



# Estate planning guide

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# Glossary

<b>ABS</b>	Australian Bureau of Statistics
<b>AFSL</b>	Australian Financial Services Licence
<b>ASIC</b>	Australian Securities and Investments Commission
<b>BDBN</b>	Binding Death Benefit Nomination
<b>ATO</b>	Australian Taxation Office
<b>EPOA</b>	Enduring power of attorney
<b>CGT</b>	Capital gains tax
<b>LPR</b>	Legal personal representative
<b>ITAA1997</b>	Income Tax Assessment Act (1997) (Cth)
<b>SIS Act</b>	Superannuation Industry (Supervision) Act 1993 (Cth)
<b>SIS Regulations</b>	Superannuation Industry (Supervision) Regulations 1994 (Cth)
<b>SMSF</b>	Self-managed superannuation fund
<b>TFN</b>	Tax file number
<b>TPD</b>	Total and Permanent Disability

# Disclaimer

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# About this guide

ClearView is committed to helping financial advisers tailor effective insurance solutions for their clients. We also understand the importance of estate planning as part of a person's overall financial plan, including the role of life risk insurance, both inside and outside super.

The purpose of this guide is to provide financial advisers with an estate planning reference tool, which can prompt them to discuss with their clients the fundamentals of an estate plan and as a springboard from which they can delve into the specific, and often complex issues, affecting their clients.

This guide does not discuss business succession planning, which is covered – for the most part – in ClearView's Business Insurance Guide, which can be accessed **here** nor does it deal with certain areas of elder law, such as aged care, the interaction of estate planning and Centrelink entitlements and reverse mortgages.

The laws relating to estate and succession planning are constantly changing. There are also regular reviews and amendments to superannuation legislation. It is important for advisers and their clients be aware of these changes and for them to consult with other professional advisers who are experienced and up to date in their particular fields.

The information in this guide is general in nature and is not intended to constitute legal, tax or financial product advice.

This guide is designed to give you an overview of the estate planning issues and to provide you with general information, tools and advice to address questions from a wide range of clients about their specific estate planning questions. However, given that estate planning consists of many parts and is inherently complex, in no small part due to the differing legislation and its application in each Australian state and territory, this guide does not replace the need for your client to seek expert tax and legal advice based on their individual situation.

## What is Estate Planning?

There are few inevitable truths we as humans must accept. First, all of us are mortal and will die. Second, the time of our death is generally unknown. And third, we can't take any earthly possessions with us when we die. The decision to plan for this inescapable event is a conscious choice. The old joke goes like this: A lawyer says to their client: 'If you plan your estate properly, your heirs won't have anything to fight over. Are you sure you want to do this?'

The main objectives of estate planning is to ensure, as much as possible, that an individual's assets or property will be distributed – after they die or are otherwise incapacitated – to the right people and in a timely and tax-effective manner.

## The importance of Estate Planning

Until the mid-20th century, for most people estate planning was simply a matter of making a will. Most of a person's assets were either owned in their own name or jointly owned with their spouse. Upon death, their personally owned assets were governed by a will and the jointly owned assets passed automatically to their spouse.

During the early colonial period in Australia, wealthy landowners and businesspeople managed their estates generally through fixed trusts to transfer intergenerational wealth. Later, the discretionary trust as we know it today began to take shape, with a surge in popularity in the 1970s. Its distinctive feature, and hence its continuing popularity, was – and is – flexibility: the discretionary ability for the trustee to distribute income and capital to beneficiaries. According to the ATO, of the total number of trusts lodging income tax returns in 2021-22 (986,545), over 80 per cent (792,267) were discretionary trusts, with total reported business income of over \$280 billion<sup>1</sup>.



Superannuation also began to grow in popularity in Australia from the 1970s and by 1974, 32.2 per cent of wage and salary owners were covered by super. Award superannuation was introduced in 1986 and subsequently mandatory occupational superannuation began operation in 1992, via the Superannuation Guarantee legislation<sup>2</sup>.

However, recent statistics show that the wealth of Australians continues to be firstly in real estate and then in superannuation. Net household wealth in Australia reached a record \$16.88 trillion in the September quarter of 2024, consisting of \$11.36 trillion (67.3%) in residential property and \$4.08 (24.2%) in superannuation<sup>3</sup>.

Most of the private wealth we have mentioned above can be successfully directed to the appropriate recipients with careful and precise estate planning, provided by professional advisers, including – and most importantly – financial advisers. Needless to say, an estate plan needs to be reviewed regularly to address an individual's changing circumstances.

## Role of the financial adviser

Financial advisers are in a unique position to assist their clients with their estate planning. They have a deep knowledge of their client's financial situation, they are in regular contact with their clients and understand their needs and objectives, generally more so than other professional advisers. Most importantly, they have the client's trust.

According to a research paper published in November 2021 by the Australian Government's Productivity Commission, it was estimated that Australians aged 60 and over would transfer \$3.5 trillion in wealth in the next two decades<sup>4</sup>. This estimate was revised upwards to \$4.9 trillion in a JBVere publication in March 2024<sup>5</sup>. This, together with the fact that the first of the baby boomers are approaching their notional life expectancy threshold, makes estate planning even more relevant and the role of the financial adviser even more pertinent.

The financial adviser's role in their client's estate planning depends on a number of factors:

- the adviser's expertise
- the size and complexity of the client's estate
- requirements of the adviser's AFSL
- professional Indemnity insurance issues

Obviously, advisers need to consider the issues mentioned above, consult with their dealer group's compliance officer and choose their level of involvement in estate planning, while also bearing in mind that the provision of estate planning advice is not a financial service or a financial product restricted to lawyers or accountants. That said, implementing

an estate plan may give rise to a financial service or financial product advice, so it is important to refer your client to the appropriate professionals, most notably lawyers, for further advice and implementation of their estate plan.

## Estate and non-estate assets

Somewhat ironically, a well-structured estate plan generally includes both estate and non-estate assets, most of which are listed below. However, the ownership of some assets may in some circumstances be structured as either estate assets or non-estate assets or even both (partially), if required.

### Estate assets

Estate assets are distributed according to a person's valid will, created by a testator (will-maker) and distributed by an executor (also known as an LPR).

More often than not and depending on the size and nature of the deceased estate, an executor needs to apply for a grant of probate. This is a court order that confirms (or proves) the validity of the will, the death of the testator and authorises the appointed executor(s) to administer the deceased estate until the distribution of assets, at which time the executor in their capacity as trustee (or a separately appointed trustee) performs the latter task.

Probate is not always required if the deceased estate is relatively small or most of the assets are jointly owned and superannuation benefits are being paid directly to beneficiaries. In NSW, for instance, if the deceased had life insurance and bank accounts of less than \$50,000 (though the amount may vary from bank to bank) and shares not exceeding \$15,000 and no other estate assets, probate may not be necessary.

Estate assets include:

- real estate owned in a person's sole name (subject to mortgages, caveats and charges against it)
- an interest in assets, including real estate, held with another as tenants in common
- personal effects, belongings or chattels if owned solely by the deceased (generally including motor vehicles, jewellery, artwork, furniture, clothing, household goods and pets)
- bank accounts and cash investments if owned solely by the deceased
- shares (including in one's own private company), units owned in a unit trust and bonds and debentures if owned solely by the deceased
- loans made by the deceased to the trustee of a trust
- income and capital allocated to a deceased from a trust

- life insurance if solely owned by the deceased with no nominated beneficiaries
- superannuation, if there is a valid BDBN in favour of deceased's LPR, via trustee discretion or in accordance with the trust deed
- digital assets and cryptocurrency

The increasing popularity of digital assets and cryptocurrency has entailed some inherent problems when it comes to estate planning. Therefore, it is important to understand how access to these assets works. This is usually set out in the terms and conditions of the particular offering. Even though these assets generally pass via the will, access to these assets may be totally blocked upon death unless the family has access to usernames and passwords. A testator should ensure that these passwords – as well as those for services that may have sentimental value, such as Facebook, TikTok and Instagram – are stored securely, but available to family members and/or executors so that these potentially valuable assets are not lost forever.

## Non-estate assets

Assets that are not owned (but controlled), or not wholly owned by the testator, are described as non-estate assets. They cannot be distributed via a will.

They include:

- assets owned jointly with another (as joint tenants), most commonly the family home, shares, and bank accounts
- superannuation, if paid directly to a beneficiary via a valid BDBN, by trustee discretion or via a trust deed
- life insurance proceeds (outside super), if the policy is jointly owned with another or paid directly to a nominated beneficiary
- account-based pensions or annuities that have a surviving reversionary beneficiary
- assets in a company and/or a trust

### Joint tenants vs. tenants in common

The advantage in holding property as joint tenants (joint owners) is that upon death the jointly owned property automatically passes to the survivor(s) (called the 'right of survivorship'). The right of survivorship also means that the asset does not form part of the deceased's estate (although in NSW there are rules which enable joint assets to be designated as 'notional estate' in certain circumstances) and hence avoids the need to obtain a grant of probate. This in turn saves time and money. It is for this reason that the majority of couples record property ownership, especially real estate, as joint tenants.

Co-owners as tenants in common have individual and potentially unequal shares (from 1 to 99 per cent ownership, with the other tenant(s) in common making up the remainder, adding up to 100 per cent) of an asset. Upon the death of a tenant in common, their interest in the property does not pass to other co-tenants but is transferred in accordance with their will (or the rules of intestacy, if applicable).

