THE FINANCIAL PLANNER AS AN ESTATE PLANNER

McMasters' Advisers' | July 2011

The Financial Planner as an Estate Planner

The Financial Planner as an Estate Planning Advisor is one of a series of technical manuals specifically created for financial planners running fee for service practices. These manuals help establish the financial planner as the client's primary advisor, the point of first contact on all business questions and the advisor who facilitates other advice and professional services as needed.

McMasters' Advisors believe financial planning is a broad based activity that must encompass all aspects of each client's financial profile. This includes the careful and prudent management of assets on death so that the client's wishes and preferences are met and that taxation and other costs are minimised or even eliminated.

McMasters' Advisers' head office in Cheltenham Victoria

McMasters' Advisors is dedicated to helping advisors develop the skills needed to run an estate planning advisory capacity as part of their financial planning practices. McMasters' Advisors believes financial planners should be their clients' primary business advisor, with a broad knowledge of all relevant areas, and the capacity and inclination to bring in other specialist advisors including accountants and solicitors where appropriate. McMasters' Legal includes expert estate planning solicitors who can prepare wills and related documents for you at costs well below what you are used to paying.

It's all about you: we help you develop your practice. I trust you find "The Financial Planner as an Estate Planning Advisor an instructive educational experience that improves your understanding of this essential field of expertise for successful fee for service financial planners.

Yours faithfully

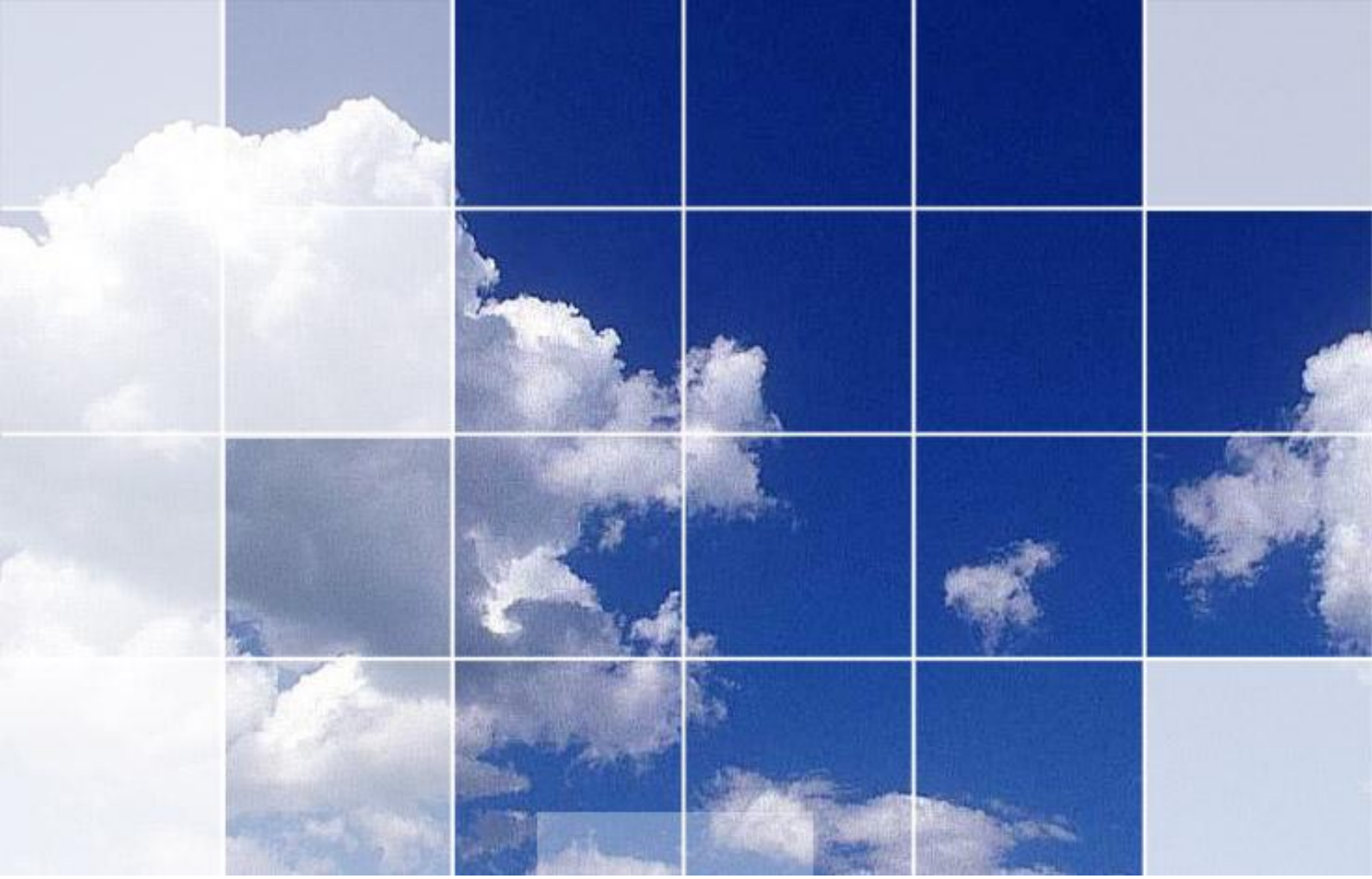
Terry McMaster
Director
McMasters' Advisors

McMasters'

McMasters' Advisers'

The Financial
Advisers' Guides

CONTENTS



THE FINANCIAL PLANNER AS AN ESTATE PLANNER

PART 1 INTRODUCTION

This manual has been designed for financial planners advising on client's estate planning needs. It is current as at 1 July 2011.

Estate planning is one of the essential skills needed by a financial planner in the new fee for service regime starting on 1 July 2012. To be relevant to clients under the new Future of Financial Advice (FOFA) regime financial planners must have the skills and experience to advise clients on the wide range of matters required by clients. Competency in estate planning is one of these areas.

This manual's main purposes are to provide financial planners with:

(i) written materials designed to give a basic understanding of the more common estate planning issues and concepts, sufficient to enable you to have a meaningful discussion with each client about their estate planning requirements and identify possible action points;

(ii) a tool (in the form of the McMasters Estate Planning Fact Finder – a schedule to this guide) to enable you to collect the relevant information from each client needed to formulate an estate plan for them; and

(iii) access to legal professionals (McMasters Solicitors Pty) with experience in estate planning and the ability to implement simpler estate plans (including those involving testamentary trusts) at a low cost, as well as

the ability to handle more complex "non-standard" estate plans at competitive rates.

The need to keep learning

Advisors are encourage to read broadly on the topic of estate planning and to attend appropriate CPD and other on-going training services to maintain and improve their knowledge of this important area of practice. One manual cannot possibly cover all relevant ground and further study is recommended, supported by active on the job training and experience.

Recommended further reading		
Death and Taxes: Tax Effective Estate Planning 2009	Michael Flynn and Miranda Stewart	Law Book Company
Estate Planning: A Practical Guide for Estate and Financial Service Professionals	M J Perkins and Robert Monahan	Law Book Company
Estate Planning for Blended Families	www.stepfamily.asn.au	www.stepfamily.asn.au

Links to further good quality materials are provided in the following pages.

PART 2 WILLS GENERALLY

Introduction

A will is a legal document signed by a testator or testatrix, or a will maker, which controls the disposition of property owned by that person on his or her death. Most people regard the will as being the dominant estate planning document. This is true for most people. But for some people this is not the case: if sensible asset protection strategies have been followed then few assets will be owned personally and the bulk of the assets will be in controlled trusts and superannuation funds.

Only assets owned personally are controlled by a will. Assets owned by superannuation funds and family trusts are not owned personally and are not controlled by a will, and have to be considered separately in any estate planning exercise.

Testamentary capacity

Only a person with "testamentary capacity" can make a valid will. A will purported to be made by a person without testamentary capacity will not be valid. Testamentary capacity will exist if the will maker is over age 18, and understands the nature of the document being signed and is of full mental capacity. Obviously, testamentary capacity is not usually an issue for professional working clients but, as the population ages the question of mental capacity is becoming more and more of a concern, and solicitors are expecting more and more challenges to wills on the basis that the will maker did not have testamentary capacity at the time the will was made. If this is a concern it is a good idea

for those involved in making the will to take steps to be able to prove full mental capacity at the time the will is made. This could include, for example, an assessment by a geriatrician or some other expert as to the will maker's mental capacity and understanding of the will as a legal document.

Formal requirements to create a valid will

A will must be in writing and must be properly signed and witnessed to be valid. Normally two independent witnesses must see the will maker sign the will and must then sign each page of the will as witnesses. The witnesses should be independent and not be related to the will maker because a person who witnesses a will cannot be the beneficiary of the will, so relatives are definitely out. The witnesses must understand the general nature of the will but they do not need to read the will, and usually they do not read the will.

What happens if a will is not valid?

If a will is for any reason invalid the most recent valid will made by the will maker will govern the will maker's estate.

