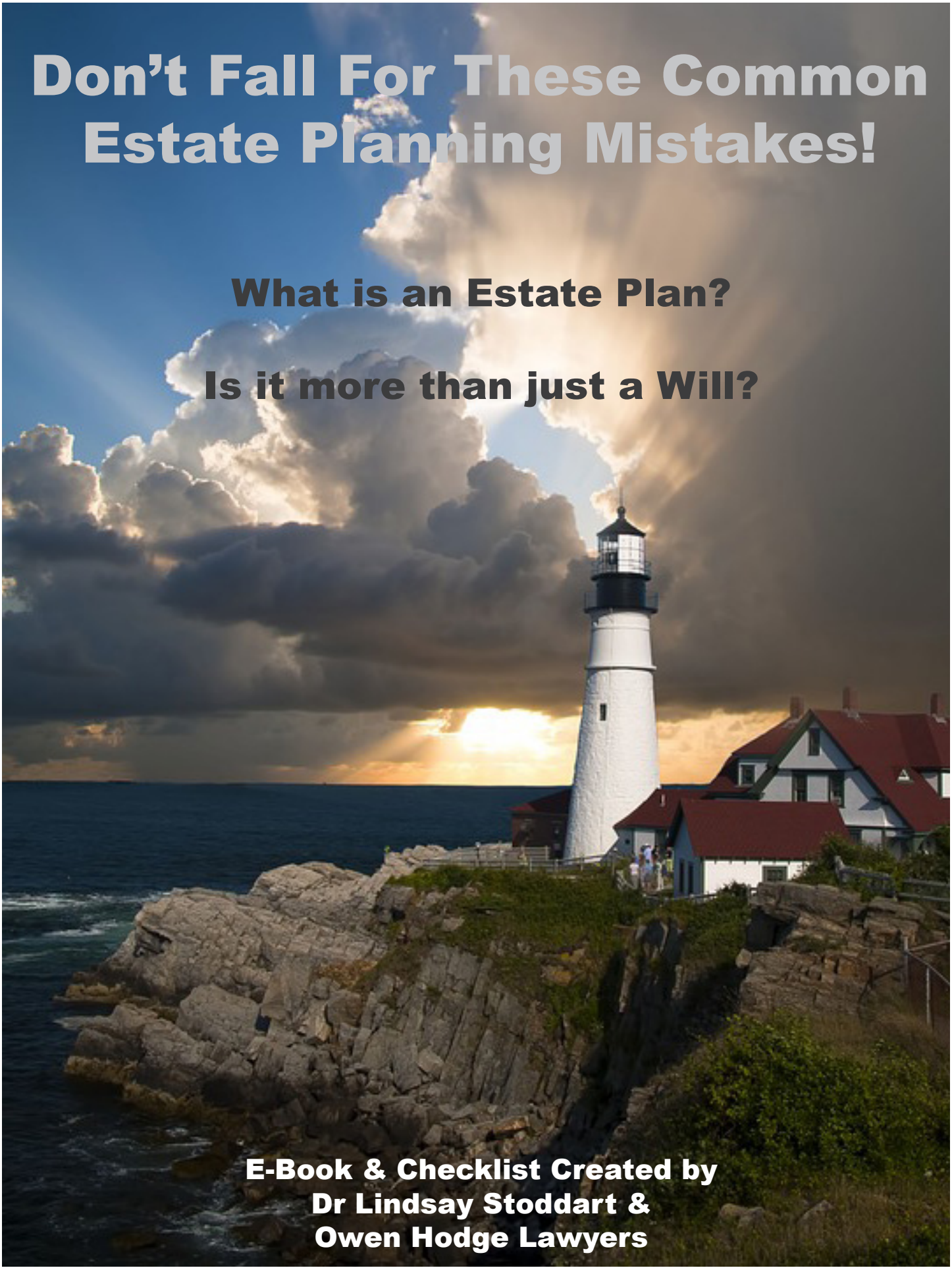
Don’t Fall For These Common Estate Planning Mistakes!



