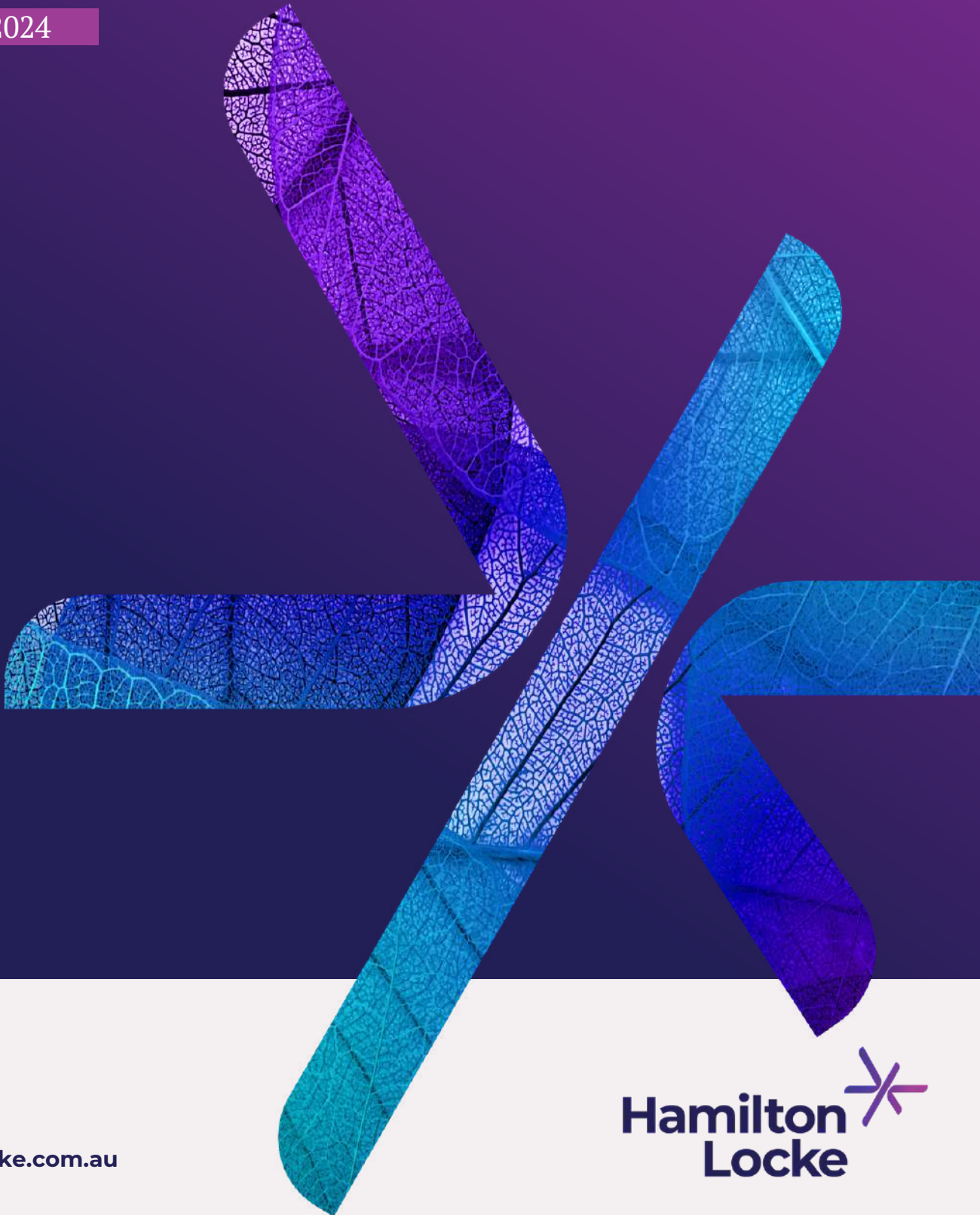


# Hamilton Locke Private: *Estate Planning*

April 2024



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

We delve into the essence of estate planning, transcending the mere drafting of wills to involve the complexity of safeguarding wealth through various life events.