If there is no such will then the estate will be governed by the rules for intestacy. These rules typically provide that the estate goes to the spouse and children and other close relatives in accordance with a set formula. Sometimes a will validly disposes of part of the will maker's estate, but not some other part. This is called a partial intestacy and in this case the set formula applies to that part of the estate that has not been properly disposed of under the will.

Further, a possible invalidity may create bargaining power for a person interested in challenging the will: the executor will be interested in settling with the challenger rather than having the whole will found to be invalid.

Obviously none of these results are what the testator wanted. So it's very important to make sure the will is valid and all the details are properly attended to.

What happens to the old will?

Executing a new will automatically revokes the old will. Some wills contain a clause like "I revoke all earlier wills" or even specify the earlier will to make the position clear. But technically this is not necessary since revocation is automatic.

It is a good idea to either destroy all copies of any earlier wills or to mark them in a way that clearly indicates that a new will has been executed and this will is revoked and is no longer necessary.

Some basic rules for executing a will

The testator or will maker should read the will carefully and be 100% satisfied that it reflects his or her wishes. The testator's should sign and date each page of the will in the presence of at least two adult witnesses (ie over age 18 and otherwise of legal capacity). The witnesses should not be family members or anyone else who may benefit under the will (this would invalidate the will) and do not have to read the will but must understand that it is a will. The witnesses should sign each page of the will and print their names, addresses and occupations on the last page of the will.

Everyone should sign using their normal or usual signature. It is a good idea for the testator and each witness to sign using the same pen.

Any last minute alterations should be referred back to the solicitor who prepared the will, and fresh drafts prepared. But if for any reason this is not possible the testator and each witness should place their initials in the margin next to each alteration.

The will should not be stapled or pinned, or marked, in any way.

Multiple copies should be signed and each copy should be kept separately in a safe place where they can be accessed quickly in the event of death. De Groots wills and estate lawyers have written an interesting article called "Protecting Important Documents When a Crisis Hits" and this article can be accessed here: Protecting Important Documents When A Crisis Hits.

Simple "standard husband/wife wills" (beneficiaries have fixed interests)

One of the most common wills for the average "nuclear" family is one where each partner gives their estate to their spouse or, if their spouse does not survive them, then to their children equally. An example of such a will is provided at appendix 1.

For clients with minimal assets and relatively simple affairs a simple will this is a perfectly sensible way to proceed, as it is simple and easy to understand. Assuming that the couple each appoint the other (if alive) as their executor, then the only real questions are:

a. who is to be executor and trustee, ie the "reserve trustee" if the spouse does not survive?
b. who is to be guardian, ie the person with the day to day care of any children under 18, if the spouse does not survive?
c. who is to benefit if no spouse or children survive?

Reserve trustee

The "reserve" executor should be a trusted relative or friend, or even better, two or more unrelated and trusted friends or relatives. We often suggest the testator's siblings and the testator's spouse's siblings (ie "unrelated relatives") be the reserve executor.

If the children are young then the "reserve" trustee should be someone with a financial background as the person may be in charge of a trust fund for the children until they reach 18.

The same person should not be the reserve trustee and guardian of children under 18. There is a conflict of interest between the two roles: it's all too easy for the person who legally owns the money and who is responsible for the day to day care of the children to "confuse" things, with the result that the trust monies disappear and are not available for the children.

Separating the trustee function and the guardian function minimises the possibility of the trust monies being used and maximises the probability of the trust monies being there for the children when the trust vests. At the very least there should be two reserve trustees, and they should be unrelated and unlikely to collude against the children.

Who should be the guardian?

We usually suggest the testator's siblings and the testator's spouse's siblings be the guardian. This is a simple approach that leaves the children in the care of their uncles and aunts, and indirectly their grandparents, if there is a double premature parental death.

This approach normally works, and has some inherent wisdom: uncles and aunts are a natural choice, and nominating all of them leaves the decision as to who should care for the children to those who are best placed to make the decision at that time based on the conditions that then exist.

Bear in mind that a double premature parental death is a very low probability event. And bear in mind that 85% of deaths occur with notice, in the sense that the person knows they have an incurable disease and will die within a certain period. This notice period allows an opportunity to re-consider the will and to nominate a more

appropriate guardian if the situation calls for it. And this means the odds of what we are talking about, ie now a double premature parental death, without notice, ie by accident, is an even less likely event.

For the vast majority of cases nominating the testator's siblings and the testator's spouse's siblings as the guardian of any infant (ie under age 18) children is the most sensible strategy. Exceptions can arise. For example, the uncles and aunts may all live overseas, or one of them uncles and aunts may be "inappropriate" for example, may have a mental illness, a drug addiction or some other condition which means children should not be in their care. But normally this approach works.

Who should benefit if no spouse or child survives?

This boils down to who should be the "default" beneficiary. This is a particularly low probability event too. We normally suggest "next of kin" or may be parents, or in the case of a married couple each set of parents in equal proportions. Each case is different. But a common sense approach is needed because it is a very low probability event.

Advisors should urge clients to put a workable will in place even if they are not certain who the default beneficiary should be: it's better to have a perfectly good will than to not have a perfect will. The will can always be changed at a later date if a more perfect option presents itself.

What does a will look like?

Advisors can access a sample will for a simple client presentation here: simple will. This is a will for a client with no children and no complications, and without any significant assets. Advisors can access a more complex will creating a testamentary trust here: Will with testamentary trust.

These two sample wills are provided to give advisors an idea of what the wills look like. Financial planners should read the wills and become familiar with the major clauses and the general construction of the documents, so they can answer client questions and explain the wills competently

.

The body of the will sets out:

1. who the trustee or executor is. The trustee or executor is the person responsible for the administration of the estate. The full name, address and relationship of the executor(s) and possibly an alternative executor should be set out in the will. It is quite common, even recommended, that the executor engage a solicitor to handle these responsibilities, except in the simplest of cases. However it is not wise to nominate a solicitor or other professional person such as a trustee company to be the executor, as this person can charge their normal professional fees and commissions for all work done in this capacity. This therefore tends to be an expensive option, and one which is sadly often abused. For obvious reasons it is a good idea for the executor to be younger than the will maker if the will maker is older than, say, 50, and in any event the executor should be likely to outlive the will maker;

2. how the assets will be dealt with after the will maker's death, that is, who gets what, how and when. The names and amounts or percentages of the estate going to each beneficiary should be set out clearly, as should the conditions attached to any bequests. This will frequently include the creation of a testamentary trust, and this is discussed in more detail below; and

3. any special directions such as, for clients with young children, who should be the guardian of the children, i.e. who should have day to day responsibility for the children after the death of the will maker (and the death of any other parent). The guardian has an important role to play and careful thought is needed as to who should take on this role. The will maker's siblings and spouse's siblings are often the people most likely to have a maternal and paternal love for the child and to understand the will maker's world view. They are the people best placed to make decisions for the child. The statistical probability of the premature death of both parents is low, so labouring to decide who else should do the job is probably a big waste of time. It is not a good idea for the executor and the guardian to be the same person(s): this is because of the potential conflict of interest, and if there is an actual conflict of interest, there is not much the children can do about it until they are age 18, and even then it will be a long shot.

What assets are controlled by a will?

Assets owned as joint tenants are not controlled by a will and on the death of one joint tenant immediately pass to the surviving joint tenants. The most common example is the family home. This is typically owned by mum and dad as joint tenants and if dad dies his share automatically passes to mum irrespective of what his will says.

Assets owned as tenants in common are controlled by a will.

It is critical to establish what assets are co-owned

and how they are co-owned. You can get surprising results, and often apparently wealthy clients emerge as having virtually no estates on death. Obviously this means effective estate planning goes beyond mere wills and requires the planner to consider all controlled assets.

Only assets owned personally are subject to a will. This means assets in a family trust are not covered by the will. This is so even if the will maker controls the family trust. Assets inside family trusts are discussed in Part 5 below.

Assets inside a superannuation fund are not subject a will. Assets inside superannuation funds are discussed in Part 6 below.

Who should be the executor?

The following article by de Groots wills and estate lawyers discusses issues connected to the choice of executor and was extracted from their website on 5 July 2011.

Who do you trust to carry out your wishes?

When making your will, one of the most important decisions you will make is who to appoint as your executor. Who do you trust to carry out your wishes?

> *An executor will take over your affairs after your death and administer your estate. If you do not have a will, then a spouse, a relative or a beneficiary can apply to be an administrator. If none of these people are willing or available, then the court can appoint the Public Trustee.*
>
> *In administering your estate, it will be necessary for your executor to ensure your funeral arrangements are attended to, notify people of your death, obtain a grant of representation (where applicable), pay your debts, distribute your assets and carry out the terms and directions of your will. Your executor must ensure that any tax liability is paid from your estate. He or she may also need to sell or lease any property, manage any investments or continue the operation of your business.*
>
> *You may have established trust structures for the beneficiaries of your will. If so, it is common to appoint your executor to manage those trusts. After the final distribution of the estate, the executor's role changes to that of a trustee. Depending on the complexity of your affairs, your executor may need to possess some business sense and expertise. But perhaps most importantly, your executor must be someone you trust to represent your best interests.*
>
> *Your executor should be at least eighteen years of age. You may appoint your spouse or a beneficiary named in your will as your executor.*
>
> *To ensure that all legal matters are attended to properly, your executor may decide to use estate funds to retain a solicitor. A solicitor can act quickly and efficiently at a time when family members are overcome with grief or uninformed about what needs to be done. A solicitor can bring mediation and dispute resolution skills to family conflict situations, if required.*

An executor is entitled to claim "commission" for administering an estate. The amount is determined by the value and nature of the estate assets and the work done by the executor to administer the estate. An executor is also entitled to charge the estate for any expenses incurred by him or her in administering the estate.

