

Estate Planning: the Will

A Will is a legal document that names the people who are to receive the property and possessions owned at the date of death of a deceased. This brochure outlines the importance of making a will and the vital factors that need to be considered regarding estate planning.

Why make a Will?

It is essential that you make a Will if you are concerned about who will receive your assets and belongings after you die. Property and possessions can include but are not limited to your home, land, car, money in bank accounts, insurance policies, shares, jewellery, furniture, household goods and potentially superannuation proceeds.

Who can make a Will?

All adults over the age of 18 should have a valid Will. A person must also have 'testamentary capacity'; this means that they know what assets they have and have some idea of how much they are worth and are able to decide who should fairly receive your assets; and who may have some moral claim upon your assets.

What happens if you do not have a Will?

If a person dies without a Will, or with an invalid Will, they die intestate. The Succession Act 2023 specifies who will benefit from the assets of the deceased and who can be appointed an administrator (a similar role to that of an executor).

Spouses and children will ordinarily share in the intestate estate of a deceased person, but if any beneficiary is a minor, then the Public Trustee have a duty to maintain the financial interests of that minor child.

If you do not have a Will you do not have any control over the distribution of your estate.

Without a Will the rules for distribution of your estate may not accord with your wishes, and may produce an unfair result. Partners, stepchildren, friends and your favourite charities may miss out or receive an insufficient share. Your children or other minors in your care may not receive the protection you desire and you

will not have the opportunity to propose a guardian for them. Any incapacitated members of your family and their own assets may be put at risk. Your estate may be administered by someone you would not want to appoint to do this and you lack the satisfaction of knowing your affairs are in order and your estate is going to the people to whom you choose it to go.

What happens upon marriage or divorce?

If you make a Will before you marry, it will be revoked upon marriage, unless it is stated that it was made in contemplation of marriage. If you divorce, any gift or appointment as an executor in favour of a former spouse is automatically revoked. The terms of your existing will continue to apply if you are married but simply remain separated.

It is therefore prudent that, following a separation, you amend your Will.

Ownership of assets

You can only leave assets in your Will if ownership of the asset is registered in only your name. If you own it with another person, such as spouse or partner, there are two alternative forms of such ownership. As joint tenants which is the most common way of owning property for couples, or as tenants-in-common, each owner having individual ownership of a specified share in a single property.

If you own an asset as a joint tenant, the asset automatically passes to the other joint owner upon your death. Your will is irrelevant in relation to that asset. If you own the asset as tenants-in-common, you can leave your share to whoever you choose in your Will, not necessarily the other owner.

When should I review my Will?

You should review your Will every two to five years or upon a change in your circumstances. A Will should reflect your current domestic and financial situation. Life changing events such as marriage, separation, divorce, births and deaths in the family, major illness, retirement and a change in financial circumstances often require a review of your Will. Your choice of an executor or a guardian for your infant children should also be reviewed as circumstances change.

Superannuation and Trusts

Considerable wealth is now held in family trusts and superannuation funds. These assets are not necessarily controlled by a Will and require special treatment. Sometimes an individual's Will is not as important as other documents which control superannuation and trusts because the Will only applies to personally owned assets. Many people have more wealth in superannuation and family trusts than in their own name. Future control of these other assets can be the real challenge of estate planning.

The use of Binding Death Benefit Nominations and superannuation can direct payment to your estate which then enables your superannuation death benefit to be dealt with pursuant to your Will. This will allow for non-dependants to benefit if you wish.

Creating a Testamentary Trust within your Will can sometimes allow a more effective strategy to leave assets to a person instead of making the gift directly. The advantages include protecting assets from wastage from bankruptcy or incapacity, divorce and significant taxation advantages.

A special disability trust is a trust established under legislation passed by the Federal Government in 2006 to assist families plan for the future care and accommodation needs of a family member with a severe disability. The trust can be established during the lifetime of the person contributing assets to the trust or more commonly in that person's Will.



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