## Which jurisdiction?

In Australia, each state or territory (or jurisdiction) has its own laws dealing with wills, powers of attorney and deceased estates. When considering estate planning issues and administration of a deceased estate, one should first determine the law of which jurisdiction – and possibly more than one – applies. This is because people are increasingly owning assets in different jurisdictions and the possibility that they may reside in more than one jurisdiction during their lifetime. There is also the issue of individuals holding assets both in Australia and overseas and establishing their place of domicile. Domicile is different from residency, which may be a temporary or permanent place of abode and has a particular meaning for tax purposes. We suggest seeking specialist legal advice with respect to international succession law if your clients have assets overseas as well as in Australia. For estate planning purposes exclusively in Australia, jurisdiction generally depends on three things:

- the deceased's domicile
- where the deceased's assets are located, and
- whether the asset is moveable or immovable

In estate planning domicile is important for a number of reasons:

- the jurisdiction for the operation of a valid will generally depend on the deceased's domicile at the time the will was made (as well as the issue of revocation)
- where a person dies intestate, the deceased's domicile will only be relevant to moveable property (e.g., leases, shares and chattels)<sup>6</sup>

For notional estate claims (under the Succession Act 2006 (NSW)), domicile is relevant with respect to the deceased's moveable property. If the deceased is domiciled in another jurisdiction (which has no notional estate provisions), this would preclude the possibility of notional estate being applied for movables under NSW legislation.

**Domicile:** Every person can only have one domicile at any given point in time. Every person is born with a domicile, known as a 'domicile of origin'. This domicile of origin can be displaced by what is known as a 'domicile of choice'. This can occur when an individual changes their domicile of origin in order to acquire

a domicile of choice with the intention to make their home indefinitely in a new country<sup>7</sup>. A 'country' in this context means any geographical area bound by a common legal system; so, for the purposes of domicile, the ACT and NSW are distinct countries.

The location of immovable property, such as land and buildings on the land (property not attached to land, such as bank accounts and shares, is generally movable property), may be important for a number of estate planning reasons. For instance, if a person dies intestate leaving immovable property in different jurisdictions, the laws of each jurisdiction will usually determine how the immovable property will be dealt with.

## Wills and intestacy

### Wills

One of the essential components of an estate plan is, of course, a valid will, which specifies a testator's wishes as to how and to whom they would like their estate assets distributed after death.

A will is a legal document. There are two ways of making a will: a testator (will maker) can do it themselves or they can seek professional advice from a either a lawyer (preferably one who specialises in estate planning) or a trustee company.

The first option is not advisable for many reasons. The most common problems are:

#### The will

- attempts to dispose of assets not owned by the testator
- fails to comply with basic legal requirements
- fails to dispose of the entire estate, leaving a partial intestacy
- fails to provide for those whom the testator has a responsibility to make provision
- has terms or wording that is confusing
- fails to revoke previous wills

A will created by a practising estate planning lawyer can be tailored to meet the testator's specific goals and needs, is legally binding and can provide peace of mind that the testator's assets and loved ones will be taken care of according to their wishes. A public trustee, on the other hand, may not have the same level of expertise or knowledge of the law, which can lead to mistakes or disputes. Public trustees typically receive their income via clients' fees or commissions from administering deceased estates or trusts.

The advantages of having a will (besides the desired distribution of assets) include:

- the ability to make instructions for funeral

arrangements

- the choice of executor and trustee, especially important if assets are to be held in trust for minors or for vulnerable beneficiaries who do not have the necessary capacity to properly manage their financial affairs due to a disability or addiction
- the potential to set up a testamentary trust to provide for spouses and children in a tax-effective manner
- the ability to appoint a guardian for minor children
- minimising costs to the estate, because dying without a will (intestate) usually means that additional documents must be submitted to the courts, with associated expenses

### Legal requirements for preparing a will

Each state and territory has its own legislation that sets out the requirements for making a valid will. Whilst there is broad alignment in many of these requirements, they do vary. Advisers should familiarise themselves with the formalities in their jurisdiction and in those of their clients' jurisdiction if they differ.

The usual requirements for preparing a valid will include:

- The testator must be over the age of 18 (unless a married minor or by court order)
- The will (document) must be in writing (some jurisdictions allow video, tapes, etc. as 'documents')
- The will must be signed and dated by the testator (or by another person at the direction of the testator, if the latter is unable to sign)
- The will must be witnessed by at least two people who are present with the testator at signing

Until recently, a will that did not meet formal requirements was held to be invalid. Legislation in all jurisdictions has been amended whereby courts may, under certain circumstances, admit a document to probate even it does not comply with these requirements, provided they are satisfied that the individual intended the document to be their last will.

### Challenging a will

Challenging a will is different from contesting a will, which can occur when someone makes a claim on the estate because the deceased did not make adequate provision for them in their will (see below). A will can be challenged if someone is concerned that a will might be invalid. The court can then determine if the deceased's will was indeed invalid.

Some circumstances where interested persons may seek to challenge a will are as follows:

- The will is not the last will of the deceased
- The testator lacked testamentary capacity at the



time the will was made

- The testator lacked knowledge and approval of the will
- The will is a forgery, was made under undue influence or pressure, or is fraudulent
- The will is not properly executed (dated, signed and witnessed)
- The testator revoked the will in their lifetime.

### **Testamentary capacity**

For their will to be valid, a testator must have testamentary capacity, which is a legal concept that quantifies their mental capacity to execute or change a will. A testator is assumed to have testamentary capacity unless proven otherwise. It is up to a challenger to present sufficient evidence to establish that the testator is or was unable to make a rational will. This is done after the grant of probate of the will. The test of testamentary capacity may be summarised as follows:

- Does the testator understand the nature of a will and its effect?
- Does the testator understand the extent of the assets that make up the estate?
- Does the testator comprehend that there are people for whom the testator has an obligation to make provision?
- Does the testator suffer from disorder of the mind which would affect them making rational decisions about how to distribute their estate?<sup>8</sup>

A testator can take measures to mitigate a challenge based on testamentary capacity, particularly if they have had or have a mental disorder, such as schizophrenia, or episodes of dementia. One option is to have a solicitor draft their will and to engage a medical practitioner to make an assessment as to their capacity to make a will. The assessment should then be kept with the original will.

### **Contesting a will and family provision applications**

Australia has a long history of the principle of freedom of testation (or testamentary freedom). While the courts still respect this principle, it is not absolute and hence the existence of a family provision regime. Each Australian state and territory has legislation that allows certain people to make a claim for provision or further provision from a deceased estate, (including under a will or intestacy provisions, if applicable) if they have been left without adequate provision for proper maintenance, education and advancement in life. These people – called eligible persons – can contest a testator's will and intestacy distributions and claim provision (or further provision) from the estate.

First, the court needs to determine whether the

applicant is an eligible person. Categories of eligible persons vary according to the jurisdiction. Some jurisdictions have narrower definitions of eligible persons than others.

Second, the court may make an order that provision be made out of the deceased estate for the proper maintenance and support of the eligible person. The court will consider the circumstances of the eligible person, including their age, their needs, their relationship with the deceased, the size and nature of the estate and any contribution by the applicant, as well as any physical, mental or intellectual disability of any applicant or beneficiary, and other factors.

Time limits on making a family provision claims vary between jurisdictions, from 3 months from the date of the grant of representation (in Tasmania) to commencement within 12 months of the date of death (in NSW and the Northern Territory). The court has discretion to extend the time if it's satisfied that there is sufficient reason for a delay.

### **Storing a will**

A person's will may be the most important document that they ever make, so it is imperative that it be stored safely and securely and be accessible for viewing after the testator's death. Failure to store an original will in a suitable place and to notify next of kin and the executor(s) of its whereabouts could lead to the estate being distributed according to the rules of intestacy. It is good practice to store a signed copy with the executor(s) for their knowledge and use at the appropriate time.

There are a number of places where an original will may be stored securely:

- A lawyer's strongroom (and keep a signed copy at home). Lawyers generally do not charge a fee (or only a nominal fee) to store wills that they have prepared
- At home, in a safe or another secure and locked container. The container should be private as well as fireproof, waterproof and otherwise damage proof. Clear instructions should be provided to the executor and family as to the will's location and how to access it
- Safe deposit box at a bank or other institution, which may be expensive. Make sure the deposit box is accessible by your executor without having a grant of probate
- Store the will with your executor but ask if they have safe and secure storage to avoid any loss or damage
- Public trustees in each jurisdiction offer secure and free secure storage of wills they have prepared. Most of them also offer storage for a fee. The NSW Trustee and Guardian offers secure storage for a

will, Power of Attorney and Enduring Guardianship, currently \$29 for a single document deposit and \$49 for up to 3 documents (or 3 for \$29 for Seniors Card holders)

### **Revoking, updating and altering a will**

To be effective in meeting a person's testamentary wishes, a will needs to deal with existing circumstances at the date of death. Reviewing one's estate plan and wills is an ongoing process. An out-of-date will may be worse than no will at all, particularly if major life events have taken place since the existing will was drafted.

A will can be changed in two ways: a testator may revoke their previous will and make an entirely new will or they may add a codicil to their existing will.

A codicil is a legal document that amends a will by stipulating changes to particular provisions of the will but leaves the remainder of the will unchanged. While preparing a codicil is an easier process than rewriting a will and may be appropriate for minor changes, the codicil still needs to be signed and witnessed in accordance with statutory rules and stored together with the will. A codicil creates two testamentary documents and if the will and codicil are separated for whatever reason, the deceased estate may be administered without the amendments made in the codicil.

Although preparing a new will may be a more time consuming and expensive process than using a codicil, it removes the paper trail. Changes made via codicil will be seen by the beneficiaries and may lead to disappointment and disputes.

### **Appointing an executor and trustee**

As mentioned previously, if there is a will, the person who deals with and manages the estate is called an executor or an LPR. If the deceased has died without a will (intestate), the person who handles the estate is known as the administrator. They too are known as an LPR. An administrator may also be appointed if there is a will, but the executor cannot or will not act.

The duties of an executor may be extensive and varied, and they may be either simple or complex. Although the roles of the executor and trustee are distinct, it is common for the same person or persons to act as both. If they are one and the same person, the executor assumes the role of trustee once the executors have collected the assets and paid the debts of the estate. The trustee holds the assets in trust until they are to be distributed to the beneficiaries or transferred to any trusts created under the will. These trusts may exist because of the operation of law (where minor beneficiaries have not attained 18 or the age specified in the will) or by choice if there is a

testamentary trust incorporated in the will. The trustee is responsible for managing these assets in accordance with the terms of the will and in the best interests of the trust's beneficiaries.