What is an Estate Plan?

Is it more than just a Will?

E-Book & Checklist Created by
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How did we get Wills so wrong?

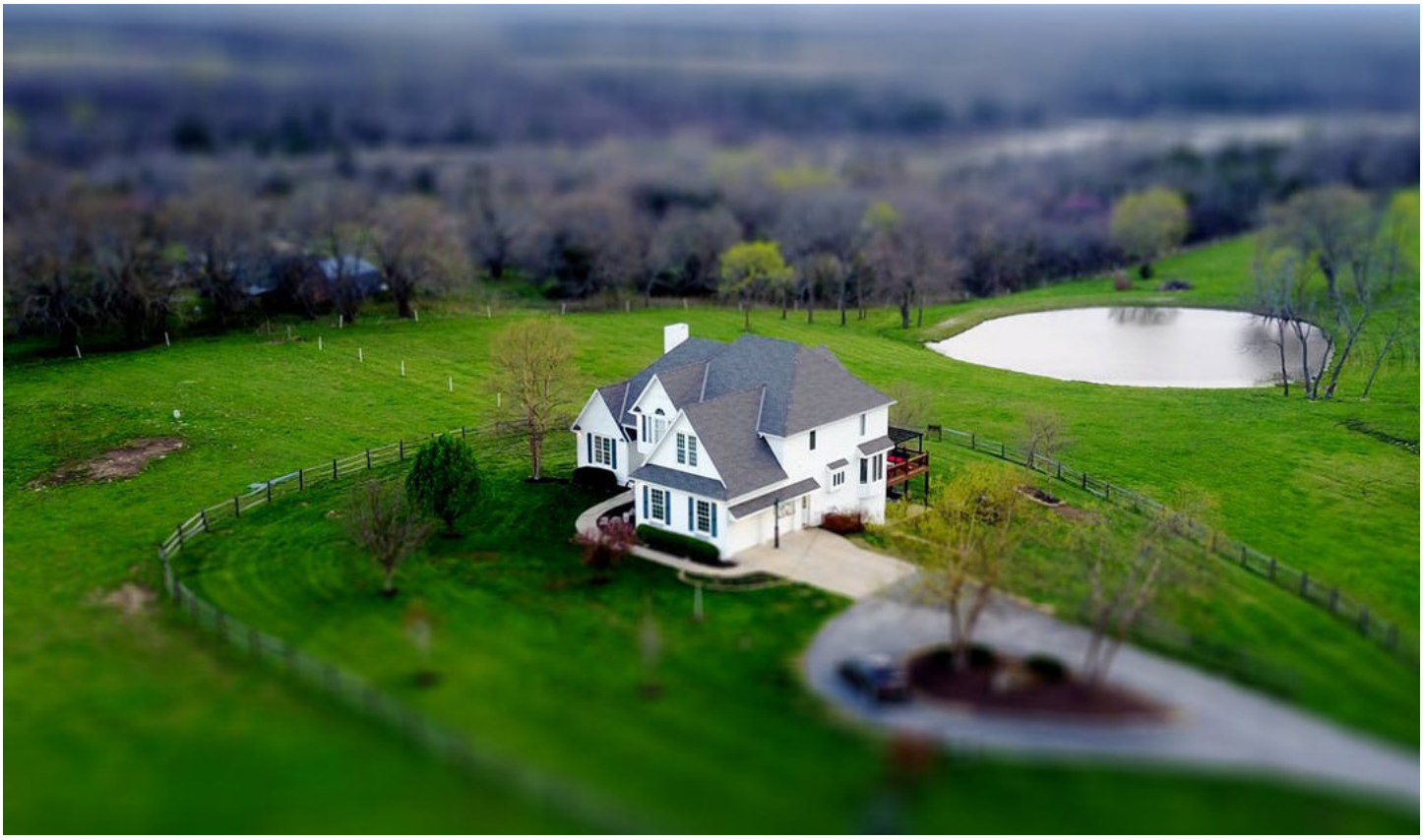
Sydney lifestyles are increasingly complex. Recently two bedroom units at Broadway and St Leonards have been listed for sale at $1.5 million. Deceased estates in Sydney are often valued at over $2 million, and many are in the tens of millions.

