



ESTATE PLANNING GUIDE

WILLS, ENDURING POWERS,
AND TESTAMENTARY TRUSTS

NOVUM LAW GROUP

Liability limited by a scheme approved under Professional Standards Legislation.

ABN: 64 661 280 888 | www.novumlawgroup.com.au

A: Suite 11, 602 Whitehorse Road Mitcham **P:** (03) 9063 0300 | **E:** contact@novumlawgroup.com.au

CONTENTS

WHAT IS ESTATE PLANNING?	1
WILLS	2
TESTAMENTARY DISCRETIONARY TRUSTS	5
SUPERANNUATION	7
ENDURING POWERS OF ATTORNEY	8
APPOINTMENT OF MEDICAL TREATMENT DECISION MAKERS	10
PLAN WITH NOVUM LAW GROUP	11

WHAT IS ESTATE PLANNING?

The process of arranging your affairs for after your death is known as **estate planning**. Having an estate plan is an important step to ensure there is an efficient and effective distribution of your estate after your death and can help you by:

- Ensuring your assets are distributed according to your wishes and in a legal and logical manner
- Protecting your loved ones
- Minimising taxation

The most basic estate planning strategy is to ensure that you leave a **Will**. Good estate planning should also encompass consideration about any superannuation, trusts, company, or business structures you have and whether a **Testamentary Trust** may be appropriate for you.

Estate planning commonly also includes planning for what happens if you lose the ability to manage your own affairs, for example through dementia or a brain injury. To plan for this possibility, you may wish to make an **Enduring Power of Attorney** and **Appointment of Medical Treatment Decision Maker** to specify who will make personal, financial, and medical decisions for you.

NOVUM LAW GROUP

Liability limited by a scheme approved under Professional Standards Legislation.

ABN: 64 661 280 888 | www.novumlawgroup.com.au

A: Suite 11, 602 Whitehorse Road Mitcham P: (03) 9063 0300 | E: contact@novumlawgroup.com.au

ESTATE PLANNING DOCUMENTS	
While you are alive	Deals with
Enduring Powers of Attorney	Personal and Financial decisions
Appointment of Medical Treatment Decision Makers	Medical decisions
Advanced Care Directive (completed with your GP)	Preferences regarding medical treatment
After your death	Deals with
Will	Assets in your estate
Testamentary Trusts	Creating trusts for beneficiaries of your will
Binding Death Benefit Nominations	Superannuation death benefit entitlements

This Estate Planning Guide is designed to give you information that will assist you in understanding your options in planning for your death or incapacity.

To discuss your estate planning, or if you have any queries, please contact our office on (03) 9063 0300 or contact@novumlawgroup.com.au.

WILLS

A Will is an important document that takes effect when you pass away. A well-drafted Will should have the longevity and flexibility to ensure that your estate is distributed according to your wishes in the right way and at the right time.

Why do I need a Will?

A Will allows you to determine how your assets and liabilities are dealt with after your death. If you don't have a valid will, the law will determine how your assets are distributed according to a statutory formula which may or may not reflect your wishes.

In your Will, you can:

- Appoint an executor, multiple executors, or alternative executors to manage your estate
- Make gifts of assets or cash that form part of your estate
- Nominate people to care for your pets or minor children
- Establish trusts for ongoing management of your assets for your beneficiaries

NOVUM LAW GROUP

Liability limited by a scheme approved under Professional Standards Legislation.

ABN: 64 661 280 888 | www.novumlawgroup.com.au

A: Suite 11, 602 Whitehorse Road Mitcham P: (03) 9063 0300 | E: contact@novumlawgroup.com.au

What forms part of my Estate?

When a person dies, all the assets and liabilities of that person are collectively called that person's **estate**. This can include assets such as cash, properties, bank accounts, investments that are in that person's name. A Will can only deal with assets that form part of your Estate.

What doesn't form part of my Estate?