It makes sense to appoint more than one executor/trustee, in case one of them cannot or is unwilling to act. If no executor is named in a will or if there is a sole executor who cannot perform or refuses the role, generally a beneficiary or appropriate independent person must apply for a grant of Letters of Administration with the will annexed.

It is also possible to appoint one executor and nominate a reserve or alternative executor if the first named executor cannot or is unwilling to act. It's a good idea to speak to potential executor's before naming them in the will, so as to explain the nature of their duties and to get their agreement to act in that capacity.

### **Who should be the executor?**

Where there is one main adult beneficiary in a will, it is often appropriate to name that person as sole executor and trustee. An example of this is where a married couple (or de-facto partners) intends to leave their entire estate to each other. The first spouse to die will leave their estate to the other. However, care should be taken to ensure that one or more alternative executors are nominated should the first executor be unable to take on that role due to lack of mental capacity, has predeceased the testator or in the case of simultaneous deaths (rule of commorientes). (See under Simultaneous Deaths).

Apart from spouses, de-facto partners and children over the age of 18, other potential executors include the testator's siblings, trusted family friends and trusted professional advisers (lawyers, accountants or financial advisers). For various reasons, a testator may choose to appoint a trustee company or the public trustee as executor. Appointment of trusted advisers as executors assumes the deceased's will includes an adequate charging clause. If a client asks you, their financial adviser, to act as their executor, it is important you discuss with them their overall situation and ensure there is an adequate charging clause in their will if you are willing to act.

There is no limit on the number of executors you can appoint in a will. However, in some jurisdictions (QLD, TAS, Vic and WA) the court will not grant probate to more than four executors at a time, while in the others (ACT, NSW, NT and SA) probate may be granted to any number of executors at the one time. If multiple executors are appointed, their authority is joint and several, which means that all executors must act jointly and agree on any decisions, which may lead to complications and delays if they disagree. If multiple

executors are named, there are options to resolve disputes. The will could direct one of the appointed executors to have a casting vote or if there is an odd number of multiple appointed executors or the outcome of a dispute could be determined by majority decision.

The first duty of an executor is to locate the original will. A copy may be stored with personal documents at home or in a safe deposit box. It is advisable to inform one's executor of the location of the original will, which will often be held at the testator's lawyer's office. Once located, the executor may seek legal advice as to the interpretation of the will's terms and the steps required to administer the estate, including whether to apply for a grant of probate of the will.

**Here is a list (not exhaustive) of subsequent executorial duties and those of the trustee:**

1. Arrange the funeral: although the executor is ultimately responsible for funeral arrangements, this is done generally by the family or next of kin (which may include the executor) or in consultation with them, in line with instructions in the will, if any
2. Obtain a death certificate (if using a funeral director, they will apply for one when they register the death), which is important for transferring or cancelling services and administering a will
3. Find and notify beneficiaries (unless the executor is also the sole beneficiary)
4. Locate, protect and list assets: The executor needs to locate and value all assets and ownership arrangements (to determine whether or not they're estate assets as the deceased may have had control of a family trust, an SMSF, or a business). Prepare inventory of all assets and liabilities
5. Ascertain all liabilities, outstanding debts and taxes and check that there are no outstanding claims against the estate
6. Notify all relevant authorities of the death, e.g., banks, financial institutions and government agencies, so that debts don't continue and income such pensions are stopped. The Australian Death Notification Service (**ADNS**) can assist in contacting multiple organisations using a single online notification
7. Apply for a grant of probate or letters of administration (not necessary if estate includes only jointly owned real estate and property such as bank accounts and there is no need for a grant to transfer assets to a beneficiary or sell them; or where the value of the estate is small). If probate or administration is not needed, the next of kin can distribute the estate after dealing with the deceased's debts, if any
8. Collect assets and pay debts once probate or letters of administration are granted; ensure all debts and expenses are accounted for; pay legacies, transfer specific gifts, establish any ongoing trusts; ensure sale of any assets is at fair market value
9. If estate has insufficient assets to pay all debts, funeral, testamentary and administrative costs are paid first. All other debts rank equally. If there is a delay in meeting debts due to lack of estate funds, contact creditors with the reason and expected payment time frame
10. (Now as trustee): Distribute assets to beneficiaries after all debts are paid (subject to any claims against the estate)
11. File tax returns on behalf of the deceased up to the date of death, then on behalf of the estate until the administration of the estate is complete (for each year until the estate is finalised)
12. Set up a testamentary trust, if applicable, and manage trust assets if beneficiary is a minor

It is important to note that a deceased estate essentially lasts indefinitely. It is not a rarity for an estate to receive additional assets, such as cash from previously unknown bank accounts, superannuation assets, life insurance policies, or even real property many years after it was thought that the estate was finalised. While the executor may distribute all known assets, lodge a final tax return and, for all practical purposes, have finalised the administration of the estate, they still retain all powers under the will and if additional assets are subsequently identified, they still have the same powers they did on day one to deal with those assets.

This may mean further administrative action, such as opening a new estate bank account to receive funds, reviving a dormant tax file number to lodge an additional tax return, and so on, but the executor does not need court approval to commence acting again. The only time that a further court application would be required is when the original executor has died (see below) or is unable to act for any reason.

## Death of an executor

There are a few variable outcomes if an executor dies, depending on the timing of the executor's death:

1. If a sole executor predeceases the testator or survives the testator but dies before beginning estate administration, and the latter has appointed a reserve (backup) executor, the reserve executor applies for a grant of probate and administers the estate. There is a solid argument for appointing more than one reserve, and the testator should appoint another reserve in that instance
2. If a co-executor dies, the remaining executors can continue administering the estate
3. If the executor survives the testator and obtains a grant of probate but dies before completion of administration of the estate, the deceased executor's executor becomes the LPR and completes administration of the estate. If an executor in turn does not have a valid will or no executor is available to act, another person (generally the major beneficiary of the estate) with an interest in the estate will need to make an application for letters of administration (with the will annexed) and be appointed to administer the estate.

## Intestacy

Many adult Australians either die without a will (intestate) or without a will that effectively and completely distributes a person's assets after they die (partial intestacy). This is usually a result of a lack of planning and of course presents a number of problems for the next of kin and intended beneficiaries.

Each state and territory has its own legislation prescribing how a person's estate is distributed if they die intestate or partially intestate. This legislation varies significantly between each jurisdiction and the intestacy rules are inflexible and complex. They vary depending on the circumstances: where the deceased was domiciled, the location of their assets and whether they have a spouse or de facto partner and whether they have children.

The administration of an intestate estate requires someone to administer the estate, as there is no executor. Therefore, an application needs to be made to the court seeking a grant of letters of administration on intestacy. This application may also be made where there is a will but all of the nominated executors are unable to act (either because they have died, have lost capacity or refuse to act). In that case, the will remains valid but an administrator needs to be appointed. Another complication may arise if there are multiple people who want to apply for a grant of letters of administration, which may lead to disputes, further

delays and extra cost (which is borne by the deceased estate).

Once an administrator is appointed, they have the legal authority to administer the intestate estate in accordance with the applicable statutory formula in the appropriate jurisdiction. Regardless of the formulas, the distribution of intestate assets will invariably differ from the testamentary wishes of the deceased if they had made a valid will.

To complicate matters further, it is important to note that the laws of intestacy may be overridden by a successful family provision claim.

## Effect of marriage, separation and divorce on a will

### Marriage

Getting married generally revokes any previous will unless the will is made 'in contemplation' of marriage. If it's a specific marriage, it is best to name the future spouse. Although most jurisdictions also accept a provision contemplating marriage in general, South Australia and the Australian Capital Territory require that contemplation of marriage be expressly stated in the will. The wording of the provision for a specific marriage can be further expanded to state that the will is either conditional or not conditional of that marriage taking place. Some jurisdictions still recognise the validity of a will in the absence of a specific provision 'in contemplation' if there is evidence that the marriage was contemplated when the will was signed.

Upon marriage and depending on the jurisdiction, a will is either wholly revoked (SA, WA, NT and ACT) or partially revoked (NSW, QLD, TAS and VIC). Any provision for the new spouse is also not revoked, even if there is no 'in contemplation' clause.

For wills made by de facto partners, an end to their relationship is less clear and harder to prove. In some cases, and particularly when one of the partners is already married to another, it may be unclear whether a de facto relationship even exists. In that case, a surviving partner may need to apply to the court for jurisdiction to consider family provision claims.

Except for in Queensland, ending a de facto relationship does not necessarily affect a person's will.

In Queensland, section 15B of the Queensland Succession Act provides that, unless there is an express contrary intention in the Will, the ending of a de facto relationship revokes:

- any gifts to a former de facto partner
- the appointment of a former de facto partner as executor, trustee, advisory trustee, or guardian, except when they are appointed as trustee of

property left in the will for beneficiaries that include their children

- any grant of a power of appointment made in the will to or for the benefit of the former de facto partner, except when the power is exercisable only in favour of children shared by both the testator and the former de facto partner.

## Divorce

In all Australian states and territories, except for Western Australia, a divorce order will only partially revoke a will. In Western Australia, the entirety of a will is cancelled following the end of a testator's marriage, unless there is a clear contrary intention in the Will, or evidence that establishes an intention that the Will would still be valid despite divorce.

In all other jurisdictions, a divorce order revokes any appointments or clauses referring to a former spouse, while the rest of the will remains intact, unless it can be demonstrated that the testator's intention was to benefit the former spouse even after divorce. If the provisions in a new or updated (by codicil) will that benefit a former spouse are made in contemplation of a divorce, they will remain valid.

## Separation

In 2023 the median duration of marriage to divorce was precisely 13 years, and the medium age from marriage to separation was a record high of precisely nine years<sup>9</sup>. That means that the medium duration of separation to divorce has reached an all-time high of exactly four years. A lot can go wrong in four years, including the death of one of the separated parties.