We are also living longer. Today's 60 old male can expect to live to 85 and today's 60 year old female can expect to live to nearly 90. You may say that is a good thing, but there are problems with this. About 30% of us in our mid-80s will develop some form of loss of cognition. Who will care for us? And what if we developed vegetative Alzheimer's disease or some other serious malady?

Estate Planning touches on all of these things. It is about implementing a quality Will that ensures your hopes, dreams and aspirations are well documented for the next generation. It is about putting the right documents in place to sure that if you lose cognition you can make valid medical decisions for yourself.

All too often we think we are immortal - or we simply procrastinate saying all this can wait another day. Tragedies often overcome us and we are not prepared.

Early preparation is the key!



The Estate Plan & Four Essential Documents

Not everyone will need a fully developed and written Estate Plan. However with reducing Commonwealth Government old age pensions, we all need retirement funds and with the right Financial Planner or Wealth Creation Specialist to develop a platform for building more assets.

In the past, when an elderly parent could no longer take care of themselves, the eldest son might go to the local branch of the bank and organise some funds to be transferred for their ongoing care. Unfortunately, with the technological advances in banking and with our increasingly complex world this can no longer be done.

The following Will documents are ones that everyone needs:

- ☐ The essential Enduring Power of Attorney
- ☐ The essential Appointment of Enduring Guardianship
- ☐ The right Will having regard to assets and beneficiaries, and
- ☐ An Advance Health Care Directive.

Can you afford not to have a Power of Attorney?

While all four of the essential Estate Planning documents may not be used, it is not a bad idea to have them all in place to protect from tragedy or misadventure.

One of the four essential documents is the Enduring Power of Attorney (EPOA). This deals with a number of assets such as property, cash in the bank, shares and equities, and leasehold.

Some maintain that this document is not necesscary as they do not have assets. However, have they considered their potential inheritances? Risks may be just around the corner: a serious fall, a traumatic event, a long-term coma or serious hospitalisation. Your attorney will be able to handle all of your property matters.

Case Study #1

Peter and Jenny had gone to the Hunter Valley to celebrate moving into their new five bedroom home. It was mortgaged to the tune of 90% of the cost price but they were both in high powered, high-paying executive positions. Returning home Peter, at high speed, overturned his car. Jenny had hardly a scratch but Peter was so badly injured it looked like he could be up to 6 months in hospital with multiple bone fractures and other wounds. He was in a coma and had no sick leave or insurance.

Fortunately they had EPOAs and Jenny immediately listed the house for sale. It was sold and in Sydney's rising market it returned $100,000 more than they had paid covering commissions and stamp duty. The EPOA prevented a tragedy from turning into a financial debacle.

Lindsay's Reccomendations:

1. An EPOA is usually a document between a husband and wife, or two people of the same generation
2. Usually an EPOA to two or more persons (children?) a generation younger
3. The absolute benefits clause between spouses allowing the easy transfer of assets between each other
4. Adequate clauses for maintenance of dependents, superannuation nominations, delegation to 1/3 party, dealing with digital self, and other clauses.

Why an Advanced Heathcare Directive is wise

The increasing longevity of today's population is both a blessing and a curse. Today's male, as noted, has a life expectancy of about 85 years. Similarly a woman has a life expectancy of nearly 90. The problem is that once we get into our mid 80s, over 30% of us, will suffer some form of cognitive impairment. That may be Alzheimer's, Lewy body, dementia or other brain disorders.

Many people do not want to be kept on a ventilator if they are in a vegetative state or if they have suffered a major stroke from which they will never recover. However, doctors may require some evidence of the seriously ill person's wishes. The Supreme Court of NSW assists us with a 2009 decision In the matter of New England and Hunter Regional Health v A.