You are permitted to appoint up to four executors in your will. It is common for people to appoint one or two executors. If you appoint two or more executors, they are required to act jointly.

You may consider appointing an alternate executor in case your first choice decides not to act and renounces the appointment, he or she loses the requisite capacity to act or … dies.

Even administering a simple will can be an onerous task involving a significant amount of time and effort on the part of an executor. For this reason, you should discuss the matter with a person before appointing him or her as your executor.

The estate planning lawyers at de Groots can help you with your choice of executor.

The role of the executor

The following materials are from the Legal Services Commission of South Australia's website and were extracted on 5 July 2011.

Duties of executors

An executor is responsible for seeing that the terms of the will are carried out.

The basic duties of an executor are to collect the assets of the deceased, pay the debts and distribute the estate to the beneficiaries under the will. How this is done depends on the terms of the will and the nature of the estate. A person can be an executor and arrange for a lawyer to complete the legal documents and the search for assets or may do it without a lawyer. Being an executor may involve all or any of the following:

- *making the funeral arrangements*
- *disposing of the remains of the* testator
- *applying for a certified copy (not an extract) of the death certificate from the Registrar of Births, Deaths and Marriages*
- *locating and identifying property belonging to the testator.*

From the proceeds of the deceased's estate the executor must pay, in the following order:

- *the funeral expenses*
- *the testamentary (legal) expenses*
- *any statutory obligations (such as taxation)*
- *any other debts.*

This priority of payment is also followed when a person dies leaving more debts than assets. Specific items left to beneficiaries are given to them, and in the case of items such as personal belongings, this may be done soon after the death of the deceased. However, if the deceased left gifts of money, the deceased's assets may have to be sold in order to obtain the money for distribution.

The selling of assets must be performed with diligence; in other words as soon as practicable. However it can often take up to one year to distribute an estate. If an executor does not act diligently, the beneficiaries may complain to the court. This is the only right of a beneficiary *before distribution, as the beneficiary does not own the property until the executor distributes the estate.*

Further reading on the role of the executor

Title	Author	Hyper text link
Executors and Beneficiaries. An Overview of duties, responsibilities and rights	Kevin White	Law Society Journal NSW June 1996
Executor's Duties	Do It Yourself Probate	Executor's Duties
The Duties of Executors in Western Australia	Elliot & Co Barristers and Solicitors	The duties of an executor in Western Australia
Duties of an executor	Equity Trustees	Duties of an executor

What happens if a client dies without a will?

If a client dies without a valid will they are said to have died intestate. Each state has statute law controlling the division of assets, and essentially the assets are divided between family members and dependants under a statutory formula.

The government does not get anything unless there are no living next of kin, however remote, which is a very low probability event. It basically never happens: everyone is related to someone, however remote the relationship may be. The urban myth that

the government gets everything is just that, a myth, without any substance at all

In NSW, for example, the relevant Act is the Wills, Probate and Administration Act and its rules can be summarised as follows:

- to your surviving spouse (including a de facto spouse) and children. If there are no children, the spouses inherits 100%;
- if there are surviving children and a spouse, the first $150,000 goes to the spouse, with the remainder shared equally by the children and the spouse;
- if there are children but no surviving spouse, the estate is shared equally between the children. If a child has already died but left children of their own (ie grandchildren) the grandchildren get their parent's share;
- if there are no living spouse, child or grandchildren, any living next of kin. If necessary, a search will be made to identify any living next of kin, including parents, siblings, half-siblings, grandparents, uncles and aunts and half-blood aunts and uncles; and
- finally, if there are no living next of kin, the estate goes to the Government.

There are many obvious problems connected to dying without a will. First, the probate process is slower, more complex and more costly, which means the client's family inherits less wealth. Second, and more importantly, it's quite unlikely that the statutory formula will be what the client actually desires. For example, most married clients would want all of their estate to pass to their spouse, not just the first $150,000, and a share of the remainder. And finally there can be real problems where a married couple

without children die together: the estate of each of them in effect passes to the next of kin of the spouse who died second. This is hardly fair or sensible. But it's what happens under the formula.

PART 3 TESTAMENTARY TRUSTS

What is a testamentary trust?

A testamentary trust is simply a trust created on the death of a person. All wills create testamentary trusts. However, some wills go into more detail than others and deliberately set out to create a trust with a significant life of its own after the death of the testator. An example of a will creating a testamentary trust is provided at appendix 2.

There are numerous types of testamentary trusts. And each type contains many individual variables such as term, permitted investments, decision making processes and so on. Alan Swan of Moores Legal has written an excellent summary of the different types of testamentary trusts and this document can be accessed here: Types of Testamentary Trusts: Moores Legal. Ili has also created an excellent summary of what is a testamentary trust and this document can be accessed here: An introduction to testamentary trusts by Melinda Wood. And, finally, another good resource has been created by Comasters Law Firm and this can be accessed here: Comasters explanation of testamentary trusts.

Why use a testamentary trust?

Testamentary trusts are powerful tax-planning and asset protection tools for the beneficiaries under the will. For example, children under the age of eighteen are not taxed at penalty rates on income derived

through a testamentary trust (as is usually the case with other types of unearned income). Further, assets held in a testamentary trust are generally not taken into account in determining old age pension entitlements.

Testamentary trusts can be used to protect valuable family assets from the risk of a spendthrift family member or a family member who is not a good business person or investor and who stands a good chance of getting themselves in financial trouble.

For example, a particularly worrying son may be given the benefit of certain assets (for example, a family home) but be unable to sell that asset. The family home may then go to the grandchildren in equal shares on the death of the son. This may sound like an extreme option, but at least the son gets a roof over his head during his life which he can't lose, no matter what else he may do.

By way of further example, a daughter may divorce her husband, say, three years after a client's death. If the client leaves her share of the estate to her directly then it will be up for grabs in the Family Court. However, if her intended share of the estate was instead left to a family trust that she and her siblings controlled then she would not legally own that share of the estate. Therefore, her ex-husband should not be able to seek a share of the trust assets.

Testamentary trusts are critically important if a parent believes that a child may be in financial difficulties, whether because of spendthrift ways, poor business acumen, poor choice of a marriage partner or just plain bad luck. Parents will most likely want their assets to benefit later generations generally and not a child's creditors generally. Testamentary trusts allow parents to ensure that this is what happens.

Testamentary trusts are generally bankruptcy proof. However, recent amendments to the Bankruptcy Act (inspired by some well documented and public bankruptcies) have made this a more complex area and specific legal advice should be sought if you believe that this could be relevant to a particular client's circumstances.

What are the advantages of (discretionary) testamentary trusts?

The advantages of testamentary trusts include:

1. maximising the prospects of an old age pension for a spouse and, ultimately, children. For example, John and Betty are married old age pensioners. They have investment assets worth $240,000 and they own their home. Betty dies. Her will leaves her share of the investment assets to John.

    i) What happens to John's pension after Betty dies? Well, since he now owns $240,000 of investment assets he no

longer gets the old age home owner pension. $240,000 is below the assets test limit for married old age home owner pensioners but is above the assets test limit for a single old age home owner pensioner.

ii) If Betty's will had left her share of the investment assets ($120,000) to a trust for the benefit of John and her children the John would have continued to get the old age pension. Because John does not own the assets in the trust they don't count for the assets test. However, in some cases Centre Link can ignore the trust and include its assets in old age pension assets test calculations. The terms of the testamentary trust will be critical to ensuring that this does not happen;

2. income tax advantages. All of the tax advantages of discretionary trusts become available plus income distributed to John and Betty's under age 18 children and grand children will not be subject to the penalty tax normally levied on unearned income derived by children under the age of eighteen years and instead will be taxed as if it was income derived

by an adult. This can save tens of thousands of dollars of tax a year;

3. asset protection. For example, in the case explained at item 1 above, it could turn out that John had guaranteed a business debt of his son some time earlier. His son goes broke and the creditor invokes the guarantee given by John. The assets in the testamentary trust cannot be touched by the creditor. This protection endures as long as the trust endures and cannot be broken down unless the trustee gives some sort of charge over the assets of the trust (and our standard document does not allow the trustee to do this.) So the testamentary trust protects the children as well as the widow or widower.