Separation does not invalidate a will, not even if a property settlement has been reached between the parties. A marriage only ends when a divorce order or annulment is granted. The laws about how the dissolution of a marriage affects a will relate only to divorce or annulment. They do not relate to separation. In other words, if a person separates but remains married, their will would take effect as if the married couple were still living happily together. The questions arises: Would the estate planning outcome reflect the wishes of a testator who died while separated?

## Funeral arrangements

A testator should make arrangements for their own funeral in advance. A funeral is organised at a difficult time and at short notice, so planning ahead will not only make life easier for the executor(s) and next of kin, but it will also ensure that the funeral takes place in accordance with a testator's wishes and instructions.

Some issues to consider when planning a funeral include:

- Religious (if so, which religion) or civil ceremony, such as celebration of life? Or both?
- Coffin at a service (open casket?) or unattended burial/cremation with subsequent ceremony?
- Invitees to the service, flowers and/or other tributes?
- Burial or cremation (if the former, is a burial plot available? If the latter, what sort of interment is preferred: cemetery niche, urn with the family, scattering of ashes rather than interment)?
- Preferred funeral director (if any) and which cemetery?
- Wake and location? Separate venue or family home?
- Proposed budget?

Funeral expenses should be considered, such as the hire of a church or chapel, the cost of a clergyman or celebrant, the cost of a coffin, transportation fees, wake, press notices etc. According to ASIC Moneysmart, funerals in Australia can cost from \$4,000 for a basic cremation to around \$15,000 for a more elaborate burial<sup>10</sup>. That presupposes engagement of a funeral director. It turns out that in most jurisdictions, almost all aspects of a funeral can be performed without using the services of a funeral director.

Funeral expenses will be a cost to the deceased estate unless other funding prearrangements are made. These may include:

**Prepaid funeral plans:** Funerals can be tailored and prepaid with a funeral director. The cost of the funeral is fixed, regardless of future price increases. Prepaid funerals are exempt from Centrelink assessment, regardless of the amount. Funeral directors must invest the prepaid funds in a registered funeral fund in New South Wales, Queensland, South Australia, Victoria, Tasmania and Western Australia, ensuring the monies are managed at arm's length from the funeral director. The ACT and Northern Territory have not enacted specific prepaid funeral fund legislation. Some prepaid funerals are paid for with a funeral bond assigned to a funeral. If it meets prepaid funeral conditions, it is treated as a prepaid funeral, not a funeral bond

**Funeral bonds:** are an investment offered by a life company or friendly society – which must be applied to funeral expenses – that provides a benefit on the death of a nominated person and cannot be accessed earlier. Up to two funeral bonds per nominee are exempt investments as regards social security assets and income tests where the total amount invested



is up to the allowable limit (\$15,500 in 2024-25 and indexed annually)

Funeral insurance: premiums buy a death benefit, generally up to \$15,000. Cover is generally for accident only for an initial period (usually 12 months) and the total amount of premiums payable over the life of the policy may exceed the cover amount. Some policies will pay the full benefit on terminal illness

Most life insurers provide an advance payment of a death benefit if the cover is held in a term life policy outside super. For instance, ClearView's ClearChoice product suite includes in its Life Cover outside super policy an Immediate Expenses Benefit, where we will advance the lesser of \$25,000 and the Life Cover benefit amount while we assess the Life Cover claim. This of course reduces the Life Cover benefit amount by the amount of the payment. This payment would generally be more than enough to cover funeral and related costs (including a decent wake).

### **Powers of attorney, enduring guardianships and advance health directives**

Wills deal with the administration and distribution of a person's estate after death, but what if a person needs someone to make estate decisions during their lifetime? The need may be temporary – following an accident when a person loses the ability to make decisions for themselves but will eventually regain full capacity – or the need may be permanent, following a severe accident or due to a medical event, such as dementia.

All Australian jurisdictions have legislative provisions for documents known as powers of attorney (**POA**), by which a person (principal or donor) appoints another person (attorney, donee or guardian) to make legal and financial decisions on their behalf. This decision making can take effect immediately or upon the occurrence of a specific event. The person making this appointment is known in various jurisdictions as principal, donor or appointer. For consistency we will use the term principal. The person appointed to act on behalf of the principal is known variously as attorney, donee or guardian. For consistency we will use the term attorney.

There are a number of eligibility criteria to be an attorney. They must be 18 years of age or older and depending on the jurisdiction, an undischarged bankrupt.

There are certain actions an attorney cannot do on behalf of a principal, including:

- voting
- making, updating or revoking a will
- making or revoking an enduring power of attorney (or delegating their powers if acting as an attorney,

unless specifically allowed under a general power of attorney)

- consenting to marriage or a divorce
- signing a statutory declaration
- making decisions about adoption of a child
- managing the principal's deceased estate
- consenting to unlawful acts

There are four types of powers:

1. A general power of attorney
2. An enduring power of attorney
3. A medical enduring power of attorney, and
4. An enduring power of guardianship

As with most laws relating to estate planning, each jurisdiction has its own variances, both in the titles of these powers and their specifics and scope. There are three areas over which an attorney may be granted authority, depending on the principal's state or territory of domicile. They are:

1. Legal and financial decisions
2. Medical treatment decisions
3. Personal and lifestyle decisions

## **Legal and financial decisions**

### **General power of attorney**

A general power of attorney is a document whereby a principal appoints an attorney to make legal and financial decisions, most commonly for a fixed time frame (e.g., while the principal is overseas). It can be limited to a particular transaction, such as signing a contract for the sale or purchase of real estate. It is important to note that a general power of attorney ceases to operate if the principal dies or loses mental capacity and it does not authorise the attorney to make health or lifestyle decisions for the principal. The power of attorney will continue until it is revoked either by the principal or the attorney. In some jurisdictions it needs to be registered to have effect or it needs to be registered to be able to deal with real property. The attorney always needs to act in the principal's best interests.

### **Enduring power of attorney (EPOA) (known as an Advance Personal Plan in the Northern Territory)**

Whilst a general power of attorney ceases when the principal loses mental capacity, the authority conferred by an enduring power of attorney to make legal and financial decisions on behalf of the principal (in some jurisdictions it can extend to making lifestyle and medical decisions) continues after a person has lost capacity. If there is no appointed EPOA, that person's property and assets are frozen until an

application is made to a court or tribunal to appoint someone to look after the person's legal and financial affairs. It could be a family member, close relative or a trusted professional. If there is no one suitable, the tribunal or court may appoint the public trustee and guardian in the relevant jurisdiction.

As with a general power of attorney, and EPOA may be tailored as to specify what decisions the attorney is authorised to make, if there's a limitation to their powers and whether they need to make decisions in conjunction with others.

Any competent adult can be an attorney. Ideally, they should be completely trustworthy, unlikely to predecease the principal and be willing, able and available when required. As the power covers financial affairs, it would be prudent to appoint someone who is competent in managing money and is familiar with the principal's situation. More than one attorney may be appointed and they can be given either joint or several authority. Joint authority means that all appointed attorneys must act together when exercising their authority, whereas a joint and several appointment allows any attorney to act on the principal's behalf.

Legislation in the ACT, New South Wales, Queensland, Victoria and Western Australia provides for substitute or replacement attorneys if a sole initial nominee is unable or unwilling to act. There is no provision for substitutes in other jurisdictions, except for those that may be appointed after the removal of an existing attorney by the relevant body (generally a state tribunal) and their replacement.

Who should a person appoint as an attorney? This generally depends on the principal's marital and parental situation.

For instance, a young single person, with no spouse, partner, and/or children or other dependants, might appoint their parents as first choice attorneys and siblings as a back-up (if permitted in that jurisdiction).

A married or de facto couple might appoint each other as attorney in the first instance, then their children of adult age (or nieces and nephews, if childless) as substitutes.

A single parent might appoint an adult child, their parents and/or a sibling as attorneys.

Where there is a blended family due to a second or subsequent relationships and there are children from previous ones, individuals should seek specific legal advice.

EPOAs have different registration requirements depending on the jurisdiction. In Tasmania, all EPOAs must be registered with the Lands Title Office before they can take effect. In all other states and territories except Victoria, an EPOA must be registered with their respective lands title office if the

EPOAs relate to real estate transactions. In Victoria there are no registration requirements at this time. In all jurisdictions, apart from Tasmania, an EPOA is valid once the document has been duly signed and witnessed.

The terms for each attorney can be different and can be tailored accordingly within the EPOA document to outline exactly what types of decisions that person has the authority to make, if there are limitations of the attorney's powers, and if they need to make decisions in conjunction with other parties.

### **Medical treatment decisions**

The relevant documents in each jurisdiction regarding medical treatment decisions made on behalf a person may be broadly described as advance care planning documents. Advance care planning is a voluntary process whereby a person's values, beliefs and preferences are made known to guide decision-making at a time in the future when that person cannot make or communicate their decisions.

Each jurisdiction has these decision-making documents, either legislated or recognised by common law. These documents are variously entitled Enduring Power of Attorney, Enduring Guardianship, Advance Health Directive, Advance Care Directive, Health Direction, Advance Personal Plan, Statement of Choices and Appointment of Medical Treatment Decision Maker. All jurisdictions, apart from the Northern Territory, have at least two documents with regard to medical treatment decisions. In the Northern Territory, when a person loses capacity, an Advance Personal Plan covers financial, healthcare and lifestyle decisions.

Each state and territory also has advance care directives, which record a person's decision about healthcare and medical treatment. The directive can request or refuse health care, including life-sustaining treatment. These directives are recognised throughout Australia by common law (except in Queensland) and by legislation in all jurisdictions (except in New South Wales). All jurisdictions have legislation and statutory forms to recognise and appoint one or more substitute decision-maker(s).