Case Study #2

Mr A was a Jehovah's Witness. He had for many years been on dialysis. He was now in an end of life state, was in a long term coma and an unsigned directive was found saying he did not want continued dialysis care. The hospital fearing criminal sanctions if they relied on the piece of paper to disconnect took the matter to court.

The Supreme Court of NSW held that a patient could in advance in writing detail his or her future medical treatment. These instructions were operative even if the patient later lost cognition and family, hospitals and medical practitioners who did not abide by the directive would be guilty of the criminal offence of assault and battery.

Most medical practitioners prefer and will act on an AHCD as it gives certainty. The other advantage is that the document makes the decision (the patient speaking through it) not a child or other person appointed under a Guardianship document. This relieves your relative making the hard call.

Serious long-term illnesses may require a complex AHCD made in consultation with a specialist.

Do you still need a Guardianship Document?

An enduring guardianship appointment is an important document. It allows someone else to make medical and lifestyle decisions on your behalf. The lifestyle decisions, which in the USA is often called a living will, are not something covered by the AHCD. Nor can an attorney under an EPOA make these decisions.

The Appointment of Enduring Guardian under the Guardianship Regulation 2016, schedule one authorises a guardian:

- To decide where I live
- To decide what health care I receive
- To decide what other kinds of personal services I receive
- To consent to the carrying out of medical or dental treatment

It is important to note that the Guardianship document only functions if you lose capacity to make decisions yourself.

You must inherently trust the person that you wish appoint as your enduring Guardian and your alternative “backup” Guardian. A round table conference with your Guardians and your family is recommended, at which you can discuss your views and goals about future treatment. If these change you should have of course let the whole family and your guardians know.

Other common clauses in part four of the document may include:

1. End of life decisions
2. Funeral requirements
3. Organ donation
4. Consultation with children and other persons
5. Electronic and other digital means of communication

You may appoint more than one Guardian but care must be taken as to whether they are appointed jointly or severally. You can only appoint one alternate Guardian.

Binding Death Benefit Nomination for your Superannuation

In many cases, Superannuation can be the largest estate asset. A Binding Death Benefit Nomination binds the trustee to pay your member funds precisely where you intend them to go. Many of us have superannuation with member funds of $500,000 or more but there are also superannuation funds with tens of millions of dollars in member benefits.

You may have member benefits in an industry fund or product fund, or you may have a self-managed superannuation fund. Whichever fund you nominate, it is commonly known that superannuation rules and regulations are detailed and complex. Similarly the Binding Death Benefit Nomination must be validly executed and even a minor variation or mistake could render it invalid.

Where you allocate your superannuation member benefit to go is an important part of Estate Planning. The advantage of the Binding Death Benefit Nomination is that it is fully binding on the trustee of the fund. The only entity that can set aside the effectiveness of a valid BDBN is the Supreme Court of New South Wales if it finds that the superannuation member benefits are what is called ‘notional estate’.

This would be pursuant to a Family Provision claim by an eligible person where there are no other assets available to meet any maintenance or award granted by the Court.

Questions that you should ask yourself are:

- Should you consolidate multiple funds into one?
- Should you review your insurances in the fund?

Self-managed superannuation funds need special care as there are many decisions, where it was purported to leave benefits under a will or under an invalid BDBN, with the result the funds have not gone to the person the deceased intended.

Do an online search and research the sad cases of Katz v Grossman; and Conti’s case (WA).

Who Do You Chose as Executor under your Will?

Unless a spouse is cognitively impaired you will usually appoint your spouse. Then you will appoint two or more of your children or other persons.

However if you have a very large or complex estate you might also appoint a lawyer or accountant. This will incur some slight additional charges as provided in the Will but nowhere as much as appointing the Public Trustee or a private equity or trustee fund.

