Separation and your estate planning

When you are going through a separation, it is easy to get bogged down in negotiations about looking after the kids and dividing up your property. However, there are some personal things to give some attention to when you are going through a separation. Your estate planning is definitely one of them. Failing to update your estate planning documents can have serious consequences for you, your assets and your children.

Your Will

During your relationship you may have put a Will in place that appoints your former partner as your executor or gifts them a portion of your estate.

When you separate from your partner your Will is not automatically revoked.

Married couples, for example, can only apply for divorce 12 months after they separate. Once you are divorced many jurisdictions will revoke any gift to your former partner or appointment of them as your executor in your Will. However, that leaves 12 months between deciding to separate and when you can actually get divorced where your assets are incredibly vulnerable to your former partner. Further, even after divorce gifts made to your former partner that are not addressed in other parts of your Will may mean that you can be left 'intestate', meaning without a valid or effective Will at all.

For de-facto couples, some jurisdictions have no presumption that gifts to or appointments of your former partner are revoked when you separate.

In our view, it is of the utmost importance that you update or prepare a new Will as soon as possible after separating from your partner to ensure that your estate planning objectives are carried out.

Your Powers of Attorney

A Power of Attorney is a document appointing someone to make legal and financial decisions for you should you lose capacity.

It is a powerful thing, and can do some real damage if it falls into the wrong hands. Unfortunately, your former partner's hands may not be the safest following a separation.

Under a Power of Attorney document, a person (your 'attorney') is authorised to deal on your behalf in relation to your legal and financial affairs. You are known as the 'donor' under a Power of Attorney, because you have donated the power under the document. A General Power of Attorney becomes effective straight away, but expires when you lose mental capacity. An Enduring Power of Attorney applies from the time that you lose mental capacity, and continues on until your death. Many people make a General & Enduring Power of Attorney, which becomes effective straight away and lasts through until you die.

The legislation that regulates powers of attorney in each State contains provisions that prohibit an attorney from acting in the interests of anyone but the donor. This is an important prohibition, because it ensures that your attorney cannot just take your money for themselves or give all your property

away to other people. However, it is possible to override the prohibition by including a clause in your Power of Attorney that allows your attorney to benefit when they act as your attorney.

An overriding clause is commonly included in Powers of Attorney where the donor is appointing their partner as their attorney. This is often an appropriate arrangement, as it prevents the partner who is acting as attorney from worrying about breaking the law by benefiting when using their power under the document. But allowing such a document to

remain in effect after separation can be very dangerous. It is almost like giving your former partner a blank chequebook. They can use their power under the document to sell property, access bank accounts – you name it.

The immediate threat only really applies to General Powers of Attorney and General & Enduring Powers of Attorney, because your partner as attorney can use the document straight away. However, it is a good idea to revoke and replace any Power of Attorney where you have appointed your former partner as your attorney.

It is important to note that a person's appointment under a Power of Attorney is only terminated once that person is notified of the document's revocation. This means that written notice should be provided to your former partner to inform them that the document has been cancelled and that their appointment as attorney is no longer effective. There is a template form of revocation that is published in most States. It is also good practice to ask your former partner to confirm that they have not transacted on your behalf (acting as your attorney) prior to the revocation, or to give you details of any transaction that they have carried out.

Your superannuation death benefit nominations

For many people, their superannuation represents the majority of their estate if they were to pass away. Younger people typically hold their life insurance policies through super but may have limited personal assets as they are still building their wealth. Whereas for older couples, they may operate a self-managed superannuation fund (SMSF) and be putting a lot of their spare money into increasing its value in preparation for retirement.

When you die, all your superannuation entitlement and the value of any life insurances owned in super get combined into one pot which is called your 'superannuation death benefits'. To direct where your superannuation death benefits are paid when you die, you must provide a binding superannuation death benefit nomination to the trustee of your super fund. This nomination is required regardless of whether you are part of a public offer fund or have an SMSF.

If you do not have a binding superannuation death benefit nomination in place, the trustee of your super fund decides where to pay your superannuation death benefits when you die. Some death benefit nominations also have a lapsing date (usually 3 years from the date they are made), and if a nomination has lapsed it will not be binding on the trustee. For this reason, it is important to keep nominations up to date.

If you separate, you should update your superannuation death benefit nomination as soon as possible to safeguard your super. If you have a binding nomination in place naming your former partner as the beneficiary, you should make a new binding nomination directing your superannuation death benefits either to your children or to your estate. Any superannuation death benefits that are paid to your estate will be dealt with as directed by your Will, so it is important to make sure that your Will directs your superannuation death benefits to be paid to the intended beneficiaries.

If you and your former partner share an SMSF, it is even more important to ensure that your binding death benefit nomination is updated following separation. This is because if you die your former partner will be left as the sole trustee of the SMSF. As the sole trustee, your former partner will get to decide where to pay your superannuation death benefits (including to themselves) unless you have a binding nomination in place.

What next?

Reviewing and updating your estate planning documents when there is a significant change in your life is crucial. Separation is a big life change, and it usually requires a complete overhaul of your existing estate planning documents. We have a wealth of experience in helping separated people update their estate planning documents to best protect them and their children.

If you are going through a separation and would like some assistance, call us on 1300 654 590 or email us at wehelp@adlvlaw.com.au.

Further information can also be found on our website at www.adlvlaw.com.au.