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

A will stands as the cornerstone of estate planning, guiding the distribution of assets and appointing trusted executors. Regardless of age or circumstance, a will ensures intentions are honoured, offering clarity and peace of mind to our loved ones.

Understanding estate and non-estate assets is vital. Non-estate assets, like jointly owned properties and trusts, require specific planning.

Testamentary trusts are powerful tools, offering asset protection, tax efficiency, and flexibility. Various types cater to specific needs, from protecting vulnerable beneficiaries to managing business assets.

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

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## What is estate planning?

Estate planning is the process of planning for the protection, preservation and succession of a person's wealth and assets when anticipated and unexpected life events occur. Estate planning often requires a multi-disciplinary approach, involving cooperation between lawyers, accountants, and financial, wealth and business advisors.

Estate planning is frequently associated with making a will, however, death is only one aspect of the estate planning process. A complete estate plan will cater for a variety of potential life events, including:

- Loss of mental decision-making capacity;
- Divorce and relationship breakdown;
- Retirement planning;
- Sales or succession of family businesses;
- Financial downturns and cashflow fluctuation;
- Insolvency and business or professional liability;
- Loss of earning capacity (e.g. due to a disabling injury).

As circumstances change, your estate plan also needs to change with it. Regular review and updating of your estate planning will ensure the arrangements you have in place are fit for purpose and meet the goals you are seeking to achieve.

### What does an estate plan look like?

An estate plan should be tailored to the individual, depending on their personal goals and the structuring of their assets and wealth.

Most estate plans include a will, to deal with a person's personal wealth when they pass away. Other key documents include enduring powers of attorney and guardianship, and medical treatment decision making documents, in the event a person loses capacity.

Certain assets such as superannuation and life insurance require special consideration, as these may not be dealt with by a will on death.


Complexity often arises where a person's wealth is held within other structures, such as trusts, companies and self-managed superannuation funds. The assets in these structures are not part of an individual's estate, and generally specific legal documentation is needed to ensure that succession is dealt with appropriately.

Business owners may also require arrangements in place to deal with an exit from a business, whether planned or as a result of a life event. Shareholders agreements and buy/sell agreements are useful documents to avoid disputes arising between business owners.

### What is achieved by an estate plan?

An estate plan should, at a minimum, achieve the following:

- protect assets during a person's life from risk and wasting, so they can be utilised to provide for the person and their dependants;
- ensure the right structures are in place for flexible and tax-effective administration of the assets;
- pass assets to the right beneficiaries on death and in the right proportions;
- appoint the best and most responsible persons to important roles, such as executors, trustees, appointors, enduring attorneys, and guardians;
- ensure a smooth transition of control and ownership of assets with minimum room for disputes;
- avoid unnecessary costs, taxes, or litigation costs.



Estate Planning

## Why is it important to have a Will?

Around one in two Australians has made a will – if you haven't, it has probably crossed your mind.

There are a lot of reasons why people tend to put off making a will (trust us, we've heard them all):

- it can be uncomfortable to think about death;
- it can seem like too big a job and end up in the 'too hard basket';
- it can be something you'll get around to when you're 'older', or once you have 'something to give away' or 'someone to give it to'.

However, with the right assistance making a will is not a difficult process, and will ensure that you have something in place that will look after your loved ones or your intended beneficiaries.

### What does a will do?

A will has a few major jobs to do:

- **Appointing an executor:** An executor has the responsibility of arranging your funeral, dealing with your estate assets and liabilities, and distributing your estate to beneficiaries. Your will should appoint somebody you trust and who is competent to do the job (though they don't need to be a professional or business-minded person, and can usually be a family member).

- **Designating your beneficiaries:** The only way to appoint beneficiaries to receive gifts or assets from your estate is by making a will. Otherwise, your estate will be distributed in accordance with the laws of 'intestacy', a legislated formula which may not reflect your actual wishes and can vary depending on what state or territory you live in.