### **Personal and lifestyle decisions**

Decision-making authority for an individual's personal and lifestyle decisions rests with Enduring Power of Attorney (ACT, QLD and VIC), or Enduring Guardianship documents (NSW, TAS and WA), Advance Personal Plan (NT) and Advance Care Directive (SA). In some jurisdictions an enduring guardian or enduring power of attorney can be appointed by a person (generally known as the appointer) to deal with their medical treatment and

other health care matters.

These decisions can best be described as the kind of decisions a parent would make for a child, including:

- where to live and with whom
- whether the appointer can work, in what capacity and other work-related matters
- who visits the appointer
- what study or training courses the appointer undertakes
- the appointer's daily dress, diet and activities
- consent to medical and dental treatment in the appointer's best interests

In the absence of guardians, administrators may be appointed by the relevant tribunal in each jurisdiction.

## Trusts

A trust is not a legal entity or person. It is a relationship between a trustee and a beneficiary, where the trustee holds property or assets for the benefit of the beneficiary. There can be more than one trustee – which may be one or more individuals or a company – and often there are many beneficiaries, who may be individuals, companies or trustees of another trust. There can also be partnerships of trusts. A trust separates legal or nominal ownership of the trust property, held by the trustee(s) from beneficial ownership, (held by the beneficiary(ies)).

Due to the separation of legal and beneficial ownership, a trustee has a legal obligation – inter alia – to act in the best interests of the beneficiaries of the trust. There are many kinds of trusts, but essentially there are two broad categories: express trusts and non-express trusts. Express trusts are intentionally created, generally by a deed, referred to as *inter vivos* ('between living persons') trusts or by a will, referred to as testamentary trusts. While an existing family discretionary trust (including a so-called bloodline trust) may be an alternative to establishing a testamentary trust (by naming the family trust as a beneficiary of the deceased estate), the primary trust structure used in estate planning is the testamentary trust.

### Testamentary trusts

Testamentary trusts describe all forms of trusts created by a will after death, which take effect after completion of estate administration and which are funded by the assets of the deceased estate. They can take many forms, from optional testamentary trusts that provide maximum flexibility as to income and capital for beneficiaries to restrictive trusts that provide a specific beneficiary with access to income but with restricted or no access to capital.

The four most common trusts established by a will are:

- Testamentary discretionary trusts (also known as beneficiary-controlled testamentary trusts)
- Life interests
- Special disability trusts
- Protective trusts
- Testamentary discretionary trusts (**TDTs**)

In most respects, a TDT operates the same way as a discretionary trust created during one's lifetime. The two major differences are:

A discretionary trust is created by a deed, whereas a testamentary trust is created by the will post death.

Testamentary trust income distributions to a minor are taxed differently from income distributions to a minor in a discretionary trust.

Like other trusts, testamentary trusts can operate for up to 80 years (except in South Australia, where there is no time limit) before vesting (when the legal ownership of trust assets transfers to the beneficiaries). However, assets may also vest in one or more beneficiaries before the trust's mandatory expiry, either through trustee discretion or via the terms of the trust.

A will can create separate testamentary trusts for individual beneficiaries, such as each child of the testator, and may also be drafted to provide for testamentary trusts that give an adult beneficiary the option to take an asset distribution directly, avoiding the operating expense of a testamentary trust, if this is preferable. This may be done after a cost-benefit analysis. This authority could also be given to the discretion of the trustee. Where a testamentary trust exists following the death of a parent, it is common for estate proceeds to be paid into the existing testamentary trust following the death of the second parent.

Due to set-up and ongoing operational costs, including lodgement of annual tax returns, many estate planning lawyers suggested there should be a minimum bequest of \$500,000 to warrant the setting up of a TDT. However, this is just a rule of thumb and if there is a need to protect the primary beneficiary (from themselves and others), then a testamentary trust may be necessary regardless of the value of estate assets.

Advantages of a testamentary discretionary trust include:

**Tax benefits:** Trustee discretion may provide tax benefits by income distributions to beneficiaries having lower marginal tax rates, as well as benefits on income received by beneficiaries under the age of 18, who pay tax at adult rates instead of the usual penalty tax rates applicable to minors. Tax concessions are not limited to income and capital gains from assets existing in the trust at date of testator's death but can include subsequent asset contributions.

**Asset protection:** Assets inside a testamentary trust are generally protected from existing or future creditors and the trustee in bankruptcy as they don't form part of the personal assets of beneficiaries. Testamentary trust assets may be protected from family law proceedings (subject to certain factors determined by the court, such as control of the trust).

**Flexibility for complex family situations:**

Where the testator has children from previous relationships, asset protection can also be provided in the case of second marriages and blended families, as well as subsequent marriages or future relationships by a surviving spouse or de facto partner.

**Protection for vulnerable or special needs beneficiaries:**

Testamentary trusts (as well as Protective and Special Disability Trusts) can provide for beneficiaries that have substance abuse, gambling or other addictions, or do not have the necessary capacity to manage their financial affairs due to a mental or physical disability.

Drawbacks of a TDT:

- TDTs are not able to circumvent probate, which may be a lengthy process: up to one year and possibly longer. The trust cannot commence operation until probate is granted.
- Initial costs and ongoing administrative expenses, such as accountancy and tax preparation reduce trust assets (see above)
- In some jurisdictions TDTs that hold real estate are subject to higher rates of land tax.

As with other trusts post death, the subject of control and succession of TDTs are paramount. The will creating the trust should allow for the succession of controlling roles to pass to the appropriate person or persons by will, codicil or deed prepared by the primary beneficiary.

## Life interests

A life interest (life tenancy or capital protected trust) is a trust created by deed or under a will that usually gives a beneficiary (commonly known as a 'life tenant' or a 'life interest beneficiary') the right of possession and enjoyment of the asset and its income during their lifetime. Upon the life tenant's death, ownership of the asset transfers to the remainderman, the person(s) nominated to receive the property. The asset may be real property or personal property. If created by a will, life interest assets remain part of the deceased estate (and held by trustees of the life interest, commonly the executors of the estate).

Life interests are typically used in situations where a testator is part of a blended family and wishes that their second spouse or partner is looked after for their lifetime but that the capital (or most of it) is preserved for their children from previous relationships. Life interests may also be used for parents with spendthrift children who wish to preserve capital for their grandchildren.

## Special disability trusts (SDTs)

These trusts may be created by deed or under a will, generally by parents and immediate family members, to provide for the current and future care and accommodation needs of a person with a severe disability. The trust must meet specific criteria to qualify for generous social security and tax concessions. The degree of disability is generally at a level that would qualify for a disability support pension.

The trust must have only one principal beneficiary (the severely disabled person) and have either an independent trustee or at least two trustees. The advantages of an SDT include:

- Assessable assets worth up to \$813,250 (as at 1 July 2024), indexed annually, are exempt from the social security assets test, as is the principal residence held within the trust
- All trust income is exempt under the social security income test
- Close family members, such as parents and grandparents, are able to collectively contribute up to \$500,000 in assets to the SDT without deprivation rules applying.

A number of CGT concessions also apply. After the death of the principal beneficiary the trust is wound up and any remaining assets are distributed to the residual beneficiaries as per trust deed.

## Protective trusts

Like SDTs, protective trusts may be created by deed or under a will. A protective trust is another type of trust that can be established to protect vulnerable beneficiaries. Vulnerable beneficiaries include children who have a cognitive disability, addiction, are bankrupt or in danger of bankruptcy, or are otherwise vulnerable through being spendthrifts or easily influenced by others. In these instances, a protective trust can help ensure that they cannot easily spend through the estate. For instance, the control of the trust may be given to a trusted relative, but the income and capital of the trust can only be spent on the vulnerable beneficiary. This means that a regular income stream can be used to cover their costs rather than wholesale access to the entirety of resources.

The beneficiary may or may not have been assessed by Centrelink as having a severe disability. If they have not been assessed, a protective trust is a good option to protect a beneficiary from themselves and others.

A protective trust may be more suited where pension eligibility is not a priority and decisions regarding the distribution of income and capital distribution are made by someone other than the principal beneficiary.

For example, a protective trust may be established with an independent controller to provide for a beneficiary who has a drug or alcohol addiction.

A protective trust is free of the constraints of a SDT, which means that it can be used for broader purposes such as providing financial support for recreation, entertainment, holiday travel, personal furniture and fittings and personal belongings.

If an existing or prospective beneficiary meets the requirement for an SDT, it may be appropriate to include both an SDT and a protective trust, if the size of the estate allows. They can be dovetailed by including special clauses that allow an estate's trustees to decide how much each trust can receive in order to preserve any disability pension entitlements and SDT benefits while taking maximum advantage of the tax planning and flexibility of a protective trust.

## Life insurance

Life insurance is and always has been an integral part of estate planning. It has similar objectives as estate planning for an individual's existing assets, but has the added benefit of providing additional assets, in the form of cash, to the estate or direct to beneficiaries. Whether life insurance proceeds become an estate or non-estate asset (and there are reasons for one or the other, and sometimes for both), is largely determined by the policy owner, which for personal risk protection purposes, is generally also the insured person. As with superannuation death benefits, the policy owner has

the ability to direct term life insurance proceeds to individuals, called nominated beneficiaries, without the constraints of the SIS Act and Regulations regarding dependants and, in most cases, without the death benefit tax liabilities under ITAA1997.

Of course not everyone needs life insurance. Older people with no debt or dependants generally do not require life insurance, unless there are specific objectives such as philanthropic gifting or to provide for grandchildren's higher education, a vulnerable beneficiary, etc.

Life insurance should be considered if a person:

- is the main breadwinner, with dependants
- is not the main breadwinner, but is responsible for looking after children in the home
- has financial commitments such as a mortgage or other debts
- has a business interest and wants their estate to receive the market value of the business after death

A death benefit (the sum insured) is payable upon the death or terminal illness of the insured person and the recipients of the benefit are subject to the policy ownership structure and any nominated beneficiaries on the policy.

