

10 ESTATE PLANNING TRAPS AND TIPS

If you own real estate and/or assets, this means that you have an estate. It also means that you need an estate plan. Estate planning is not only integral to a comprehensive financial plan but should also be a key part of your life plan. It enables you to define and live out your legacy with peace of mind that, in the event of your death, your affairs and loved ones are protected. No matter what stage of life you are at, it is important to understand how estate planning could impact you and your family. With that in mind, here are ten estate planning pitfalls and steps you should take to avoid them.

1. TRAP: Your Former Spouse

Even if you have gone through a property settlement, become divorced and made a new will, and that will leaves nothing to your former spouse, you may be surprised to learn that your former spouse is legally entitled to make a claim on your estate for provision.

TIP: The best way to protect your estate from a former ex-spouse is to have your ex-spouse enter into a Succession Act release deed. If this document is signed by your ex-spouse and approved by the Court, your ex-spouse will have waived their right to make a claim on your estate in the future.

2. TRAP: Your Relatives

Similarly, you may have a relative or another "eligible person" pursuant to the *Succession Act 2006* (NSW), who you do not wish to accommodate in your will, or whom you only wish to leave a small gift to.¹ For the purposes of the Act, "eligible persons" can include a spouse or de facto-partner at the time of death; a child or former spouse of the deceased; or, a person in a "close personal relationship" with the deceased at the time of death.²

A "close personal relationship" does not include a marriage or de facto partnership, but can be two adult persons living together, one or each of whom provides the other with domestic support and personal care.³ "Eligible persons" can also be a person previously "wholly or partly" dependent on the deceased; the deceased's grandchild; or, a member of the same household.⁴ This broad interpretation makes it even more crucial to have a firm estate plan.

¹ *Succession Act 2006* (NSW) s 57(1), definition of "eligible person".

² *Ibid* ss 57(1)(a)-(d), (f).

³ *Ibid* s 3(3).

⁴ *Ibid* s 57(1)(e)(i), (ii).

TIP: The best way to protect your estate from an expectant relative or eligible person is to set out the below factors, in a document separate to the will:

- ✚ The nature of your relationship with that person;
- ✚ The reasons why you are not obligated to leave that person a gift or a substantial gift; and,
- ✚ The reasons why you are obligated to leave the person/s of your choosing your estate.

3. TRAP: Estate Debts

If your estate has significant debts generally, but still has some assets, and, you leave specific assets rather than a proportion of your estate, you may unintentionally leave certain beneficiaries with more or less of your estate than you wanted, or with no gift at all. This is because the debts of the estate must be paid before the assets can be distributed. If there is no direction in your will as to how the debts should be paid, the legislation will determine the order for the payment of debts.

- ✚ For example, you leave \$100,000 to Bob and \$100,000 to Mary. You also leave a house worth \$100,000 to Sam. If you have \$200,000 worth of debts, Bob and Mary will lose out and Sam will keep the house.

TIP: The best way to avoid this is to not leave specific gifts and rather split your estate into equal parts or specify how the debts are to be paid.

4. TIP: Overseas Assets

If you have assets located overseas, and those assets are physical assets such as real estate, it is important to make a will in that particular country with respect to those assets, separate but in addition to your will in Australia.

5. TRAP: Gifts to Charities

It is commonplace for individuals to include a gift to charity in their will. Sometimes, people do not correctly name the charity meaning the gift will fail. In particular, where a will-maker has no family and decides to leave the whole of their estate to a specified charity, but later that charity ceases to exist, or it was improperly described, the gift may fail. Unfortunately, the estate would then be considered an intestacy and, if the will-maker had no family, the entire estate would go to the State.

TIP: The best way to avoid this is to properly name the charity. Check the charity's website for a bequests section. Most charities will have the proper name and Australian Company Number (ACN) listed here. It would be beneficial to suggest an alternate charity in case the first charity ceases to exist. You may also wish to include a clause in your will setting out that if the first charity or the alternate charity are improperly named or cease to exist, then you wish for your estate to go to a charity with your desired objective. You must be sure to set out what that objective is.

- ✚ For example, in addition to naming the RSPCA as a beneficiary, you could include a clause to cover charities concerned with the protection and care of domestic animals within Australia.

6. TRAP: Joint Tenancy

You can only dispose of assets that you own and if property is owned in a certain manner, you may be unable to dispose of that asset in your will. For example, real estate is often owned as joint tenants rather than tenants in common. If you own a property with someone as tenants in common, there is no issue with you disposing of your share of that property in your will. However, if you own the property with another person as joint tenants then, upon your death, your interest in that property automatically goes to them. If you gifted this interest to someone other than them, the gift would fail.

TIP: The best way to avoid your interest in jointly held property going to the other joint tenant is to unilaterally sever the joint tenancy. This situation may arise if you and your spouse are separated, but not yet divorced.

7. TRAP: Testamentary Capacity

To make a valid will, you must have testamentary capacity or be of sound mind. If it is found that you made a will when you did not have capacity, the last will that you made when you were deemed to have testamentary capacity will be considered your final, valid will. If you did not have an earlier will, your estate would be distributed according to the rules of intestacy. This means that your estate will be left to your next of kin or, if you have no relatives, to the State.

TIP: To avoid this, it is important to make your will when you are of sound mind. If you do not, the Court may make a will on your behalf, but that may not reflect your testamentary wishes and is likely to be an expensive process.

8. TIP: Control of Your Body

If you expect that there may be a fight as to who will control your body for the purposes of the funeral, you should be careful who you choose as your executor/s.

Many people do not realise that the executor generally gains control of the body after death.

9. TRAP: Gifts Prior to Death

Some people may decide to give away assets prior to their death. This may be to frustrate a relative or another person from making a claim on the estate for further provision, as that asset would not fall to the estate. However, in NSW, there are notional estate provisions. Potentially, if you give away an asset in NSW and die within 3 years of doing so, without another asset or minimal assets left in the estate, should a person makes a claim for further

provision, the estate may 'claw back' that asset. Unfortunately, there is no way to avoid a person bringing a family provision claim.

TIP: Your best defence to a claim for further provision is to make a statement separate to your will (as outlined in Pitfall 2). As no other Australian state or territory has notional estate provisions, you could alternatively purchase property in another state and give that property away before you die.

10. TIP: Witnesses

Finally, to ensure your will is valid, ensure that you have two adult witnesses and that those witnesses are not beneficiaries. Both of the aforementioned witnesses must be present when you sign your will.