Your will can also contain bequests for charities you support, funeral and burial wishes, trusts for minor and vulnerable beneficiaries, provision for your pets, and a variety of other types of provision.

An important benefit that a will provides is certainty – it allows your family to quickly and clearly understand who is making decisions regarding your funeral and your assets, and what your final wishes are. When your family is grieving, having a will in place can ease the stress and confusion that your family members may be going through, and provide some sense of direction. Otherwise, they may not even know where to start concerning your wishes and intentions.

### I'm young and single – do I need a will?

Yes – everyone needs a will, even if you have not accumulated wealth or started a family. Most young Australians who have started to work have begun to earn superannuation, which often comes with a substantial life insurance policy attached. What happens if you die? If you don't have any dependants, your superannuation will be paid to your estate, meaning you need a will to direct who should receive the benefits.



### **I have a spouse and young children – won't they be provided for anyway?**

If you die without a will, the intestacy laws in your state or territory will determine how your estate is divided. While these laws usually provide in some way for your spouse or children, each state has different rules as to what they receive.

Some jurisdictions may require that the estate be divided between a surviving spouse and children, even if the children are minors living with their surviving parent. This may cause issues – what if the family home has to be sold to realise a payment to children? Even if the family are on good terms, legal issues can complicate the family arrangements.

### **Complexity and disputes**

The financial affairs of many families today are much more complicated than in earlier decades. It is more common that family members have divorced, re-partnered, have stepchildren, or live long enough to experience cognitive decline or outlive some of their children. People often have complicated financial arrangements, including trusts, businesses, and self-managed superannuation funds, all of which require special attention.

When proper planning is not in place, families can find themselves in dispute over how the estate should be dealt with. The cost of any litigation is commonly borne by the estate in some way, and will likely diminish the benefit every person receives. While litigation is not always avoidable, the best strategy to avoid potential litigation is through careful estate planning while you are alive.



## What assets are dealt with by a Will?

A will is an important document to have to ensure that assets you own pass to the right persons on your death. However, not all 'assets' are dealt with by a will, and most people will have at least one asset which is dealt with separately. Accordingly, the only way to ensure your wealth passes in accordance with your wishes is through a well-considered estate plan.

### What assets are dealt with by a will?

Generally, any property which is legally owned by or vested in a person will form part of their 'estate' when they die. A will is only able to deal with assets in a person's estate.

Virtually any kind of property can be dealt with by a will:

- Real property, such as land, housing, leaseholds, and farmland;
- Personal property, such as furniture and household items, artworks, jewellery, vehicles and vessels, livestock and water rights;
- Money;
- Shares and other securities in public and private companies;
- Units in a unit trust;
- Intellectual property, including copyrights, trade marks, patents and designs;
- Certain rights and entitlements, such as the right to sue for compensation or a right of due administration in a trust.

### What are non-estate assets?

Non-estate assets are generally assets of which you are not the sole and absolute owner. These are commonly assets which you cannot deal with or dispose of solely during your life, and therefore you cannot solely deal with these on death through your will.

Common non-estate assets include:

- **Jointly owned property** – such as real property owned with a spouse, or a joint bank account – these pass fully to the surviving joint owner in accordance with the law of survivorship.
- **Trust property** – property owned by you as trustee, or owned by another trustee in which you have a contingent interest, does not form part of your estate. The rules of the trust will determine how that property is dealt with after your death.
- **Superannuation** – superannuation is a kind of trust, which is governed by special regulations. Your interest in the superannuation fund is not dealt with by your will, but by the rules of your superannuation fund. Most funds allow you to nominate your preferred beneficiary, who must be a dependant according to superannuation law.
- **Life insurance** – life insurance payable on your death is generally directed to a particular beneficiary under the terms of the life insurance policy. If no beneficiary is nominated, the benefit is usually payable to the executor of the deceased's estate.