Some assets that you may think of as belonging to you may not form part of your estate, and a good estate plan should consider both your estate and non-estate assets.

Non-estate assets include assets that are held jointly with another individual, such as property, shares and bank accounts, as those assets will pass automatically to the surviving joint owner.

Because trusts and companies are legal entities separate from you, they typically continue on after your death and their assets don't automatically form part of your estate. Usually, the main consideration in planning for these is how to pass control of them to persons you wish to benefit or to people whom you trust to administer them according to your wishes. The documents associated with these structures will dictate how and to whom you can pass control, and this can vary significantly.

Superannuation entitlements are also not automatically considered an Estate asset. Please see our [Superannuation](#) section below for further information.

YOUR ESTATE INCLUDES	YOUR ESTATE DOES NOT AUTOMATICALLY INCLUDE
✓ Property, cash, shares, or other investments in your sole personal name or as tenants in common	✗ Superannuation and retirement income streams
✓ Personal belongings and possessions	✗ Jointly held assets
✓ Employment entitlements or benefits	✗ Company or trust assets

Appointing Executors

Your **Executors** (also known as trustees) are the people who will have the legal authority to manage your estate's affairs and uphold the wishes in your will and are responsible for:

- Gathering your assets and paying any debts and liabilities
- Distributing the assets of your Estate amongst your chosen **beneficiaries**

NOVUM LAW GROUP

Liability limited by a scheme approved under Professional Standards Legislation.

ABN: 64 661 280 888 | www.novumlawgroup.com.au

A: Suite 11, 602 Whitehorse Road Mitcham P: (03) 9063 0300 | E: contact@novumlawgroup.com.au

- Holding any money on trust for minor beneficiaries (unless your Will specifies otherwise)
- Defending any claims against your estate

It is important that you select people you trust, who understand your wishes and who can cope with the responsibilities of administering your estate. It is possible to appoint multiple people together as your Executors (up to a maximum of four), however you should be confident the people you appoint will have a good working relationship. You may wish to include a dispute resolution clause to deal with any potential conflict.

We also strongly recommend that you appoint a substitute Executor who can act if your first-named Executor/s are unable to.

Giving gifts in your Will

Your **beneficiaries** are the people or entities who you elect to receive a gift or benefits from your estate in your Will. You can decide the *type* of gift you would like to give your beneficiaries and decide *how* that beneficiary will receive their gift (i.e outright or through a trust). Types of gifts may include:

- **Specific gifts:** for example, “my grandmother’s ring” or “my record recollection”
- **General gifts:** for example, “the sum of \$10,000”
- **Residuary gifts:** for example, “the remainder of my estate after my liabilities are paid”

You must take care when giving specific gifts as if you don’t own the asset at your death the gift will usually fail.

If you give a gift to a beneficiary from your Estate, that beneficiary will be the owner and pay tax on any income generated from the asset. If that beneficiary is declared bankrupt, then the assets can be seized by the beneficiary’s trustee in bankruptcy.

Alternatively, you may elect to have that gift ‘held on trust’ for the beneficiary. Assets that are held on trust will not be owned directly by the beneficiary. Instead, the assets are owned and controlled by a trustee according to the terms in your Will. The trustee could be your Executors or any other person that you nominate. The various types of trusts available include:

- **Minor children trust:** the trustee holds assets until the beneficiaries reach a certain age (18 years or some later age you nominate)
- **Protective trust:** the trustee holds assets for the benefit of a vulnerable beneficiary who is unable to manage their own affairs. This includes a beneficiary with substance dependency issues, minor disabilities or injuries, or personal and financial struggles

NOVUM LAW GROUP

Liability limited by a scheme approved under Professional Standards Legislation.