This asset protection is important and includes protection against divorce. Nearly one half of Australian marriages end in divorce. The proportion is higher for younger people. This means that if clients have 3 kids one of them will probably be divorced. Few people wish to benefit their ex-sons-in-law or ex-daughters-in-laws. Testamentary trusts protect assets against divorce as well as bankruptcy. We will go through some examples now to demonstrate the usefulness of a testamentary trust.

Scenario 1: John and Betty and their three infant children

In this example John and Betty are married with three children aged under 12 years and they put in place wills which provide for all of their estate to pass to a discretionary testamentary trust for the benefit of the surviving spouse and children. Five years down the track and John dies suddenly of a heart attack, leaving Betty to cope with the mortgage and three kids at private school. The set up of the discretionary testamentary trust upon John's death is depicted in the diagram Scenario 1. Betty is joined as executor and trustee of the estate and as trustee of the testamentary trust by Bill who is an old trusted family friend.

Bill and Betty are able to delegate the day to day operation of the trust to Betty so that she can continue to access funds as required. Having Bill as an additional trustee helps Betty feel better protected if she enters another relationship, as she will not be in sole control of the trust. Betty receives significant life insurance proceeds and superannuation benefits upon John's death and, on advice, pays all these funds into the testamentary trust. The funds are used to invest in property and listed shares.

The income from these investments for the years following is significant and is able to be distributed to each of her three children to cover their private school fees. Because this income is derived in a trust established on John's death, income can be distributed to beneficiaries under 18 at usual adult marginal rates. This means there are now four taxpayers instead of just one to share the distributions, resulting in a significant tax saving each year until the children reach 18.

Scenario 2: John and Betty and their three adult children

In this example John does not die from his heart attack but survives and ten years down the track all the kids are grown up and are at university studying to be doctors with no thoughts as to getting married or having children. John and Betty decide to simplify their wills so that each of them can inherit each other's estate without the need for a testamentary trust but still allow for a testamentary trust to be established upon the death of both of them. Five further years on and John and Betty are killed in a car accident leaving the three children to manage their affairs and to cope with their own new families (all three got married and had 2 kids each

in the last few years). All their parents insurance and superannuation is paid into their estates and

into the testamentary trust and invested in property and shares.

This time the income can be split 12 ways (the three children, their spouses and their children) so the potential tax savings are significant. Also, because all three children are involved in the control and benefit from the trust, the trust assets are well protected if one of the children's marriages were to break down.

Complex wills with special provisions (eg blended families or beneficiaries with disabilities)

The last two sections dealing with "standard" type wills (whether or not they include discretionary testamentary trusts) will fit most clients, perhaps as much as 80% - 90% of cases.

The other 10% - 20% will require extra attention and more complex strategies as a result of specific circumstances such as:

- the desire to prevent a particular person, for example an ex-spouse, from being able to receive capital or income from a trust;
- the desire to make sure a particular person, such as a disabled child, is adequately provided for; or
- the need to minimise the effect of likely challenges to a will.

We stress that complications should always be considered by a recognised expert and a financial planner should not go it alone in his or her advice

The skill for you to learn in this area is not how to solve these more complex issues or to come up with strategies to address them (as tempting as that may sometimes be) but rather to recognize when a particular client or matter falls within that 10% – 20%, so that you can obtain specialist advice.

There is a series of questions at the end of the fact finder, which are designed to elicit information, which will help identify any specific or more complex issues.

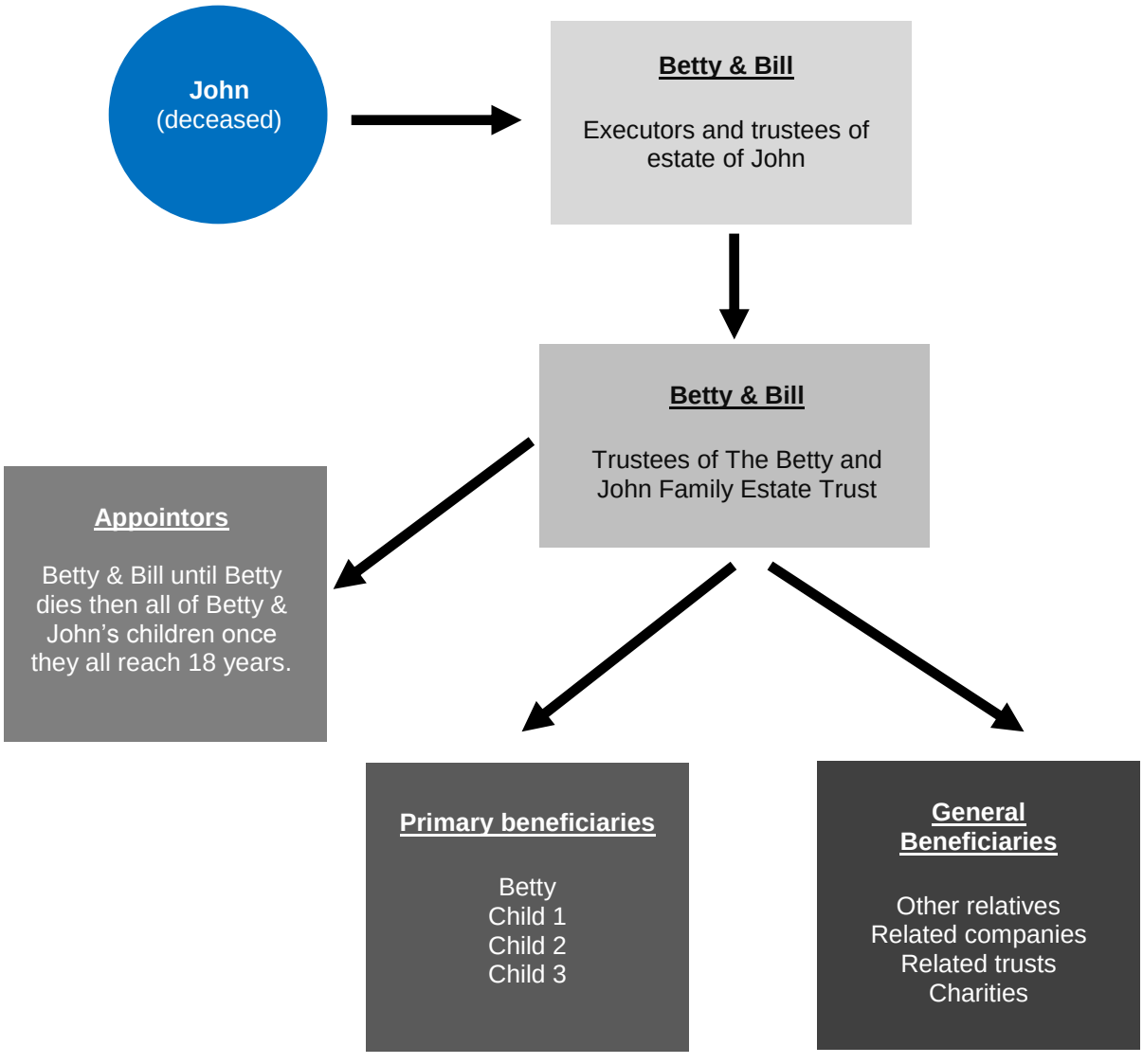
Sample will creating a testamentary trust

A sample will creating a testamentary trust can be downloaded here: Will with testamentary trust.

Financial planners should spend some time reading this sample will and understanding its form and content. The will is written in a very plain English style so that it is able to be understood by most clients and advisors. We have deliberately avoided many of the unnecessary complexities included by most solicitors to create a user friendly and very functional document.