- **Assets owned by a company** – if you have a company for investment purposes or for running a business, the assets of the company are separate from your estate. You cannot usually direct how company assets are divided on your death through a will, however, you can dispose of the shares in the company through the will.
- **Partnership assets** – if you are carrying on business in partnership with others, the assets of the partnership generally cannot be distributed by your will. Your interest in the partnership may be transferable by will, however, this depends on the partnership agreement and any legislation governing the partnership.

### Why is it important to know the difference?

There are many reasons why understanding the ownership of various assets is important:

- Many people attempt to give away non-estate assets in their wills, and these gifts are usually ineffective.
- Where proper planning isn't in place for non-estate assets, it may result in unequal benefits being received (eg if a superannuation death benefit is paid to one child, rather than equally between several children)
- Substantial wealth is often held within families outside of direct personal ownership – in family trusts, companies, and SMSFs. In some cases, virtually no assets are personally owned and dealt with by the will. Failure to deal with these assets can result in uncertainty about who will benefit from the general wealth.
- Where beneficiaries are not satisfied with the provision made, or feel the testator's intentions have not been carried out, the estate will more likely see court applications or litigation by beneficiaries to resolve the issues.

### Digital assets

A special category of property are digital assets. More of our important information, photos and media are now stored digitally, often with third party service providers and hosted on the cloud.

Passing on these assets to your beneficiaries is a complicated issue, and a developing area of law across the globe.

Online security is a key concern for everyone, however, maintaining strict confidentiality of your passwords during life means people may not have access to your emails, social media and other accounts.

Many software and service providers, including for purchased media or for personal cloud storage, provide their service via a licence. The terms of service often provide that the licences are not transferable on death, and unless the company has a service allowing account transfer or access, licences may be revoked and accounts closed as soon as a provider learns of a person's death.

Information is generally not considered property. There can be difficulties in transferring ownership of digital assets which have no copyright or other intellectual property protection.



## Why should I have testamentary trusts in my Will?

Testamentary trusts are a valuable tool that can be employed in your estate planning to achieve specific goals, such as asset protection, tax minimisation, investment flexibility, and protection of your estate from loss or waste in the hands of vulnerable beneficiaries.

While trusts have existed for a long time, testamentary trusts have seen increased popularity with the increase in family wealth and the rising complexity of personal financial arrangements.

This article explores what testamentary trusts are, and how they can be used as part of your estate plan.

### What is a testamentary trust?

A 'testamentary trust' is merely a trust that is created by your will and comes into effect on your death (the word 'testamentary' comes from the word 'testament', meaning a will). Until you pass away, you retain control of your assets, but on your death the assets in your estate pass into the testamentary trust.

So, what is a trust? A trust is an arrangement where a person (the trustee) holds property for the benefit of another person (the beneficiary). The trustee legally owns the property, but only the beneficiaries have rights to benefit from the trust property. A trust usually has rules, which are set out in a trust deed or in a will, which the trustee must follow. A trust can be enforced in court by the beneficiary to ensure the trustee acts in accordance with the trust rules and its fiduciary duties.

Trusts in a will can be extremely simple – for instance, a gift to a minor child which is conditional upon the child attaining the age of 25 can create a trust, as the executor must hold the gift on trust for the child until he or she reaches that age. In the meantime, the trustee would manage and invest the gift, can distribute income to the child, and may be able to lend or advance money to the beneficiary if the will permits this.

### Benefits of a discretionary testamentary trust

Trusts can be created and customised entirely to your specific needs, however, it is common for wills to establish 'discretionary testamentary trusts'. The key feature of a discretionary trust is that it has a wide class of potential beneficiaries, and the trustee is empowered to choose which members of the class will receive a distribution from the trust.

Until a distribution is made, no beneficiary has an entitlement to any assets of the trust or to receive a distribution. The trustee does not have an obligation to distribute anything to a particular beneficiary for the whole life of a trust, and may refrain from distributing to some members entirely. The trustee can distribute differently from time to time, and as new members enter the class (e.g. children and grandchildren being born) they can become eligible to receive distributions.