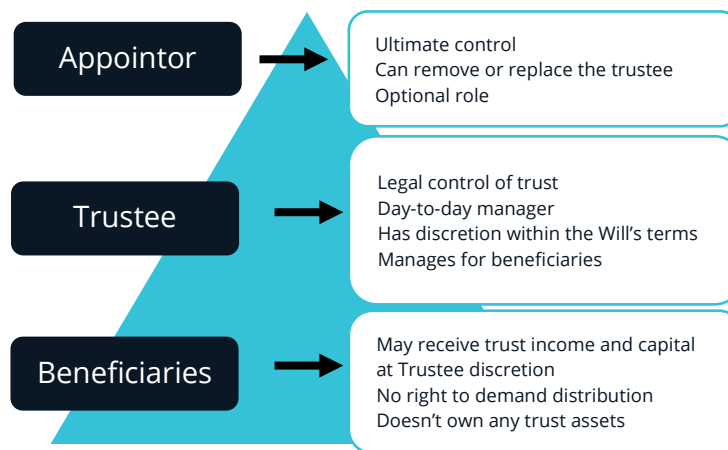
ABN: 64 661 280 888 | www.novumlawgroup.com.au

A: Suite 11, 602 Whitehorse Road Mitcham P: (03) 9063 0300 | E: contact@novumlawgroup.com.au

- **Testamentary Discretionary Trust:** like a discretionary family trust, the trustee holds assets and can pay income or capital to a range of different beneficiaries

TESTAMENTARY DISCRETIONARY TRUSTS

A Testamentary Discretionary Trust (“**TDT**”) has some similarities to a discretionary family trust, but it only comes into effect after the death of the person who made the Will. While your Will is the document that declares your wishes about the distribution of your assets, a TDT is a separate trust where assets are held and managed on behalf of the beneficiaries of your estate.



Trusts work by separating control of the assets held in the trust from the actual benefit. The person who has control of the trust assets is the **Trustee**. The Trustee is the legal holder of the assets and is responsible for the day-to-day management and administration of the trust.

An effective TDT trust can have many people who can potentially benefit from the assets in the trust (**beneficiaries**) with these benefits at the discretion of the Trustee.

Advantages of a TDT

The discretionary nature of the TDT is what makes it **so powerful for asset protection**. Because none of the beneficiaries own the trust assets and their only right is to be considered by the trustee for potential distributions, it is very difficult for someone to argue that the assets of the trust belong to any one of the beneficiaries.

A Trustee can also be one of the beneficiaries of the trust, and if that is the case, then the trust assets will 'look and feel' more like that person's assets because they are in control and can choose themselves or their family members to benefit from the trust, although they will still have certain obligations to consider other potential beneficiaries. If a person is simply a beneficiary without being a Trustee, then whether they benefit from the trust is entirely at the trustee's discretion.

NOVUM LAW GROUP

Liability limited by a scheme approved under Professional Standards Legislation.

ABN: 64 661 280 888 | www.novumlawgroup.com.au

A: Suite 11, 602 Whitehorse Road Mitcham P: (03) 9063 0300 | E: contact@novumlawgroup.com.au

TDTs offer fantastic **tax flexibility**. In essence, trusts are flow-through vehicles for tax purposes, which means the income earned each year from investing the trust assets can be distributed to beneficiaries and each beneficiary gets taxed on the income they receive from the trust at their own marginal tax rate. This allows the Trustee to take into account the relative tax rates of the different beneficiaries.

TDTs offer an additional benefit which is not available to standard family discretionary trusts; TDT beneficiaries under 18 are treated like adults for tax purposes. This means that if they do not have any other taxable income they can receive about \$18,200 from the TDT annually without having to pay tax.

KEY BENEFITS OF A TESTAMENTARY DISCRETIONARY TRUST

- ✓ Income can be paid to a wide range of beneficiaries (ie. your children and grandchildren)
- ✓ Protects immature beneficiaries
- ✓ Income tax flexibility
- ✓ May provide asset protection
- ✓ TDTs can be optional, so your beneficiaries can obtain advice about whether they would be suitable for their individual needs at the time they will inherit

Is a TDT right for me?