Discretionary testamentary trust John & Betty

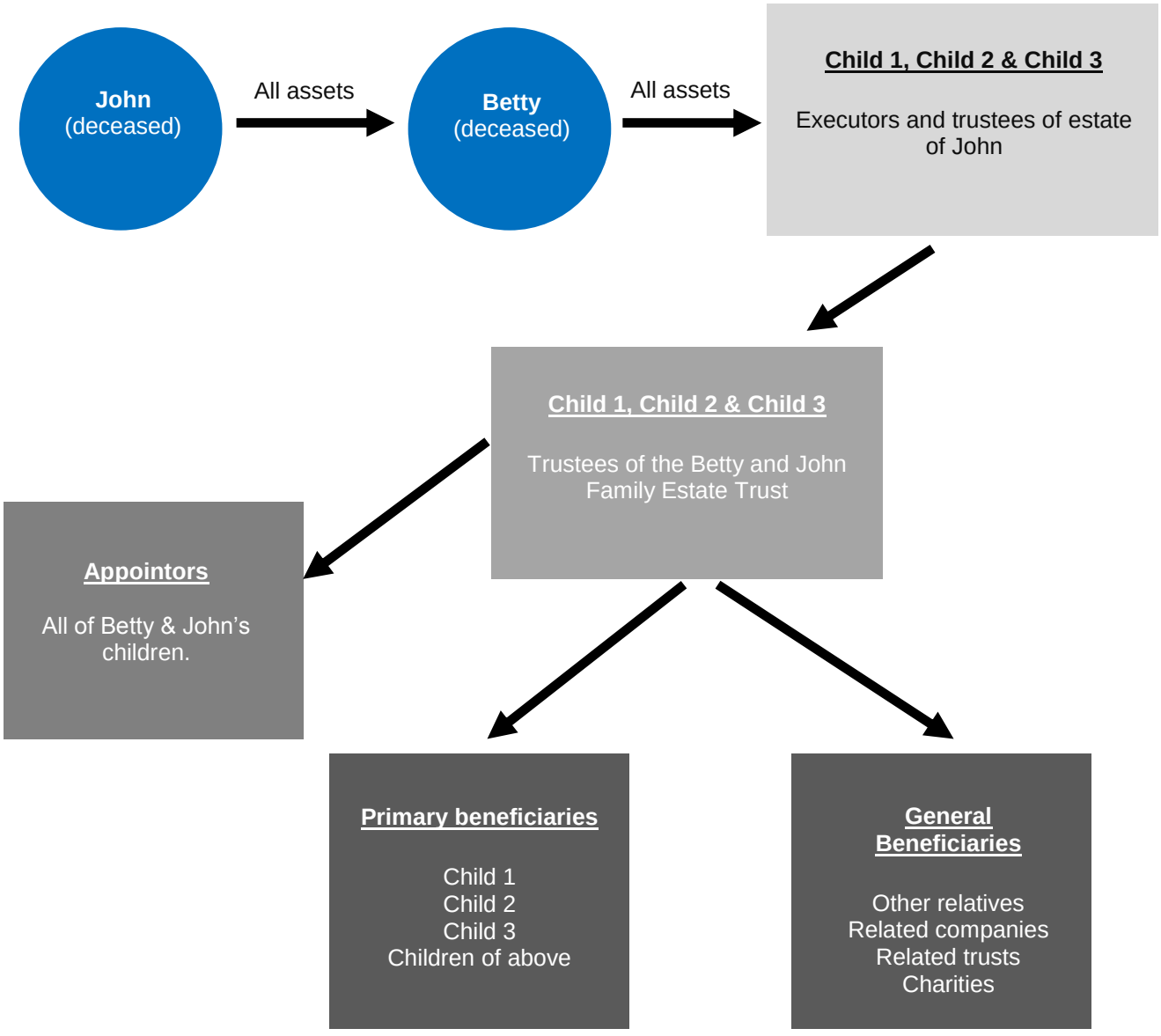
Scenario 1 – Infant children



Betty and John are married with 3 infant children.
Bill is an old family friend of Betty and John.

Discretionary testamentary trust John & Betty

Scenario 2 – Adult children



PART 4 POWERS OF ATTORNEY AND GUARDIANSHIP

What is a power of attorney?

Essentially, a power of attorney is a document given by an individual person (donor) authorising another individual person or persons (attorneys) to act or make decisions on behalf of the donor.

The rules governing powers of attorney and guardianship differ from state to state and this guide only covers those applying in Victoria. The rules differ from state to state and specific local legal advice will always be necessary. Under the heading "Further Reading" below we have identified links to quality websites providing more detailed explanations for each of the six states.

In Victoria there are four main types of powers of attorney and guardianship as follows:

1. General Powers of Attorney which allow signing of documents by the Attorney but

the power ceases if the donor becomes incapable;

2. Enduring Powers of Attorney (Financial) which allow signing of documents and which endure, or continue in effect, if the donor becomes incapable;
3. Enduring Powers of Attorney (Medical) which allow medical decisions to be made and only become effective if the donor becomes incapable; and
4. Enduring Powers of Guardianship, which allow lifestyle decisions to be made and only become effective if the donor becomes incapable.

General Powers of Attorney are of limited use because of limited life and so are rarely used except in short term specific situations. In some circumstances a person may in effect appoint another person as a power of attorney for a limited commercial purpose, for example, the completion of task under a commercial contract such as a loan agreement. We do not discuss these powers here.

More detailed information about the other three types of powers of attorney and guardianship is provided in the explanatory notes in schedule 2.

When should a power of attorney be used?

A power of attorney should be signed by a client whenever these is a concern whether that person will be able to make decisions for himself or herself, that is, whether the person will not have legal capacity, whether it be temporary or permanent. This often happens as a client gets older. All clients age 70 or more should have appropriate powers of attorney in place, and younger clients may need to have them in place depending on their individual circumstances.

Other clients may consider powers of attorney on a more temporary basis. For example a client who is leaving Australia temporarily but for a significant period, say 6 months, may execute a power of attorney in favour of say, his three adult children, that is only effective for 6 months or is only effective while he is outside Australia.

Elder abuse

"Elder abuse" is a generic term for a range of inappropriate actions by persons who hold powers of attorney for elderly people.

The inappropriate actions range from minor and immaterial matters, to errors of judgement, for example, a son "under-spending" on his mother's age care to maximise his eventual inheritance, to outright fraud, where holders, for example, stealing cash or other assets or borrowing money against the security of the elderly person's assets.

These thinks happen. And it is incumbent on estate planning practitioners to advise clients of the risks connected to granting powers of attorney. Some common sense precautions can help minimise risks. For example:

(a) make the power of attorney conditional upon two medical practitioners certifying that the grantor no longer has the ability to make decisions for herself or himself; and

(b) always appointing at least two people, one of whom should be unrelated, as the grantees, so there is less risk of the grantee abusing the power.

You can read a detailed report on elder abuse by Monash University here: Financial abuse of elders: a review of the evidence June 2009

Revocation of power of attorney

A power of attorney can be revoked at any time by the grantor, provided the grantor still has legal capacity. Revocation should be in writing and ideally the earlier documents will be destroyed or marked as being revoked.

The situation is more complex where the grantor does not have legal capacity. A person who does not have legal capacity cannot create a legal document, and this includes a document that purports to revoke an earlier effective document. Here revocation requires the involvement of a court or a tribunal such as a state guardianship board. Specific legal advice should be sought in all such circumstances

.

Further reading on powers of attorney

Victoria	Extract from www.publicadvocate.vic.gov.au Extract from www.justice.vic.gov.au
New South Wales	Extract from www.gt.nsw.gov.au Extract from www.lpma.nsw.gov.au (fact sheet)

Western Australia	Extract from www.publicadvocate.wa.gov.au Extract from www.enduringpowerofattorney.org
South Australia	Extract from www.sa.gov.au Extract from www.guardianshipboard.sa.gov.au
Tasmania	Extract from www.legalaid.tas.gov.au Extract from www.cann.legal.com.au
Queensland	Extract from www.justice.qld.gov.au Extract from www.mccculloughroberston.com.au

Sample documents

A sample of an enduring power of attorney (financial) is attached to give you an idea of what these documents look like. These are Victorian documents, are provided as samples only and should not be used without specific legal advice. The can be accessed at the end of this part below.

Enduring power of attorney advisor notes

We have prepared an extensive set of enduring power of attorney advisor notes intended to be used by financial planners with their clients to make sure they and their clients understand the form and function of an enduring power of attorney. These notes have been prepared for Victoria and may not be appropriate for the other states. The notes are available on request.

Enduring power of Attorney (Financial)

This enduring power of attorney is made under Part XIA of the **Instruments Act 1958** and has effect as a deed.

This enduring power of attorney is made on the …… day of …… 2010.

1. I, [NAME OF PERSON] of [ADDRESS OF PERSON] **appoint** [NAME OF ATTORNEY 1] to be my attorney.

1. a. I, [NAME OF PERSON]of[ADDRESS OF PERSON] **appoint** [NAME OF ATTORNEY 2] as an alternative attorney for[NAME OF ATTORNEY 1].

2. **I authorise** my attorney(s) to do on my behalf anything that I may lawfully authorise an attorney to do.

3. The authority of my attorney(s) is subject to the following **conditions, limitations,** and **instructions**:

   Nil

4. **I declare** that this power of attorney begins:

   ☐ immediately.

   ☐ on this date:……

   ☐ on this occasion:……

5. **I declare** that this power of attorney will continue to operate and have full force and effect even if I subsequently become legally incapable.

6. **I declare** that all previous enduring powers of attorney (financial) signed by me are hereby revoked.

Signed as a deed by……

Note: If this enduring power of attorney confers power on two or more attorneys to act jointly, then they have equal authority and can only act with the agreement of them all, and any documents must be signed by all of the attorneys together. If this enduring power of attorney confers power on two or more attorneys to act jointly and severally, then in exercising the powers under the enduring power of attorney any of the attorneys can act and sign documents together or alone.

Certificate of witness

We, ……..

of……..

and……

of……..

certify-

a) that the donor has signed this enduring power of attorney (financial) freely and voluntarily in our presence;

AND

b) that at the time of signing, the donor appeared to each of us to have the capacity necessary to make the enduring power of attorney.