Distributions of income from a trust are not taxed to the trust, but flow through to the beneficiary and are taxed in the beneficiaries' hands. The beneficiaries do not pay tax unless a distribution of income is made to them, and this means that distributions to family members who have a lower taxable income or available tax losses can be preferred, which will reduce the overall tax payable on the income generated by the trust property. Particular types of income, including capital gains and franking credits, are also capable of being streamed to particular beneficiaries.

Discretionary trusts are popular because of the unique benefits that can arise:

- Because the class of beneficiaries do not have an entitlement to any asset of the trust, the assets of the trust cannot be pursued by creditors, or vest in a trustee in bankruptcy;





- Trust assets can be protected from division in family law property settlements, although this will depend on the particular structure and circumstances of the trust;
- Distributions of income and capital can be made in a flexible manner depending on the circumstances of the beneficiaries, which will change over time;
- The trustee can manage the funds for the benefit of the beneficiaries, who may not be capable of managing wealth themselves due to age, maturity, disability, dependency on drugs or alcohol, or inability to properly manage their finances;
- As a trust lasts can exist for a long period of time, the property can be invested in a way that provides for multiple generations of beneficiaries.
- All-needs protective TDT: Where a TDT is established which prioritises the needs of a particular beneficiary (often a vulnerable or disabled beneficiary), and only allows for a discretionary distribution to be made where that beneficiaries' needs are met;
- Capital protected TDT: Where only the income of the trust may be distributed in a discretionary manner, while the capital is unable to be distributed until the trust ends or some other stipulated time.

The above trusts are examples of trusts which are drafted with different degrees of priority given to flexibility and freedom vs asset protection and preservation of capital. However, each trust can be uniquely crafted and customised to serve the particular purposes and concerns of a will-maker.

There are also particular benefits which derive from a testamentary discretionary trust, which cannot be obtained through a trust established while you are alive:

- Minor beneficiaries are not subject to penalty tax rates, meaning each minor child or grandchild can benefit from the tax-free threshold and lower marginal tax rates on income distributed to them;
- Assets passing to and from the trust which are owned by the deceased at their death do not trigger a CGT liability;
- In most states, real property can pass from the deceased's estate to a testamentary trust without incurring transfer duty, and in some cases may pass to beneficiaries duty free also;
- Where the trustee is assessed to pay tax, the tax is generally assessed at the normal adult tax rates.

### Types of testamentary trusts

There are a number of types of common trust arrangements which are used in wills, including:

- Single testamentary discretionary trust (TDT): Where all of the estate passes to a single testamentary trust intended to benefit an entire family;
- Beneficiary-controlled TDT: Where the estate is divided between beneficiaries who each control a TDT to themselves;
- Lineal descendants TDT: Where the beneficiary class is limited only to children and descendants related by blood, to protect against distributions being made to spouses or stepchildren and against exposure in family law proceedings;

In addition to having different types of trusts for different beneficiaries, it can be appropriate for a will to establish different trusts for different purposes, such as:

- Trusts which exclude foreign beneficiaries, to hold real property which may be subject to surcharge duties or taxes under state laws;
- Trusts limited to superannuation dependants, to ensure that superannuation death benefits are eligible for tax-free treatment;
- Trusts to hold business assets or assets exposed to risk, which may assist to isolate the assets from risk.

### Other will trusts

Wills often utilise other types of trust including:

- Life interests or rights of occupation, allowing a property (often the family home) or other financial assets to be used by a person throughout their life, and on their death to pass automatically to specified remainder beneficiaries;
- Special disability trusts: for disabled beneficiaries, to obtain concessional treatment of assets for Centrelink purposes.

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*\*All articles in this publication have been prepared by Jack Conway.*

# About Hamilton Locke Private



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

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

## **Why is it important to manage your affairs now?**

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

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

## **Why work with us?**

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

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

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

## **Our Services**

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

Our services include:

### *1. Estate and Succession Planning*

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

### *2. Tax and Structuring*

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

### *3. Estate Litigation*

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

### *4. Real estate and property*

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

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