Whether a Testamentary Discretionary Trust is right for you will depend on your circumstances, and you should obtain advice before making a decision. However, as a rule of thumb, a TDT may be relevant if:

- You are leaving at least \$500,000 (including super and life insurance) to one or more people
- You want to leave an inheritance to minors or to people with minor dependents who can receive distributions in a tax-effective manner
- You are concerned about a beneficiary's potential for bankruptcy or relationship breakdown (e.g. divorce or separation)
- You are leaving assets to a beneficiary who cannot manage their inheritance appropriately and you are worried they will be taken advantage of or waste it

NOVUM LAW GROUP

Liability limited by a scheme approved under Professional Standards Legislation.

ABN: 64 661 280 888 | www.novumlawgroup.com.au

A: Suite 11, 602 Whitehorse Road Mitcham P: (03) 9063 0300 | E: contact@novumlawgroup.com.au

SUPERANNUATION

Superannuation benefits (and any life insurance owned via superannuation) do not automatically form part of your estate to be dealt with by your Will. To control what happens to your super benefits after your death, you may wish to put **death benefit nominations** in place. Nominations may be either:

- **Non-Binding Death Benefit Nominations:** a non-binding direction to the Trustee of your superannuation fund as to who should receive the benefit. The discretion to pay ultimately remains with the Trustee.
- **Binding Death Benefit Nominations (“BDBNs”):** binding nominations require your Trustee to pay the benefit in accordance with your directions provided you have nominated an eligible person. BDBNs must usually be renewed every 3 years, although some funds may allow non-lapsing BDBNs.

If you don't have a BDBN in place at the time of your death, the Trustee of your superannuation fund will have discretion as to which of the eligible recipients is to receive your death benefit. Usually, the benefit will be paid to your spouse/partner or your children. The Trustee may also pay the benefit into your estate if you do not have any dependants or if there is conflict around who should receive the benefit.

To ensure your benefits are paid in accordance with your wishes, we recommend checking whether you have any binding nominations in place. If you don't, you may wish to contact your superannuation fund and request their nomination forms. Alternatively, if you have a **self-managed superannuation fund**, you may wish to have your lawyer or accountant prepare your nominations on your behalf.

Typically, some elements of the superannuation death benefit will be taxable, but some beneficiaries such as your spouse/partner or minor children are exempt.

It is important that you seek taxation and financial advice in relation to your superannuation benefits.

ENDURING POWERS OF ATTORNEY

At some point in your life, you may be faced with an event – such as an accident or illness – that leaves you unable to make decisions for yourself. An Enduring Power of Attorney (“**EPA**”) allows you to appoint a person (or multiple people) to make financial decisions and personal/lifestyle decisions for you during your lifetime if you no longer have the capacity to do so. With an EPA, the person giving the power is called the ‘**Principal**’ and the person who is granted the power to act is called the ‘**Attorney**’.

The EPA is a flexible document that allows you to decide *who* to appoint as your Attorney/s, *what* decisions they can make, and *when* they are able to begin making decisions on your behalf.

EPAs in Victoria are covered by the *Powers of Attorney Act 2014 (Vic)*, which commenced on 1 September 2015. The new legislation didn’t invalidate EPAs that were already in place when it commenced. The old EPAs, however, did not include the power to make decisions about personal/lifestyle matters as this was previously covered by a Guardianship document. Accordingly, if you don’t have a Guardianship document, it may be beneficial to make a new EPA to give your attorneys the authority to make decisions about personal/lifestyle matters in addition to financial matters.

Appointing an attorney or attorneys

You can appoint one or multiple eligible people to make decisions on your behalf. You can also appoint alternate Attorney/ss to act in case your first-named Attorney/s are unable or unwilling. A person is eligible to be an attorney if they are 18 years of age or older, not insolvent, and not a care worker, health provider or accommodation provider for you. Granting decision-making power to a person has enormous implications for your legal, personal and financial well-being, so it is absolutely crucial that you appoint someone who is trustworthy and preferably is familiar with your personal preferences.