Your executors should be trustworthy and prepared to undertake their duties in a timely way. These include:

- Locating the will and instructing a lawyer.
- Ensuring the funeral is appropriately held.
- Paying the funeral director's fee.
- Advertising the application for Probate on-line with the Supreme Court.
- Managing the estate, which can include taking an inventory of assets, protect ing assets, or selling assets.
- Informing the beneficiaries appropriately.
- Representing the estate in any probate proceedings, which includes filing the will with the Supreme Court and determining whether the estate is eligible for a streamlined probate process.
- Determining who the deceased's beneficiaries are and properly distributing assets to them.
- Advertising the notice of intention to distribute on-line with the Supreme Court to protect the Executor.
- Paying debts and taxes, including notifying creditors and filing a final tax re turn on behalf of the deceased if necessary.
- Arranging with the lawyer for any money that is owed to the deceased and delivered after death, such as final paychecks, stock dividends, or payment of debts owed to the deceased. Smaller funds may be held in trust but larger amounts, despite low interest rates, may be placed on interest.
- Paying any ongoing expenses, such as making any payments on utilities, a mortgage, or insurance premiums.
- Filing estate accounts with the Probate Office if called upon by the Court.

Does the executor get a fee?

If the executor is a beneficiary it is not usual for a fee to be paid.

However if the executor is not a beneficiary it may be advantageous to give a set amount in lieu of commission. An order for commission is a drawn out process and costly. It requires a separate order of the court. You may leave your executor say $5000 or $10,000 or such other amount as you see fit that meets the allocation of time that will be given and your gratitude to that person.

If your executor or one of your executors is a professional person such as your accountant or lawyer it is preferable to provide for a commission by way of an increase in fees. For instance for the lawyer as executor you may allow him or her 140% of the usual fee. Your long term accountant may also be a wise choice either with another family member or alone.

By the way the 40% increase in the professional person's fee is far less than a professional trustee would charge.

The less complex but still quality Will

Will precedents are constantly being updated, and it is important to ensure that your Will is still of the highest quality. It should contain up-to-date and modern provisions such as:

- [ ] The power to create a Special Disability Trust for a severely disabled beneficiary. A child may be of excellent health when you make your Will but by the time of your death they may be on disability pension and require substantial assistance. This provides added care provisions and tax benefits.

- [ ] A clause dealing with your digital self – Facebook, LinkedIn, Twitter et cetera. There may be very good reason for your executor to have this power and the digital provider may better empower your executor to deal with these matters with an appropriate clause.

- [ ] Appropriate clauses that expand the powers given by the Probate and Administration Act 1898 and the Trustee Act 1925. For instance if you are running a business at your death additional clauses would be helpful.

Reccomendations:

- [ ] Beneficiaries must be clearly identified and names spelt correctly.

- [ ] Care must be taken that an eligible beneficiary is not omitted without good reason. (You may leave your estate open to costly attack).

- [ ] A trusted executor must be appointed and provision must be made for that executor to be replaced on death, inappropriate appointment or lack of cognitive ability.

- [ ] Normally you would appoint at least two persons after your spouse/first executor as alternative executors.

- [ ] You may appoint a lawyer or accountant as one of your executor and you may appoint OHL as a substitute executor or in the event that no other persons can take up the role. This will incur a small additional charge.