……
[*Witness authorised to witness the signing of statutory declarations signs here*]

……
[*Other witness signs here*]

Statement of acceptance

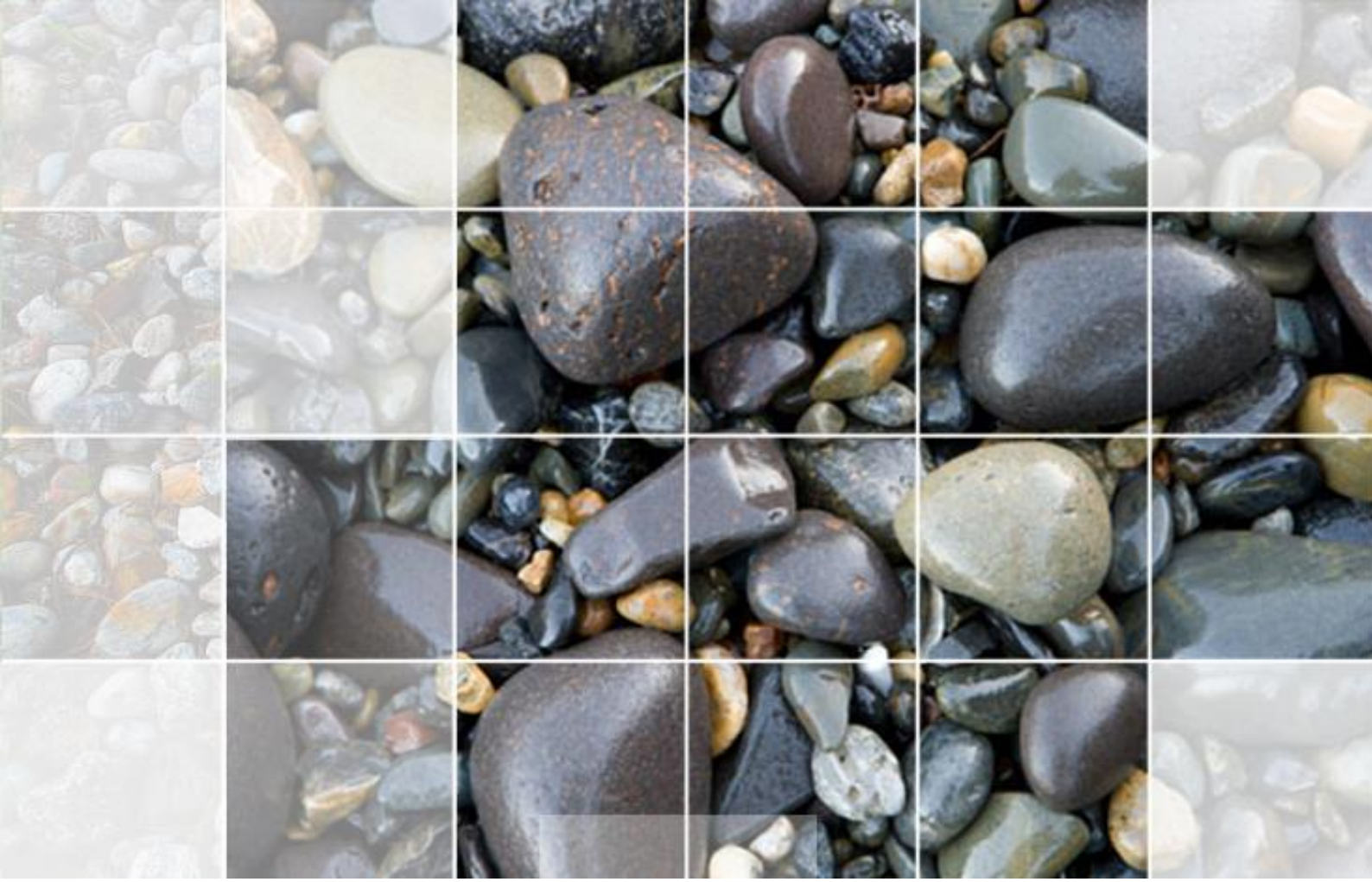
I,[name of Attorney 1] of [Address, Suburb, State PostCode] on the……day of…… 2011 **accept** appointment as an attorney under this enduring power of attorney **and undertake –**

a) to exercise the powers conferred with reasonable diligence to protect the interests of the donor; and

b) to avoid acting where there is any conflict of interest between the interests of the donor and my interests; and

c) to exercise the powers conferred in accordance with Part XIA of the Instruments Act 1958.

……
Signature of attorney



PART 5 ASSETS INSIDE DISCRETIONARY OR FAMILY TRUSTS

The problem

Many clients will have assets owned in family or discretionary trusts and, although for some this may be obvious, advisers must remember that assets held in a trust are not owned by any one person and cannot be controlled by a will. This is, of course, one of the reasons why family trusts are used so frequently: they provide for perpetual succession, in the sense that they go on beyond the life of one individual and allow for wealth to be transmitted between generations. They also protect family assets from the risk of divorce and bankruptcy of an individual family member, and one of the key principles here is that no one beneficiary has a right against the trustee that is recognised at law (and if you do not own it you cannot lose it).

So if a client controls the assets in a family trust it is not possible to deal with those assets specifically under the will. A will only deals with assets owned personally by the will maker. The best that can be done with assets that are not owned personally and are owned in a family trust is to ensure that the correct people are given control of the trust. This is usually the same people who are expected to inherit under the will.

Most trusts will have a corporate trustee so a good start is to give shares in the company to relevant beneficiaries, who may also be surviving directors. In the simple scenarios discussed above, shares would form part of the estate and pass either to a surviving spouse or children or a testamentary trust. But just dealing with the shares in the trustee company is not sufficient.

Who controls the assets in a trust?

The real question is who has the power to appoint the trustee? This person, called the "appointor", controls the trust. The appointor has the power to remove and appoint trustees and so has ultimate control of the trust. Usually the appointor's role is shared between a husband and wife and it is only upon both of them passing away that the issue needs to be addressed.

Some wills use the word "guardian", "supervisor", "protector" or "principal" rather than "appointor". Nothing turns on this and they are the one and the same thing.

The trust deed will specify who holds the power of appointment, and what needs to be done to exercise the power of appointment in favour of another person or persons if the current appointor dies, become incapable of acting as the appointor or ceases to wish to act as the appointor.

Usually this will involve a deed of appointment being exercise in which the new appointor is formally recognised, or appointed, as the appointor and in which the old appointor may resign or otherwise cease to act as the appointor.

Often the trust deed may provide that the power of appointment passes to the appointor's legal personal representative on the death of the appointor. This is on the surface at least a common sense provision but it can create many other problems, and once again expert legal advice is recommended.

The trust deed may also provide a mediation process or other dispute resolution process to determine disputes between appointors.

The solution

A common solution is for the wills to provide that where a will maker is the sole remaining appointor of any trusts, then the will nominates the executors of their will (or the trustees of their testamentary trust if one is to be established) to be the appointors of those trusts.

That is, the will exercises the power of appointment, often using words like:

"I direct that any power of appointment I hold in any trust be exercised in favour of my legal personal representative and that my legal personal representative deal with the assets in that trust as if they were personal assets subject to the control of this will and last testament."

More complex scenarios will require different and more specific arrangements to be made either in the wills or in separate trust documents.

What should a financial planner do?

The financial planner needs to be very careful about any comments or advice provided to clients concerning assets in family trusts, and in particular the interpretation of any clauses in the trust deed concerning the appointor. This comprises legal advice and, in summary, the financial planner should obtain legal advice about the particular trust and then pass the advice on to the client along the lines of "I have obtained legal advice on your behalf from Name of Solicitor and in summary he or she has advised that....".

This is a perfectly acceptable approach which leaves the financial planner in control of the advice process but does not breach any laws regarding providing legal advice.