When you are appointing multiple Attorneys, you can specify how they must make decisions. For example, you might require that they make decisions jointly (all in agreement), by majority, or severally (meaning any one of your Attorneys can act independently).

Types of decisions you can authorise your Attorney to make on your behalf

You can authorise your Attorney to make various decisions on your behalf, including:

- **Financial decisions:** includes all financial decisions such as any dealing with your assets, managing your bills and bank accounts and buying or selling real estate.
- **Personal/lifestyle decisions:** includes all lifestyle decisions such as where you live, who you see, what activities you participate in and, if necessary, what you eat and wear.

NOVUM LAW GROUP

Liability limited by a scheme approved under Professional Standards Legislation.

ABN: 64 661 280 888 | www.novumlawgroup.com.au

A: Suite 11, 602 Whitehorse Road Mitcham P: (03) 9063 0300 | E: contact@novumlawgroup.com.au

- **Specific personal and or financial decisions:** may include powers to do certain things such as “manage my rental properties while I am overseas”.

The Powers of Attorney Act also provides limits on what an Attorney can do on your behalf:

YOU CAN ALLOW YOUR ATTORNEY TO	YOUR ATTORNEY CANNOT
✓ Decide where you live	✗ Make or revoke a Will or EPA on your behalf
✓ Decide who you see	✗ Make medical decisions
✓ Pay your bills	✗ Act in your place as a company director
✓ Sign a contract to buy or sell property	✗ Enter into or dissolve your marriage
✓ Manage your investments	✗ Vote for you

Commencement

You can choose when your Attorney can start acting on your behalf. You have the option of having your EPA take effect:

- Immediately on the date the EPA is signed
- At a later date, for example “when I am overseas from 5 June to 5 July this year”
- Upon the occurrence of a later event, for example, if you **lose capacity**, or if you later give your Attorney written authorisation to commence acting

Ordinarily, people will elect for their EPA to commence only at the point they lose capacity. This is because allowing somebody to make decisions on your behalf while you still have capacity can be confronting and may carry unnecessary risk.

A person no longer has capacity if they are unable to understand or retain information relevant to a decision, cannot use or weigh information as part of making a decision, or cannot communicate their decision or their views and needs about a decision in any way.

What happens if I don't appoint an Attorney?

If you lose capacity and have not appointed an Attorney, an application would need to be made to Victorian Civil and Administrative Tribunal (VCAT) to appoint somebody as your Guardian and/or Administrator. One or several people can apply for to VCAT, and they may or may not be people you would like to act on your behalf. If there is disagreement about who should be appointed VCAT may appoint an independent administrator such as State Trustees.

NOVUM LAW GROUP

Liability limited by a scheme approved under Professional Standards Legislation.

ABN: 64 661 280 888 | www.novumlawgroup.com.au

A: Suite 11, 602 Whitehorse Road Mitcham P: (03) 9063 0300 | E: contact@novumlawgroup.com.au

APPOINTMENT OF MEDICAL TREATMENT DECISION MAKERS

You have the right to make your own medical treatment decisions. However, if you experience illness or an accident you may be unable to do so (either temporarily or permanently).

An Appointment of Medical Treatment Decision Maker (“**AMTDM**”) is a formal legal document that allows you to give authority to a person to make medical treatment decisions on your behalf if you do not have decision-making capacity to make the decision yourself. The person you appoint to make medical decisions on your behalf is known as your **medical treatment decision maker**.

AMTDMs in Victoria are covered by the *Medical Treatment Planning and Decisions Act 2016* (Vic), which commenced on 1 March 2018. Prior to that date, the relevant document was an Enduring Power of Attorney (Medical). The new legislation did not invalidate any existing Enduring Powers of Attorney (Medical).

