretely, with the percentage of each owner varying depending on the circumstances [for example, 50/50, 75/25, 99/1].

On the death of one of the owners, their share of the property will pass to the beneficiaries of their estate [absence any other precontractual agreements].

converting

Property held in either form can be transferred to the other ownership type. There can be some tax and stamp duty considerations, if for example, the change results in an ownership structure that does not equal-ly represent each party's interests.

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PART 8

checklist

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estate planning considerations

a bit of background

Below are some examples of the key points that should be determined as a part of any collection of background data relating to client [as the answers will dramatically affect the advice that is provided].

Having a preliminary conversation on each of these points with the client can mean any meeting with a legal representative can focus mostly on strategy [rather than on background information].

1. Does the client have existing wills or powers of attorney? ☐ Yes ☐ No ☐ Unsure
2. Is there anybody that could challenge the client's estate? ☐ Yes ☐ No ☐ Unsure

If yes, please provide details

3. Has the client entered into a Binding Financial Agreement with anyone [often called 'prenuptial agreements']? ☐ Yes ☐ No ☐ Unsure
4. Is there anybody that could challenge the client's estate? ☐ Yes ☐ No ☐ Unsure
5. Does the client have any assets inside other entities [e.g. companies, trusts, partnerships etc.] If yes, ensure to fill out the relevant part of this form ☐ Yes ☐ No ☐ Unsure
6. Does the client have assets outside Australia? ☐ Yes ☐ No ☐ Unsure

If yes, please provide details

7. Does the client have assets in another State? ☐ Yes ☐ No ☐ Unsure

If yes, please provide details

8. Does the client own assets owned jointly with any person? ☐ Yes ☐ No ☐ Unsure

If yes, please provide details

9. Does the client have any life insurance? ☐ Yes ☐ No ☐ Unsure

If yes, please provide details

10. Does the client have any nominations in place for their superannuation? ☐ Yes ☐ No ☐ Unsure

If yes, please provide details

11. Does the client have any personal assets of singular high monetary or sentimental value [for example, vintage cars, boats, war medals etc.]? ☐ Yes ☐ No ☐ Unsure

playing beneficiaries

Knowing who the client wants to benefit is probably one of the largest factors in determining how an estate plan is crafted. Below are set out some of the main things that need to be raised with regard to each beneficiary the client intends to benefit.

Again, having a preliminary conversation on each of these points with the client can mean any meeting with a legal representative can focus mostly on strategy [rather than on background information].

A child [or other beneficiary] with special needs?	☐ Yes	☐ No	☐ Unsure
An elderly, dependent parent	☐ Yes	☐ No	☐ Unsure
A child from a previous relationship [especially if paying maintenance]	☐ Yes	☐ No	☐ Unsure
A spendthrift or drug-dependent beneficiary	☐ Yes	☐ No	☐ Unsure
Risk of bankruptcy or are bankrupt	☐ Yes	☐ No	☐ Unsure
Live overseas	☐ Yes	☐ No	☐ Unsure

background information

Working out what is in a client's estate [and what is not in their estate] is often one of the most critical things when preparing an estate plan.

Assisting with identifying where assets sit across a client's group is critical to ensuring that a client's estate plan covers all their assets, regardless of how they are held.

We suggest that you provide copies of the following information to the legal representative assisting the client [to the extent that it is readily available and relevant]:

- ☐ Copies of existing estate planning documents [wills, power of attorney – if any]
- ☐ A summary of assets and how they are owned [e.g. jointly, solely or as tenants in common] with approximate values.
- ☐ Copies of existing estate planning documents [wills, power of attorney – if any].
- ☐ A summary of assets and how they are owned [e.g. jointly, solely or as tenants in common] with approximate values.