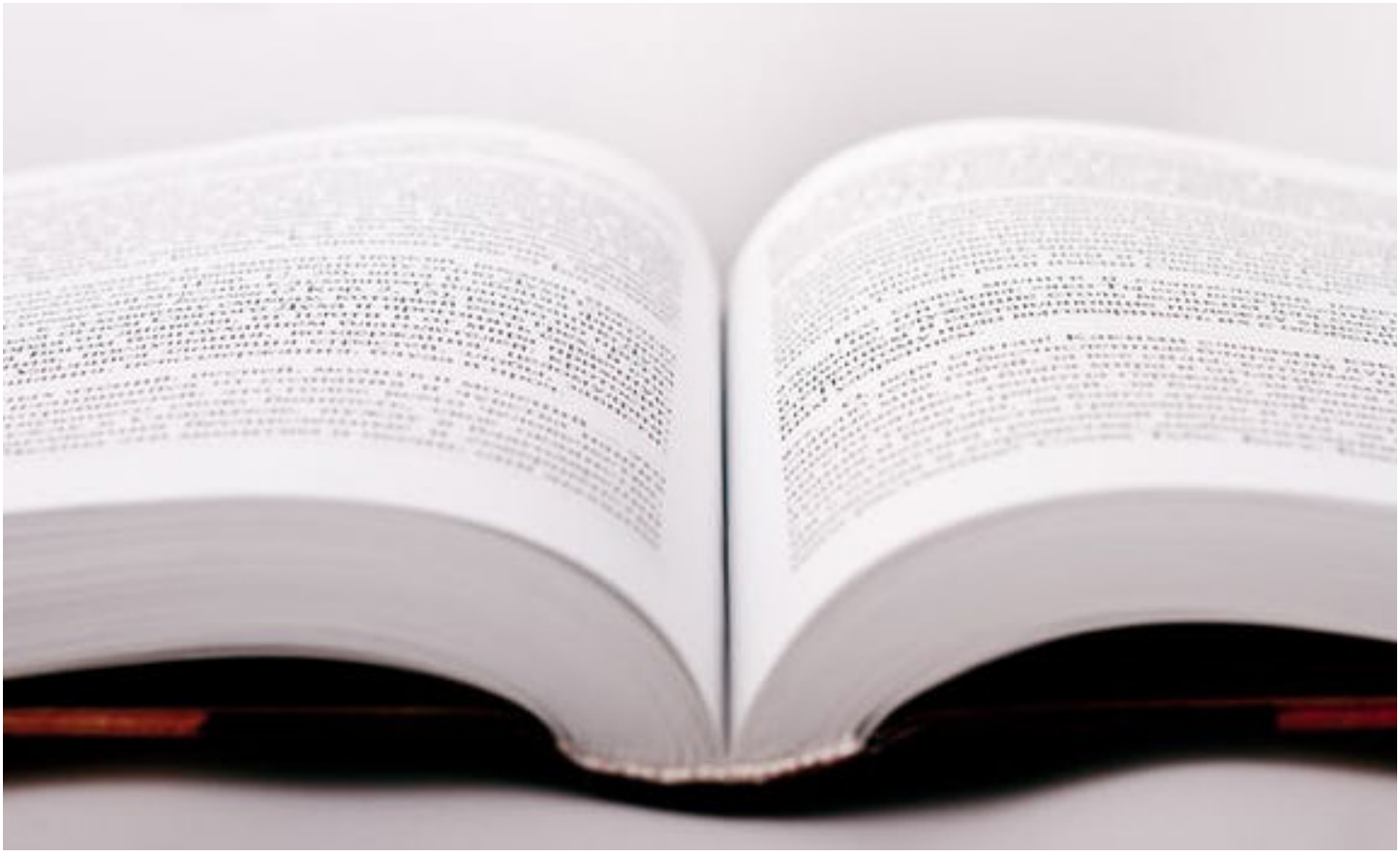
- [ ] Do you want to leave a charitable gift as a living legacy that your children can look back on as a hallmark of your contribution to life?

- [ ] Did you know that that gift can be left as a strong wish on a tax-deductible basis for your beneficiary?

- [ ] Care must be taken that the will is appropriately executed by two independent witnesses with you at the same time and this is one of the advantages of having a Will drafted professionally by the right lawyer.

- [ ] With many small families of one or two children do you have a tragedy clause to cover the event that the whole family is killed in a car accident or plane disaster?

- [ ] Finally and this cannot be pressed too strongly, if you have infant children, have you appointed the right person to be a testamentary Guardian in the event that you and your spouse are killed together?



The Will from the Newsagents only cost me $20 or the DIY Will

A cheap Will may cost you more than that in terms of dollars and cents. They can be $20 or $30 or you may get a free one from an insurance company who is hoping to help you a little. Unfortunately they raise huge obstacles for your beneficiaries and potential cost to your estate.