Appointing a decision maker and back up decisions makers

Unlike with an EPA, you can only appoint one person at a time to be your medical treatment decision maker. You can appoint several back up decision makers, but they will only have the authority to make decisions on your behalf if your earlier-appointed medical treatment decision makers are unavailable.

Types of decisions your Medical Treatment Decision Maker can make

Your medical treatment decision maker is authorised to make medical treatment decisions on your behalf. These include decisions about surgeries, immunisations, medication, dental treatment and life support.

In making their decisions, they must take into consideration any **Advanced Care Directive** that you have put in place and any other preferences that you have expressed.

An Advanced Care Directive is a detailed document that sets out legally binding instructions about your preferences for medical treatment, including what you consent to and what treatments you wish to refuse (for example, receiving life support or to be resuscitated). This is NOT the same as an AMTDM and should be completed with the assistance of your doctor.

What happens if I don't appoint a medical treatment decision maker?

If you don't have an AMTDM in place, the law provides a list of people who can make medical treatment decisions on your behalf if you are unable to do so. The first of the following people who are reasonably available, willing, and able will be your medical treatment decision maker: a

NOVUM LAW GROUP

Liability limited by a scheme approved under Professional Standards Legislation.

ABN: 64 661 280 888 | www.novumlawgroup.com.au

A: Suite 11, 602 Whitehorse Road Mitcham P: (03) 9063 0300 | E: contact@novumlawgroup.com.au

guardian appointed by VCAT for medical treatment, your spouse or partner, your primary carer, your children in order of age, your parents, and finally your siblings.

Even if you would be comfortable with this list of persons making medical treatment decisions on your behalf, you may wish to make an AMTDM to provide your family and any relevant health-care professionals with complete clarity about who has the authority to make these decisions. This can avoid your family having to try to figure this out when they are already stressed and under pressure.

PLAN WITH NOVUM LAW GROUP

Our expert estate planning lawyers would be delighted to assist you with your estate planning. Please contact our office on (03) 9063 0300 or by email at contact@novumlawgroup.com.au to book an appointment to discuss your estate plan.

To assist you in preparing for our appointment, we have provided you with the below checklist which sets out the basic information we will need in order to assist you.

ESTATE PLANNING CHECKLIST

- Consider who you would appoint to make personal and/or financial decisions on your behalf

- Consider who you would appoint to make decisions about medical treatment on your behalf

- Identify the assets and liabilities in your name

- Consider who should be the beneficiaries of your estate and how your assets should be divided between them

- Consider who you would like to appoint as the Executor/s of your estate

- Identify a guardian for any minor children

- Consider whether a Testamentary Trust is a suitable option for you/your beneficiaries

- For any company, business or trust structures – provide copies of all trust deeds and variations, company constitutions and any related documentation

- Complete our [Estate Planning Instruction Form](#)

NOVUM LAW GROUP

Liability limited by a scheme approved under Professional Standards Legislation.

ABN: 64 661 280 888 | www.novumlawgroup.com.au

A: Suite 11, 602 Whitehorse Road Mitcham P: (03) 9063 0300 | E: contact@novumlawgroup.com.au

Notice of Disclaimer

This Guide is intended to provide general information only and does not constitute legal advice. You must not use this information in the place of legal, accounting or financial advice and it should not be relied upon in making any decision. Each person and each situation requires individual consideration and personalised advice.

Novum Law Group does not warrant that the information provided is correct as at the time that you read it and is not obliged to notify you of any changes in the law that may affect the information provided. Novum Law Group shall not be liable for any loss or damage of any kind whatsoever arising as a result of your reliance on any information expressed or implied in or in relation to this Guide.

NOVUM LAW GROUP

Liability limited by a scheme approved under Professional Standards Legislation.

ABN: 64 661 280 888 | www.novumlawgroup.com.au

A: Suite 11, 602 Whitehorse Road Mitcham **P:** (03) 9063 0300 | **E:** contact@novumlawgroup.com.au