### Policy ownership

For personal risk protection, term life insurance policies are generally owned by a sole policy owner who is also the insured person. A death benefit is paid either to a nominated beneficiary or, if there are no nominees, to the estate of the insured policy owner.

A term life policy may also be jointly owned with another individual or individuals. Ownership of life insurance policies in Australia is generally set up as joint tenancy. There is some doubt as to whether a life policy can be legally owned as tenants in common (at common law, but not in equity), and therefore it is preferable to register multiple ownership as a joint tenancy. ClearView and most other life insurers will not issue a policy owned as tenants in common. It is therefore unlikely that a joint tenancy could be severed and converted to tenancy in common. If there is no nominated beneficiary(ies), as with other jointly owned property, the surviving policy owner(s) receive a death benefit (however, a terminal illness benefit would be paid jointly to all policy owners).

In the past joint ownership of life policies was quite common between spouses or de facto partners, with both parties generally joint owners and insured persons. Part of the reason was to minimise policy fees (which ClearView does not have). In the absence of nominated beneficiaries, on death of one of the couple, the surviving co-owner would receive the insurance proceeds, avoiding delays with probate. The



exact same outcome could be achieved with a self-owned policy nominating the existing spouse or de facto as a beneficiary.

A major problem with joint ownership between spouses was the possibility of a marriage or relationship breakdown where a living benefit – such as following a terminal illness diagnosis or a Total and Permanent Disability (TPD) or a trauma event – was not readily payable because one of the parties refused to sign the discharge forms for payment. In the case of a term life policy, this would mean the surviving co-owner received a benefit following the death of an estranged spouse or partner, which likely did not reflect the testamentary wishes of the deceased.

There is an argument for a spouse to own a non-death policy where their partner is a self-employed professional person at risk, such as a lawyer, doctor, accountant, architect, etc. Whereas there is a degree of bankruptcy protection for term life policies (and possibly linked TPD and trauma policies) under the Bankruptcy Act 1966 (Cth), this protection only applies where the person has been declared bankrupt. Stand-alone TPD and trauma policies may not be life insurance at common law and therefore likely not excluded from being property divisible among creditors of a bankrupt. Therefore, for ‘at-risk’ professionals, it is a consideration in having their spouses (including de-facto) own these standalone policies.

Another consideration for ‘at-risk’ professionals is to have the trustee of a family discretionary trust own the policy on their lives, particularly if there is a corporate or an independent trustee.

### Non-super beneficiary nominations

The nomination of beneficiaries in a term life policy is considered a valuable estate planning tool, as it allows the proceeds to be paid directly to beneficiaries – generally tax free – and potentially bypassing a deceased estate; therefore, in most cases, avoiding any delays due to probate. The ability to nominate beneficiaries in non-super life insurance policies is legislated under section 48A of the Insurance Contracts Act 1984 (Cth) (ICA). These beneficiary nominations apply to term life policies (and existing whole-of-life and endowment policies) and certain investment products, such as insurance (investment) bonds.

They are similar to binding death benefit nominations under super, but without the requirement that the nominee needs to be a SIS dependant or the super fund member’s LPR.

Beneficiary nominations may be revoked or changed at any time before the death of an insured person.

If a beneficiary nomination is in force at the time of death, the death benefit is paid to the nominee(s) rather than to any surviving policy owners. However, it is important to note that not all insurers have the same rules regarding beneficiary nominations. Some insurers only allow a nomination if there is only one insured person who is also the policy owner. Others are more flexible. ClearView, for example, will allow a structure where a wife can own a policy in the life of her husband (e.g., a professional at risk of bankruptcy proceedings) and nominate her children as beneficiaries, which may be desirable under certain circumstances.

Most insurers allow a maximum of five or six beneficiaries, which may be an individual(s), a corporation or a trustee and/or the deceased estate (the LPR), though some insurers impose further restrictions. Some only permit natural persons as nominees. ClearView allows up to five beneficiaries at the time of this guide. It is worth noting that ClearView allows beneficiary nominations for all death benefits (excluding child cover) even when payable on non-term life covers (e.g., income protection, standalone TPD or trauma, and business expense cover).

A non-super life insurance policy may be owned by an individual(s), a corporation, or a trustee. If a policy is owned by a family trust, the distribution of any benefits (including any beneficiary nominations) would be subject to the terms of the trust deed. This is also true for term life policies owned by self-managed superannuation funds (SMSFs), which are also governed by superannuation legislation and regulations.

As mentioned, amounts paid under ordinary term life beneficiary nominations would usually bypass a will and are therefore non-estate assets. As such, at the time of writing, they are ordinarily not subject to family provision claims in most Australian states and territories (except in NSW, where the Supreme Court has the power to designate non-estate assets as ‘notional estate’). Nominations can be challenged in all jurisdictions on the basis that the policy owner was not of legal capacity (sound mind) or that the nominations were made under duress.

**Predeceased beneficiaries (beneficiaries who die before the insured person):** In general, life companies do not have a uniform approach to the payment of benefits to predeceased beneficiaries. Most insurers, including ClearView, will treat a nomination of a deceased beneficiary as invalid and will pay the beneficiary’s portion of the death benefit either to a surviving policy owner(s) or their estate. Some insurers, however, will pay the benefit to the deceased beneficiary’s LPR, regardless of the time frame

between the death of the beneficiary and the death of the insured. It is therefore important for advisers to understand the terms of individual insurance contracts and to regularly review the nomination of beneficiaries to ensure that the appropriate parties benefit from the insurance proceeds.

## Superannuation death and terminal illness benefits

Given the percentage of Australians' wealth in super, the treatment of superannuation death benefits, both from an estate planning and a tax perspective, are vitally important in achieving a person's testamentary wishes.

A superannuation member's death is a condition of release and a compulsory cashing event where any superannuation benefit is required to be released as soon as practicable after death. In general, the recipient of the benefit (beneficiary) is determined by Superannuation Industry (Supervision) Regulations (SIS Regulations) and the superannuation fund's governing rules set out in the trust deed and any other relevant associated documents and rules.

Under SIS Regulations, a super death benefit can generally be paid only to the deceased member's dependants (defined under SIS law as being spouse, child, financial dependant or interdependent relation); or to the member's legal personal representative (LPR), who is either the executor of the will or administrator of the deceased estate. If after making reasonable enquiries, a super fund's trustee cannot find a deceased member's dependant or LPR, it may be able to pay the death benefit to another individual if the fund's governing rules allow it (including a former spouse, who would receive the death benefit free of tax).

### Beneficiary nomination options in APRA-regulated super funds

Where the super fund is an APRA-regulated super fund, members also have the option to nominate a beneficiary. The terms of doing so are often set out in the super fund's governing rules. The governing rules may allow a range of death benefit nomination options and can include rules about the trustee's discretion and default payments when making a benefit payment. The options can include:

- Non-binding death benefit nomination or no nomination
  - both are subject to ultimate trustee discretion, the former providing guidance as to the member's wishes at the time of making the nomination
- Lapsing binding death benefit nominations (BDBNs):

- If valid, they provide certainty that the trustee will pay the benefit in line with the client's wishes. They are subject to specific SIS Regulations requirements and lapse after a maximum of three years.
- Non-lapsing BDBNs:
  - They require trustee consent to the nomination and do not automatically lapse. They are also subject to the fund's governing rules, which in some cases can invalidate the nomination upon the member's marriage or divorce. As with lapsing BDBNs, for valid non-lapsing BDBNs the trustee is obliged to pay the death benefit to nominated beneficiaries in line with SIS cashing rules.

### Beneficiary nomination options in self-managed superannuation funds (SMSFs)

Rules around the nomination of beneficiaries for SMSFs are different. In particular, non-lapsing BDBNs for SMSFs may not be subject to the same restrictions that apply to APRA-regulated fund, e.g., a SMSF's governing rules may permit a non-lapsing BDBN that does not have to be witnessed in a particular way or consented to by the trustee. SMSF rules can also have more flexibility in their nominations and can include specific death benefit payment rules for additional certainty. For example, SMSF rules can set out nomination options that are tailored to provide for specific circumstances or can specify that a particular form of death benefit be paid. These 'customised nominations' are also variously known as conditional, contingent, cascading or discretionary BDBNs:

- Conditional and contingent BDBNs
  - Members can account for simultaneous deaths (couples, children) by having 30-day survivorship clauses and stipulate conditions for potential beneficiaries. They can also ensure a death benefit is paid to a member's children through a previous relationship by providing a non-commutable income stream to an existing spouse (based on life expectancy) until such time as they die or enter into a new spousal relationship, upon which the benefit (or remainder) is split between the member's adult children.
- Cascading BDBNs
  - Similar to conditional BDBNs, they can provide for alternate beneficiaries if one or more beneficiary(ies) predeceases the fund member, identify specific assets for beneficiaries and nominate how benefits are to be paid.
- Discretionary BDBNs
  - May be used for estate equalisation purposes, where, for example, the SMSF trustee has

discretion to allocate death benefits based on the receipt of other estate or non-estate assets by certain beneficiaries, such as siblings.

There is also the option to incorporate specific death benefit payment rules in the SMSF trust deed for additional certainty.

### Invalid BDBNs

It is important to note that BDBNs may be invalid for a number of reasons. It may be that the BDBN:

- does not nominate a SIS dependant or the LPR
- does not comply with the requirements of the SMSF trust deed
- has an invalid trust deed due to non-compliance with deed-of-variation formalities
- is worded incorrectly and challenged by a trustee or beneficiary, or
- is signed or witnessed incorrectly according to the trust deed.

Where there is no valid nomination in place or a BDBN is invalid, the default provisions under the fund's governing rules will apply. Generally, the default provisions include two options:

- The trustee will pay the benefit to the deceased member's LPR, which is then distributed according to a valid will or intestacy rules, or
- The trustee exercises its discretion to choose eligible beneficiaries to receive the benefit and in what proportion.

If there is a partially invalid BDBN, the fund's governing rules will generally set out how the benefits will be distributed, which could include the fund's default provisions applying to the entire death benefit, or the default provisions applying only to the invalid nomination.