Case Study #3

Racing legend Peter Brock had an incredibly complex estate. He had three wills. He had children and an ex-wife and a partner. His first 2006 Will was made by a lawyer. Subsequently he had two Will kits. They were not complete. They made enormous succession type errors. After a year with tens of thousands of dollars in litigation fees the court found the second will kit was the valid one. That will revoked the first will. It gave away nothing because the gift clauses were left blank.

In essence Peter Brock had drafted a will, the failure to include a properly drafted give clause in the Will meant that he died partially intestate and the estate was well and truly litigated. The costs were enormous.

A badly drafted Will whether it be a newsagent Will kit, a badly completed Will pulled down from the web or even a badly drawn Will by a lawyer could cost up to $40,000 or more in legal fees for a Will construction in the Probate Division of the Supreme Court of New South Wales.

Master Sanderson of the WA Supreme Court has repeatedly said that the newsagent or generic online template is ‘the curse of the home-made Will.’ They are more often than not ambiguous and inadequate. The legal costs of fixing them and dealing with the fallout after death are usually orders of magnitude more than the cost of having a good lawyer Will done in the first place. It is one of the greatest false economies of all time.

At least two Masters of Supreme Court’s in differing states have suggested that it would be good if these newsagent-type wills could be banned. Of course they cannot be because you could validly write your own will on the back of a bus ticket. Simply put, a lawyer is trained to sniff out any potential problems for your estate. So make sure that your Will and estate plan are protected as far as possible to prevent these problems occurring. Choose a good lawyer and ensure that you have a good Will and avoid costly litigation.

Who needs a Testamentary Trust Will and why?

If you have an estate in excess of $2,500,000, and that is not hard in Sydney with the cost of housing; if you have a disabled child; a potentially at risk beneficiary, or, a bankrupt child you may well be advised to consider your lawyer's advice to prepare a Testamentary Trust Will.

These are not cheap. They require full and adequate advice and it is not possible to tell you all that I would like to tell you in this page or so.

In summary the Testamentary Trust Will offers three main advantages:

- Asset protection
- Tax minimisation, and
- Amazing flexibility.

Like a discretionary trust income of the fund of the estate can be streamed to various beneficiaries by the Primary Beneficiary. Income streamed to children or grandchildren under the age of 18 is taxed pursuant to section 102 AG of the Income Tax Assessment Act 1936 at adult concessional rates. With multiple children and grandchildren the tax savings can be amazing. (See Dora's case)

A good lawyer will have a number of will precedents that can be modified to suit your precise requirements:

- Beneficiary control testamentary trust Wills
- Capital protected trust Wills
- Staggered trust Wills
- Multiple trust Wills
- Complex trust Wills
- Special disability trusts and,
- Others specially drafted to your requirements

I have asked many clients whether they want the estranged son-in-law to get a hand on the daughter's inheritance. The answer has been 100%, 'No'. A tool that may put some obstacle in the way of the Family Law Court is the Capital Protected Trust.

The Family Court is a creeping jurisdiction. It has over the years gradually extended its reach over assets including family trusts and superannuation. We make a number of recommendations:

- The capital protections trust is a generational trust leaving your daughter' share for her and her children and grandchildren
- Preferably she is not one of the two trustees
- She is given set defined rights to capital including
  - Funds for health and education for herself and children
  - A set percentage for pop-up costs such as new carpet for the home or a new car. This is a defined amount and is only payable at the discretion of the trustees
  - The power to borrow money from the fund to purchase a home. This amount will be lent to her and will be secured by first registered mortgage at an interest rate which although not payable will advantage her by way of interest that can be called in on demand to minimise any capital gain that may be available to her estate in the event of marriage breakdown and property settlement.
- Of course sons are advantaged well.
- We cannot promise full protection but this is an advantageous way ahead.