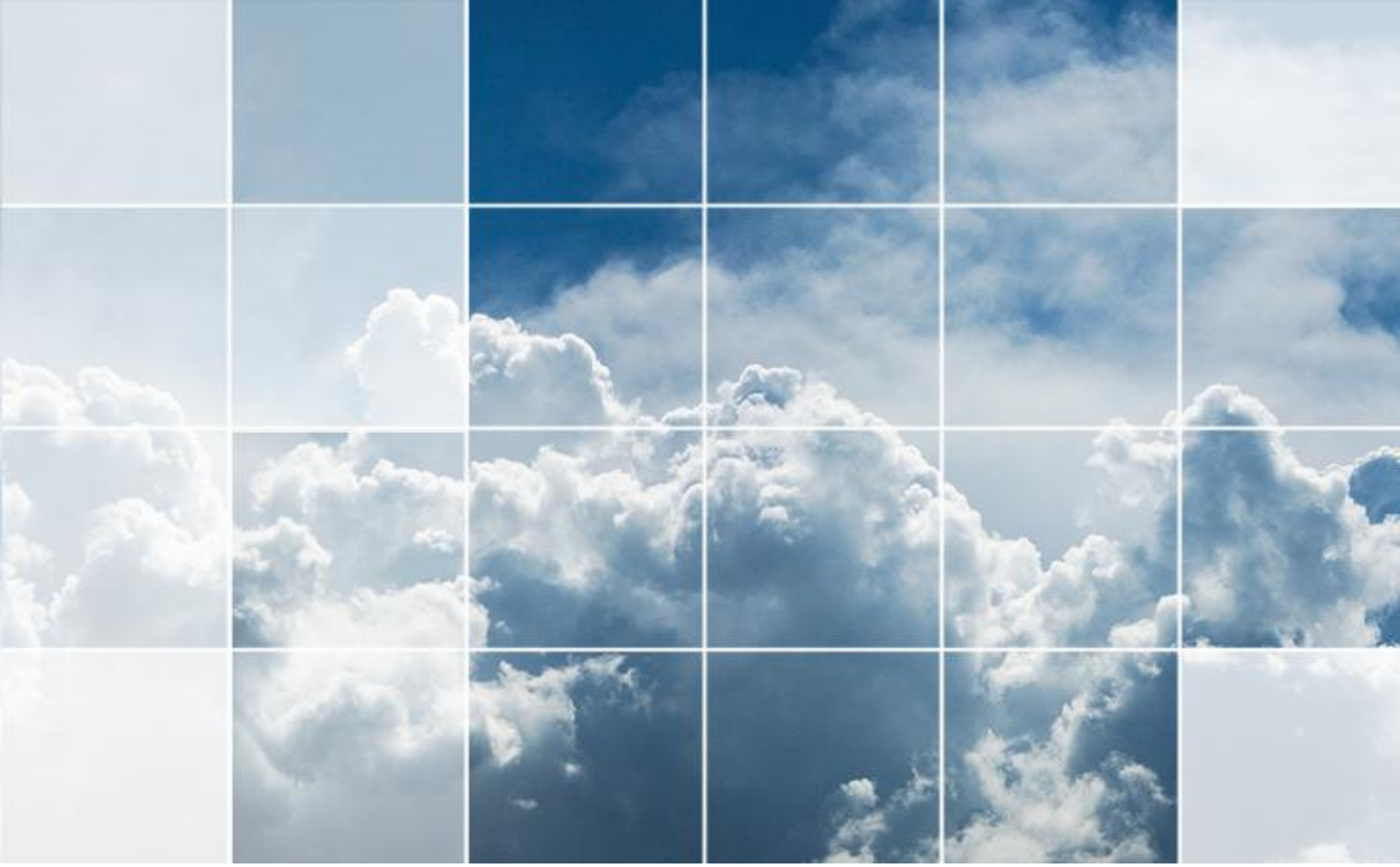
Each case will be different and will be determined by its own facts and the contents of the relevant trust's deed. Specific legal advice will always be needed.

Further reading on assets inside family trusts

BDO Kendall's Family Business News Issue 10 2008 contained a good summary of the issues and some interesting case studies, and it can be accessed here: BDO Kendall Materials on assets owned by trusts. The Australian Executor Trustees have a short document which touches on the main issues and it can be accessed here: Australian Executor Trustee materials.

You can read a case study created by Rigby Cooke Lawyers for a 2007 financial planning conference here: Rigby Cooke on estate planning within the family trust. This article walks the reader through a series of scenarios concerning estate planning and family trusts and is recommended reading for all estate planning advisors.

You can read an explanation of the concept of an appointor of a family trust by Riordan's Solicitors here: Appointor and guardian powers in a family trust



PART 6 ASSETS INSIDE SUPERANNUATION FUNDS

Introduction

Superannuation is another area often forgotten or misunderstood in the estate planning process.

A superannuation fund member cannot just sign a will and assume that their superannuation benefits will automatically be paid in the way set out in their will. The superannuation fund trustees are not bound by the deceased member's will and may pay the benefits to either the deceased member's estate or to appropriate dependants as they see fit.

In most cases problems will not arise. But problems can arise, for example, in same sex relationships, with "hidden" or multiple relationships, with "warring" children[1], and so on.

Moral and legal factors which may influence a trustee's discretion to pay a benefit to a person include:

(i) the relationship between that person and the deceased member;
(ii) the person's age and ability to look after themselves financially;
(iii) the extent of the person's dependency;
(iv) the person's financial circumstances;
(v) the history of the person's relationship with the deceased member; and
(vi) the strength of any other claims made by other people.

There is a further general restriction, and this is the trustees can only pay the benefits to crtain persons, being a person who is:

(i) a "superannuation dependant" of the deceased member which means:
- a spouse,

[1] Practitioners need to be aware of the risk of a conflict of interest where they have acted for members of the same family. De Groots wills and estate lawyers have written about this and their article can be accessed here: Conflicts in succession law.

- a child (of any age,; or
- a person who was financially dependent on the member at the time of death; or

(ii) the estate of the deceased member.

Binding death benefit nominations

Clients can override the trustees' discretion by signing a binding death benefit nomination ("BDBN").

A BDBN directs the trustee to pay the death benefits to a particular person. That is, it allows the client to control the trustees' discretion as to who gets the benefits on the client's death. The trustee must pay the death benefit in accordance with the BDBN.

A BDBN may be used in conjunction with a so called "superannuation will" to coordinate the payment of the deceased member's super benefits with their other estate planning strategies.

A BDBN usually cannot be contested by an aggrieved person unless for some reason it is not valid. Possible reasons for a BDBN not being valid include:

1) the fund's trust deed does not allow BDBNs;
2) the BDBN was not signed properly;
3) the client was not of sound mind when the BDBN was executed;
4) the BDBN is the result of a fraud or emotional or physical duress; and
5) the BDBN is more than three years old.

What other issues impact the decision to pay benefits from a superannuation fund?

The "other issues" basically relate to income tax planning and asset protection issues.

On the income tax planning side the definition of a "superannuation dependant" means death benefits are only tax free if paid to:

- a spouse of the member
- a child of the member who is under 18;
- a person who was financially dependent on the member at the time of death; or
- the estate of the deceased member where the tax commissioner is satisfied that the funds will pass to, or be held for the benefit of, any one or

more of persons listed above.

On the asset protection side the payment of a large death benefit to a person suffering either financial or matrimonial difficulties is ill-advised, since it is quite possible they will not end up with the intended beneficiary.

Some common problems

The ongoing control of a SMSF will be held by the remaining individual trustees or the shareholders of a corporate trustee.

One common problem arises where only one of several children is a member and trustee of a SMSF, since that child will control the SMSF on the death of both parents, and exercise his or her power as a trustee to the detriment of the other children.

Another common problem arises where the client wishes to leave their superannuation benefits to a person such as a parent, sibling or a friend who is not a superannuation dependant, as that term is defined. Such a person cannot receive a death benefit directly from the fund. One option is a binding death benefit nomination in favour of the estate, coupled with a will which specifically gives an amount equal to the superannuation benefits to that person. Another option may be to leave non-superannuation assets to that person and to only pay superannuation benefits to dependants.

The effect of the 2007 superannuation changes

Financial planners will be aware that 2007 saw some significant changes to superannuation as part of the federal government's simplification policy. De Groots wills and estate lawyers have prepared an interesting article on these changes and it can be accessed here: The effect of the superannuation changes on your estate planning.

Part 7 Estate planning and family law

Introduction

Financial planners need to be aware of their client's marital status, whether it is actual or merely aspirational. Marital status including pending changes has a significant effect on the form and content of each client's estate planning strategies.

Sometimes this means discrete enquiries are appropriate, and this can often be done in the small talk that proceeds the (apparently) business part of the meeting. For example, a joking enquiry about a young man's romantic life may elicit a comment like "...yes, there actually is someone special now...".

This comment is a signal that the client needs advice on wills and related areas, and also needs advice on related matters such as life insurance

If a client is getting married

Marriage automatically revokes a will, unless the will specifically contemplates the marriage and names the intended spouse.

First marriages are generally straight forward. Each partner executes a will in favour of the other partner. The wills are usually simple and short, and unless there are already children, or children are expected quickly, usually would not create a formal testamentary trust along the lines discussed in Part 3 and depicted insert link to sample will creating a testamentary trust.

But problems may still arise. For example:

(i) one partner may be significantly older than the other;
(ii) one partner may be significantly wealthier than the other;
(iii) one partner may be in litigation prone profession, such as a financial planner; and/or
(iv) one partner may in poor health with a higher risk of mortality.

In cases like this legal advice should be sought as to whether any specific provisions should be in the will to make the will better suit the clients' circumstances.

If the client is getting divorced

Divorce does not automatically revoke a will. This means all clients who are getting divorced or who have recently divorced need specific legal advice as to the status of their will.

Separation

Separation has no effect on a will.

This is the case even if the partners have reached a property settlement.

This means, for example, that if a separated partner dies after reaching a property settlement and without making a new will his or her assets will still go to the spouse, and not to any other person, either under the terms of the earlier will or under the intestacy laws.

Blended families

Blended families are common and are becoming more common. They create their own problems for estate planning and in most cases expert advice is needed to balance the genuinely competing claims of spouses, ex-spouses and different batches of children if your client dies prematurely.