While super death benefit nominations are an important tool in estate planning it is paramount that fund members understand the potential pitfalls. For SMSF members in particular, it is essential to obtain professional legal advice from lawyers with expertise in estate planning, superannuation strategies and tax.

## Tax treatment of super death benefits

### Lump-sum death benefits

Super death benefits may consist of a tax-free component and a taxable component. The tax-free component of a death benefit lump sum is never taxed regardless of the beneficiary. The taxable component is the total value of the deceased's super interest less the value of the tax-free component and is generally amounts where a fund has paid 15 per cent tax on the contributions or earnings, known as the taxed

element. The taxable component may also include an amount that has not been taxed in the fund, known as the untaxed element. This can arise in certain public sector super schemes.

Where a member's lump sum death benefit does not include any insurance proceeds, the whole of the taxable component will generally consist of taxed element. However, where the lump-sum death benefit includes insurance proceeds (even \$1) and the trustee has claimed or will claim a deduction for the cost of the insurance premiums (or claim a deduction for a future liability to pay benefits), the taxable component will also include untaxed element.

The tax treatment of a death benefit depends on whether the recipient is a death benefits dependant (for simplicity, a 'tax dependant') of the deceased member (at date of death) or not. Note that superannuation and taxation law have different definitions of 'dependant'.

Tax dependants (in relation to the member) are as follows:

- Spouse (including de facto and same sex)
- Former spouse (however, is not recognised as a SIS dependant so cannot be a nominee)
- Child under age 18
- Financial dependant (including financially dependent adult child)
- Interdependent relation
- Individual who receives super lump sum death benefit where the deceased died in the line of duty

Where the proceeds of a term life insurance policy are allocated to a deceased member's superannuation interest, they will form part of the taxable component of that interest. If a deceased member's interest is then paid as a lump sum to a tax dependant, the entire payment will be tax free (i.e., non-assessable, non-exempt income). Therefore, the super fund trustee generally will not be required to calculate the tax components or withhold any tax from the payment.

Death benefits may also be rolled over to another super fund where the death benefit beneficiary is a dependant eligible to receive a death benefit income stream, for immediate commencement. This may be desirable where a beneficiary wishes to consolidate death benefits in a single death benefit pension or where the paying fund has no income stream option (common in risk insurance-only super funds).

A death benefit paid to a deceased member's LPR must be paid as a lump sum. Where a death benefit is paid to an LPR as executor or administrator of an estate, no tax is withheld by the trustee of the super fund. To the extent that non-tax dependent

beneficiaries will (or could be expected to) benefit from the death benefit, it is subject to the same taxation in the estate as a non-tax dependant would pay had they received the benefit directly from the super fund. However, Medicare levy does not apply.

Where a fund pays a super death benefit as a lump sum from accumulation phase to a non-tax dependant, the trustee will need to withhold tax from the taxable component as per the following table:

Tax component	Tax rate
Tax-free component	Nil (non-assessable, non-exempt income)
Taxable component (taxed element)	15%*
Taxable component (untaxed element)	30%*

\* Medicare levy may also apply, except where the death benefit is paid to the member's estate.

Where a member's lump sum death benefit does not include any insurance proceeds, the whole of the taxable component will generally consist of taxed element. However, where the lump-sum death benefit includes insurance proceeds (even \$1) and the trustee has claimed or will claim a deduction for the cost of the insurance premiums (or claim a deduction for a future liability to pay benefits), the taxable component will also include untaxed element.

The process to calculate untaxed element is specified in section 307-290 of *Income Tax Assessment Act 1997* and is as follows:

#### Step 1: Calculate the taxable component (taxed element)

$$\text{Taxed element} = \text{lump sum amount} \times \left( \frac{\text{Service days}}{\text{Service days} + \text{Days to retirement}} \right) - \text{tax-free component}$$

Where:

- Days to retirement = the number of days between the date of death and the deceased's last retirement date (generally age 65)
- Service days = is the number of days from the day the member joined the fund (or if a rollover amount was received by the fund with an earlier service period start date, that earlier start date) to the date of death. For an employer sponsored fund, service days may commence when the members employment commenced, if that was prior to the commencement of their fund membership.

Note: If the calculated result is negative (i.e., where the tax-free component is large in relation to the total benefit), the taxed element in the fund is nil and the residual amount - after taking into account the tax-free component - is deemed to be a wholly untaxed element in the fund.

#### Step 2: Calculate the taxable component (untaxed element)

$$\text{Untaxed element} = \text{taxable component} - \text{taxed element}$$

#### Case study

Gomez, a widower, dies at the age of 55. He set up a self-managed super fund (SMSF) two years ago and made both concessional and non-concessional contributions. At date of death, he had \$1 million of term life cover through his fund as well as an existing SMSF balance of \$400,000 (50% of which was tax free). Gomez named his adult, non-dependent daughter Wednesday as the sole beneficiary of his superannuation benefit (directly, not via his will).

Gomez also had a super fund account with a small industry fund worth \$300 which he set up 20 years ago and considered consolidating into his SMSF, but never got around to it. Let's look at how this potential rollover would have impacted on the untaxed element of his lump sum super death benefit, together with a benefit payment in favour of Wednesday via Gomez's estate rather than directly.

	No rollover	Rollover
Service period (assuming 365 days per year)	Service days: 730 Days to retirement: 3,650	Service days: 8,030 Days to retirement: 3,650
Tax-free component	\$200,000	\$200,000
Taxable component (taxed element)	\$33,333	\$762,500
Taxable component (untaxed element)	\$1,166,667	\$437,500
Total lump sum death benefit	\$1,400,000	\$1,400,000
Tax	<b>\$379,000</b> (includes Medicare levy)	<b>\$245,625</b> (no Medicare levy)
Net death benefit	<b>\$1,021,000</b>	<b>\$1,154,375</b>

Note: \$300 rollover balance ignored due to small value.

The longer the existing service period of a client's superannuation interest, the less untaxed element their lump-sum death benefit will contain. As you can see from the above table, Gomez could have saved Wednesday \$133,375 by rolling over his industry fund with a longer existing service period into his SMSF and nominating his estate as the recipient of his death benefit – thereby removing the Medicare levy – and adjusting his will accordingly.

Alternatively, a client can look at taking term life cover outside (or converting an existing super policy to non-super, if possible), which would avoid any tax liability to a nominated beneficiary or to themselves as insured person and policy owner.

### Death benefit income streams

A death benefit received as an income stream must be a superannuation income stream (pension or annuity) that is in retirement phase. Although most superannuation income streams are retirement phase income streams, exceptions are transition to retirement (**TTR**) income streams and deferred income streams. Whereas a lump-sum death benefit can be paid to any SIS dependant and/or the deceased member's LPR, there are restrictions on who can receive a death benefit as an income stream (pension or annuity). If a member dies on or after 1 July 2007, only the following beneficiaries are eligible to receive an income stream (pension or annuity):

- A spouse, including de facto and same sex
- A person who was financially dependent on the deceased
- A person who had an interdependency relationship with the deceased, and
- A child (including adopted, step and ex-nuptial) who is:
  - Under age 18
  - Over age 18 with a prescribed disability
  - Aged 18 to 24 who was financial dependent on the deceased at date of death

Most adult children are unable to receive a death benefit income stream unless they have a prescribed disability. If an income stream is paid to a child, the death benefit income stream must be cashed as a lump sum on the day the child turns 25 years of age, unless the child has a prescribed disability.

Regardless of the age of the deceased member of the recipient, the tax-free component of a death benefit income stream is tax free (non-assessable, non-exempt income). The tax treatment of a death benefit income stream is as follows:



Age of deceased (at time of death)	Age of recipient	Taxable component (taxed element)	Taxable component (untaxed element)*
Age 60 or over	Any age	Tax free	Assessable income. Taxed at MTR less 10% tax offset
Under 60	60 or over	Tax free	Assessable income. Taxed at MTR less 10% tax offset
	Under 60	Assessable income. Taxed at MTR less 15% tax offset	Assessable income. Taxed at MTR (no tax offset)

Note: Medicare levy may also apply to all non-zero tax rates.

\*This applies to untaxed sources such as Commonwealth and State government pension funds

It is important to note that death benefit income streams are also subject to transfer balance cap limits. The cap for the 2024-25 financial year remains at \$1.9 million. There are also specific rules as to the payment and tax treatment of reversionary income streams.

## Terminal illness benefits inside super

Under superannuation law, a 'terminal medical condition' exists in relation to a person at a particular time if the following circumstances exist:

- a. two registered medical practitioners have certified, jointly or separately, that the person suffers from an illness, or has incurred an injury, that is likely to result in the death of the person within a period (the certification period) that ends not more than 24 months after the date of certification.
- b. at least one of the registered medical practitioners is a specialist practising in an area related to the illness or injury suffered by the person;
- c. either:
  - If there is one certification period – the certification period has not ended; or
  - Otherwise – neither of the certification periods has ended<sup>11</sup>

Super fund members may access this benefit either as a lump sum, an income stream, or a combination. This benefit is a full condition of release and lump-sum withdrawals of the benefit are tax free, regardless of the member's age), whereas income streams will be taxed as normal super income streams.

If members have some of their super as a taxable component and no tax dependants to receive a super death benefit, they may consider taking their terminal illness benefit as a tax-free lump sum. This is because the taxable component of a super death benefit will be taxed up to a maximum rate of 30% (plus Medicare levy) if received by non-tax-dependants. The member could then leave the tax-free proceeds to their non-dependants via their will.

## Simultaneous deaths

Nobody expects to die suddenly, and certainly nobody expects to die in an accident or catastrophe at the same time as their spouse, de facto partner or family member. Unfortunately, whilst rare, these things can and do happen. But who is presumed to have died first if two or more persons die simultaneously? The order of their deaths may be critical in determining who receives jointly held property and the distribution of a deceased estate's assets. The order of deaths may also impact the payment of superannuation and life insurance benefits.