Case Study #4

Dora passed away at 92. She had a TTW. Her husband had died 20 years earlier leaving her six timber mills sold for $6 million. Twenty years later with good financial planning her estate was valued at $20 million. She had three sons. Bob aged 72 was in a vegetative state in a Sydney nursing home. He could not recognise anyone, he could not speak and he could not feed himself. Her other children Richard and John had children and grandchildren of their own. John with two children and only 3 grandchildren contacted Quality Accountants of Hunter Street, Sydney to learn that in the first full year of income the TTW saved him $57,000 tax. Bob's two daughters were able to legally split his Trust into two and each managed one on his and her behalf. They were exceptionally happy with the inbuilt flexibility and tax benefits.

The Special Disability Trust

The Special Disability Trust is a joint initiative of the Commonwealth Government and its entity known as Centrelink. These Trust Wills provide incentives for additional tax free income over and above the disability pension if the means test is not exceeded. The fund can consist of about $640,000, which is increased by CPI index, every July. In addition your child can have accommodation. This could be a shared accommodation with another sibling? It could be a care bond. It could be a freehold property.

For many aged people the long-term care of the disabled child is an overwhelming burden. Your child may suffer Downs's syndrome, intellectual impairment, severe physical disability, mental illness or other problems.

At OHL we have the capacity to well and compassionately deal with the interests of you and your child. This will be a significant matter for you and deserves close attention and proper Estate Planning advice.

Avoiding disputes and fiascos

Myths

1. A nominal amount will prevent a beneficiary contesting your Will
2. Failure to understand the difference between Will and non-Will assets.
3. Superannuation and the joint tenancy are both examples of non-Will assets.
4. The clause that says if someone challenges your Will their gift is reduced to nil.
5. The claim that you do not need a Will because you have no assets. Who knows when you will inherit a large will gift or win the lottery?
6. A $20 newsagent Will or a will drawn down from the web will do. Estate Planning is much more than making a will. It is about providing wealth for your family, availing of tax minimisation and preventing future contests among other things.
7. I do not need a will because I'm married.

Mistakes

1. A badly drafted will that requires construction by the Probate Court. Construction could cost well in excess of $40,000.
2. Wills that are not signed in accordance with the Succession Act 2006 and require rectification by the Court at great expense.
3. Failure to provide for eligible persons such as the child who was a black sheep. This opens your estate to a costly Family Provision claim. (By the way often the black sheep has good cause to leave the family.)
4. Ademption whereby an asset left to a beneficiary is no longer in the same form as at the time of the will and the beneficiary loses out.
5. Partial intestacy whereby not all of your estate passes under your will.
6. Failure of formal requirements under the Act potentially rendering your will invalid or requiring rectification.

Any approach to the court or even the cost of a deed of family arrangement will cost many times the fee charged by a reputable and professional lawyer.

Checklist

- [ ] Have you reviewed your current will over the last three years?
- [ ] Do you have assets in excess of $2,500,000 and should you investigate the practicality of asset protection and tax minimisation?
- [ ] Do you have up-to-date Enduring Powers of Attorney?
- [ ] Does that Power of Attorney contain the Absolute Benefits clause permitting the free and easy transfer of assets between you and your partner/spouse?
- [ ] Do you have an alternative Power of Attorney authorising two or more other persons to act in the event that your partner/spouse is not able?
- [ ] Have these documents been drafted to meet your specific needs or are they off-the-shelf?
- [ ] Have you investigated an Advanced Health Care Directive?
- [ ] Do you have an Appointment of Enduring Guardianship?
- [ ] Have you told your guardians, alternative guardians and attorneys about their appointment?
- [ ] Have your Attorney/guardians formally accepted their appointments?
- [ ] Have you considered a round table conference with your guardians and family?
- [ ] Do you require a formal written Estate Plan?
- [ ] Is your wealth growing?
- [ ] Is your retirement funding on track?
- [ ] Should you consider a Financial Planner or Wealth Creation specialist to assist you?
- [ ] Would you like to bring your current EP documents for a free 30 minute review with Lindsay Stoddart?

If you have any queries about your Estate Planning needs, don't hesitate to call Dr Lindsay Stoddart at Owen Hodge Lawyers for your free 30 minute consultation on 1800 770 780