The general goal will be to ensure that the client's wishes are achieved, at least as far as the law allows the client's wishes to be achieved. And sometimes there will be the further goal of helping the client through what can be a very difficult and emotional process. Awkward questions must be asked, and the advisor has to strive to understand the client and his or her family history and dynamics.

The wealthier and more complex the family's financial arrangements the more difficult the will making process, and all the other issues discussed in this manual become more difficult too.

Family law interacts with estate planning law, and some complex and surprising results can arise.

The issues are discussed in a paper presented by Zinta Harris in 2006 titled Blended Families and Estate Planning which can be accessed here: Blended Families and Estate Planning by Zinta Harris.

The paper considers the complications caused by blended families in estate planning generally with extensive and detailed comments on:

- executor and trustee selection;
- testamentary trusts;
- succession of discretionary trust assets;
- succession of company assets;
- effect of joint tenancies;
- superannuation and binding death benefit nominations;
- life insurance;
- binding financial agreements; and
- mutual wills.

Article from the Australian newspaper March 11 2009

SIMPLE WILLS DON'T SUIT OUR COMPLEX LIVES

MAKING a will used to involve a special trip to the family solicitor for the half of the Australian population that had done it.

But increasingly the will is seen as an integral part of a person's financial planning and is made -- and maintained -- as part of that process. Estate planning has become a fully specialised advice area within a financial planning practice. Most accredited financial planners have at least done a course of study on estate planning and a practice usually has a specialist estate planner.

Mike Fitzpatrick, principal of Clarendene Estate Planning, says the availability of specialised estate planning advice is not before time, given two simultaneous but conflicting developments. On the one hand, there is the growing national wealth kitty; on the other, the growing divorce rate.

"Over the last generation, Australians' personal wealth has grown enormously," Fitzpatrick says. "There is about $2 trillion that will change hands over the next 20 years. But the problem from an estate planning point of view is that the divorce rate is so high, and we have blended and split families all over the place. This fact complicates estate planning hugely."

Australian Bureau of Statistics figures show there were 109,323 marriages in Australia and 52,400 divorces in2005. In 18 per cent of marriages, themarriage was the first for only onepartner. In 14 per cent of marriages, both partners had been previously married.

"These days, almost 50 per cent of marriages end in divorce," says Rob Monahan, senior estate planner at Australian Executor Trustees. "Given the growth in wealth, the high divorce rate has really become a huge driver in estate planning. People want to be able to keep assets within nuclear families.

"Every presentation I give, I ask: 'Who here has had a relationship breakdown in their family?' and all the hands go up. Then I ask: 'Who would be happy for their inheritance not to pass on to their son or daughter but to the former in-law?', and they're shocked that's even a possibility, but it is," Monahan says.

With second marriages so common, the complications mount up, Fitzpatrick says. "The real problem that these people grapple with is, 'How do I look after my second spouse and any children we have but have some money left over for my kids from my first marriage?', and that's assuming that they've finalised all of their family law issues with their first spouse. And now, if you've got a mistress on the side, she can come in and stand in line.

"It shocks people that there are so many potential problems."

Phillip McGowan, partner at de Groots Wills & Estate Lawyers, cites the high-profile example of motor-racing legend Peter Brock. After Brock died during a rally in September 2006, his girlfriend, his former wife of 28 years and their three children were left with competing claims to his estate, set out in three wills.

Last October, the Victorian Supreme Court ruled that Brock's latest will, prepared by his personal assistant in 2006, was invalid because it was not signed. That will divided his estate between his girlfriend and his children.

Instead, the court ruled that the second will, prepared by Brock and his ex-wife with the help of a will kit in 2003, was valid. This will left everything to the children but failed to state how the assets would be distributed.

"With greater wealth and more complex personal circumstances, there is an upsurge in will disputes, with family members applying to the courts to argue that wills are invalid or that he or she should receive a greater share of the deceased's assets," McGowan says. "From a handful of cases being litigated in the courts 20 years ago, hundreds of these cases now pass through the court system. A small scale dispute over an estate may result in legal costs in excess of $100,000, often paid from the estate assets before the beneficiaries get their share."

Monahan says tax is another complicating factor in estate planning.

"The vast majority of people who have a will have just a simple will, which simply says: 'These are my beneficiaries, this is how my assets are distributed.' You can get those from a newsagent," Monahan says.

"That's better than having no will, but when people really sit down and look at passing on their assets, you usually find that simple doesn't do the job, mainly because of tax. You're not just passing on assets in a will, you can pass on liabilities as well. People fairly quickly realise that they are going to have to make inheriting their assets as tax-effective for their beneficiaries as possible. That is not achievable with a simple will."

Although Australia has not had death duties for three decades, it has a capital gains tax regime that Monahan describes as a "sleeping death duty".

"For instance, people might have a share portfolio or an investment property. When they die, (capital gains tax) on those assets doesn't have to be paid at that stage, but when the beneficiary sells that asset the CGT will be payable. Again, managing that problem is beyond a simple will."

Monahan says the most effective tool for making a will as tax-effective as possible, and ensuring that assets go to the chosen beneficiaries, is a discretionary testamentary trust, a trust created within a person's will that takes effect when that person dies. A testamentary trust may be created using specified assets, a designated portion of your estate or the entire remaining balance of your estate. Multiple testamentary trusts may be created by the one will.

Steven Carroll, director and head of financial planning at boutique advisory firm Carroll, Pike & Piercy, says a testamentary trust has two main attributes: it protects assets and it is highly tax-effective.

"Assets in a testamentary trust are protected from litigation, bankruptcy and divorce," Carroll says.

"That's the asset protection side of it, in the event of the beneficiaries being sued or going through a divorce. The other side of the coin is as far as income is concerned, you can spread the distribution of income out among the family. And if you have a couple of young children or grandchildren it's particularly tax-effective because they receive the income on adult marginal tax rates. The beneficiaries can decide how the capital gain is going to be distributed, then use that to minimise their tax."

As Australians' personal wealth grew in the past decade, more people found they were leaving legacies to their children that would create tax problems for them, so the testamentary trust became more widespread.

"When you create a will that's got testamentary trusts in it, it's only a choice that you're giving the children to go down that route," Carroll says. "They can, if they want to, turn their part of the inheritance into an immediately distributable estate and simply take the cash and run. They could do that to pay off debt or whatever they wanted to do.

"Alternatively, they might take a hybrid view and say 'look, give me part of the cash. I'm due to receive $1million out of mum and dad's estate; I'd like to take $400,000 and pay off my mortgage because it's not tax-deductible and it's a burden on the cash flow, and I'd like the other $600,000 to stay in the testamentary trust so that I can educate my own kids tax-effectively, with the income coming out at the end of the day."

He says the idea is not to lock the money into a testamentary trust.

"You're likely to have beneficiaries at different stages of their financial lives. Some will take money and leave a bit in there; some will take the whole lot and pay off a mortgage, or blow it; and the other might want to leave it all in there. It's protected while it's in there, but once they take it out into their own name, it's open to the vagaries of real life."

Arguably every will should contain a testamentary trust, says Carroll. "They cost $1500-$2000 to set up, whereas an immediately distributable will might only cost between $400 to set up. But they're definitely worth having in there to at least give the beneficiaries the option of using them."

Peter Whitehead, public trustee for NSW, says education is an area where testamentary trusts are commonly used. "Even where one of the parents is still alive, you often see a testamentary trust set up for the children's education because, being taxed at adult rates, the first $6000 each year will be tax-free," Whitehead says.

"Whereas anything that the surviving spouse might spend on education will be after-tax dollars, using a testamentary trust means that you can have at least $6000 spent per child from income that's not taxable. We often see grandparents setting up testamentary trusts for their grandchildren for this reason because of the way that it will be tax-effective to support those children compared with the parents themselves inheriting and having to spend after-tax dollars on the kids."

Phillip Bailey, a solicitor and estate planner with Dixon Advisory in Canberra, says a testamentary trust should be at least an option in a will.

"You've almost got two phases in estate planning," Bailey says. "If the beneficiary is a minor, you're looking at protecting the beneficiary from themselves. If an 18-year-old

inherits $1million, they're highly likely to blow it up. So you would lock that up in a mandatory and protective trust, and then at 25 it morphs into a fully flexible discretionary testamentary trust."

Bailey says he has included an optional testamentary trust in all wills since changes made to superannuation rules in 2007. "Before 2007, you could actually pass on your superannuation in the form of an income stream to an adult non-dependent child. The widow could die knowing that her children would simply continue her allocated pension. After July 2007 that (was no longer) possible and adult non-dependent children had to take lump sums. If you are, say, 30 and your parents die, you could suddenly get this massive chunk of super money.

"Say one person wants to use it to buy their principal residence and, fair enough, they don't really need a testamentary trust because they're just going to live in the house.

"But another person might want to invest the money and generate income from it, and they will find the testamentary very handy."

Bailey says it does not matter if the first person inherits $1 million and the second inherits $100,000; whether they need a testamentary trust depends on their circumstances, not the amount. "It's just a good option to have available to beneficiaries," he says. "They can decide if they want to use it and it's billed as a testamentary expense."