## Presumption of survivorship and the order of deaths

Each Australian state and territory has laws dealing with the order of deaths where two or more persons die in circumstances where it is not clear who died first. Although these laws are fairly uniform, there are some differences, depending on whether they are dealing with jointly owned property, wills or intestacy. With respect to jointly owned property, in most cases, the order of death is to be determined by seniority in that the younger person is deemed to have survived the elder. See:

- New South Wales: s.35 Conveyancing Act 1919 (NSW).
- Queensland, s.65 Succession Act 1981 (QLD)
- Victoria, s.184 Property Law Act 1958 (VIC)
- Tasmania, s.2 Presumption of Survivorship Act 1921 (TAS)
- Northern Territory, s.217 Law of Property Act 2000 (NT)

In Western Australia s.120 of the Property Law Act 1969 (WA) provides that on simultaneous deaths, any property owned jointly and exclusively by two or more of the persons so dying, shall devolve as if it were owned by them when they died as tenants in common in equal shares.

Section 127 of the new South Australian Succession Act 2023 (SA), which took effect on 1 January 2025, provides that if there are simultaneous deaths, any jointly owned property will devolve to each person's estate in equal shares as if the joint owners, at the time of their deaths, held the property as tenants in common.

In the Australian Capital Territory s.49P of the Administration and Probate Act 1929 (ACT) provides that where two or more persons die at the same time the property of the benefactor devolves as if the benefactor had survived the beneficiary and had died immediately after the beneficiary.

Most states now do have a survivorship requirement for intestacy, stating that a potential beneficiary would not be entitled to a share of an intestate estate if that person did not survive the intestate for a specified time (28 or 30 days).

As regards wills, where both parties die simultaneously, legislation deems that the older person died first.

However, this can be altered by a valid will that provides for a specified survivorship time frame (usually 30 days). If a person is going to die from an accident or catastrophe, they are likely to do so within that short period of time.

That avoids the confusion that might arise through an uncertain order of death and also avoids the need to pass everything from one deceased estate to the estate of another person who has already died.

## Superannuation law

Superannuation law is silent on the matter of simultaneous deaths. As you know, Superannuation Industry (Supervision) Act 1993 (SIS Act) and Regulations 1994 (Cth) stipulate a range of eligible beneficiaries for super death benefits, including spouses and de facto partners, children of any age, financial dependants and the deceased member's legal personal representative. The tax treatment of these benefits depends on the status of beneficiaries as either tax dependants (spouses and de factos, minor children, financial dependants, and persons in an interdependency relationship) or non-tax dependants (adult independent children and other non-SIS dependants, if applicable). A member's benefit in a regulated super fund must be cashed as a lump sum or pension or rolled over to purchase an annuity as soon as practicable after the member dies. There is no legislative definition or APRA interpretation of how long 'as soon as practicable' for the purposes of compulsory cashing of super upon death.

So how would simultaneous deaths be treated when paying a super death benefit (including life insurance proceeds)? This would depend on the type of regulated super fund: an APRA-regulated fund (such as industry or public offer funds), a self-managed super fund (**SMSF**) or a small APRA fund (**SAF**), as well as the respective super fund's governing rules.

### Super fund governing rules

Governing rules will always include the super fund's trust deed or other constituent instrument and any rules attached to the trust deed or other instrument together with any further rules which are made pursuant to such instrument. These rules are often narrower in their application than those contained in the SIS Act and Regulations.

### APRA-regulated super funds

Spouses or de-facto partners who have accumulation and/or insurance cover in APRA-regulated funds often make binding death benefit nominations (**BDBN**) – either lapsing or non-lapsing – in favour of each other (bearing in mind that not all super funds offer BDBNs and some don't offer nominations at all). This provides the couples with certainty and peace of mind. However, in the case of simultaneous deaths, these nominations would be invalid. The next step would depend on the fund's governing rules.

The general legal interpretation is that a super death benefit must be paid to either a living dependant or the deceased's LPR. If the trustee is advised of the death of the spouse or de facto prior to payment of the death benefit, the trustee would then follow the governing rules. If permitted, it may investigate what other SIS dependants can receive the death benefit and pay it to them, or it may pay the benefit to the deceased member's LPR. The advantage of paying a dependant directly is that this is a relatively quick process, whereas generally a payment to the deceased member's LPR would need to await the grant of probate or letters of administration (in case of intestacy). In addition, the beneficiary may need to wait until the estate is administered before receiving payment from the LPR.

If there is the option of paying SIS dependants directly and they are adult non-dependent children, for instance, they would receive the benefit with the relevant tax deducted. If they received the same benefit via the LPR, they would not need to pay the two per cent Medicare levy. The potential downside to receiving payment via the member's estate is there is a risk of a challenge to the estate by creditors or a family provision claim and therefore a possible negative impact on the benefit.

In contrast a super death benefit paid directly to a SIS dependant is generally not impacted by a challenge to the member's estate, except possibly in New South Wales under the notional estate provisions in the Succession Act.

### **SMSFs and SAFs**

The death benefit payment options in SMSFs and SAFs are considerably more flexible than in the larger APRA regulated funds. For instance, survivor provisions that are used in State and Territory laws can be inserted in BDBNs with the option to nominate a preferred survival time frame, different from 28 or 30 days. They could cater not only for simultaneous deaths of spouses but also situations where a nominee predeceases another nominee. For even greater certainty, specific death benefit payment rules may be incorporated in the SMSF or SAF trust deed.

The existence of blended families means the member may wish their death benefits paid to their children or their estate rather than to their spouse's children via the spouse's estate. The member may also wish to put in place a cascading death benefit nomination, which would nominate the surviving spouse as the first death benefit beneficiary, but if the surviving spouse died within 30 days (or another survival period) of the member's death that their children or other dependants would become entitled to the death benefit.

Where there are adult non-dependent children and there is the unlikelihood of estate challenges, an alternative strategy may be to nominate the estate as the recipient of a death benefit via a BDBN and to distribute the death benefit with no Medicare levy payable.

These conditional nominations, which make alternative provisions for the payment of death benefits due to the death of originally nominated beneficiaries, are not generally available under the governing rules of retail or public offer super funds.

### **Simultaneous death and non-super life insurance**

Although governed by legislation, notably the Life Insurance Act 1995 (Cth) and the Insurance Contracts Act 1984 (Cth), which allows for beneficiary nominations, life insurance contracts are also subject to further terms and conditions as stipulated by individual insurers. In general, life companies do not have a uniform approach to the payment of benefits to predeceased beneficiaries (beneficiaries who die before the person insured). Most insurers, including ClearView, will treat a nomination of a deceased beneficiary as invalid and will pay the beneficiary's portion of the death benefit either to a surviving policy owner(s), if any, or to the policy owner's estate.

As mentioned previously, a few insurers, however, will pay the benefit to the deceased beneficiary's LPR, regardless of the time frame between the death of the beneficiary and the death of the insured policy owner.

In the case of simultaneous deaths – and in general with respect to predeceased beneficiaries – advisers should look at the insurance contract policy wording and inform their clients of how the payment of benefits would be treated under particular circumstances – and if necessary clarify scenarios with the existing or prospective insurers – so as to avoid unintended consequences.

## Binding financial agreements (BFA)

BFAs are known variously as pre-nuptial agreements, post-nuptial agreements, cohabitation agreements, separation agreements and divorce agreements. These agreements have been available since 2000, under Part VIIIA of the Family Law Act 1975 (Cth), and can be entered into by couples before marriage (known as a pre-nuptial agreement or colloquially as a 'pre-nup'), during a marriage or de facto relationship (but before divorce or relationship breakdown), or after a divorce order or a de facto relationship breakdown. If it is made after marriage, the BFA must be made within 12 months of a divorce order.

A BFA is a private enforceable contract between two people that addresses their financial relationship in the event their relationship or marriage breaks down. For it to be legal and binding, a BFA must comply with the strict requirements of the Family Law Act. The agreement may include the distribution of assets, debts and other financial matters, as well as spousal maintenance. It may isolate assets that one of the parties owned prior to the marriage or relationship and other assets that may have been received during the marriage or relationship, such as gifts or inheritances.

There are a number of reasons set out in the legislation where the court may set aside a BFA, including:

- non-compliance with the technical requirements of a contract
- material non-disclosure (of assets), i.e., fraud
- the agreement was made under duress
- a significant change of circumstances that make the agreement impracticable (such as unconscionable conduct by one of the parties)
- a material change in circumstances that would result in hardship for a child or a party to the agreement (if a carer for the child)
- the agreement covers at least one superannuation interest that is an 'unsplittable interest'.

If there is consent by both parties, a BFA can be terminated in one of two ways:

- the parties can enter into another BFA, provided there is a specific provision in it stating that the former agreement is terminated, or
- the parties can execute a 'termination agreement' pursuant to section 90J (for married couples) or section 90UL (for de facto couples) of the Family Law Act.

# References

1. ATO: Taxation Statistics 2021-22, Trusts, accessed on 2 January 2025
2. Towards higher retirement incomes for Australians: a history of the Australian retirement system since Federation, The Treasury, accessed on 2 January 2025
3. ABS: Australian National Accounts: Finance and Wealth, accessed on 2 January 2025
4. 'Wealth transfers and their economic effects', Australian Government Productivity Commission, November 2021
5. 'The growth of Women and Wealth: A closer look at Australia's growing cohort of high-net-worth female investors', JBWere, March 2024
6. See *O'Donnell v O'Donnell* [2022] NSWSC 1742
7. Domicile Act 1982 (Cth) s 10
8. Based on the criteria outlined in a British legal case *Banks v Goodfellow* (1870) 5QB 549 AT 565
9. Australian Bureau of Statistics: Marriages and Divorces, Australia, 2023
10. Moneysmart.gov.au, accessed on 2 January 2025
11. Income Tax Assessment (1997 ACT) (Cth) Regulations 2021 – Reg 995.1.06