

INFORMATION ON WILLS AND ESTATE MATTERS

Why do I need a will?

Recently published Federal Government figures estimated that 60% of Australians do not have wills. In my experience, the figure is probably closer to 80%!

Everyone over the age of 18 years is entitled to have a will and you should have one.

Although you may not consider your estate to be large enough to warrant having a will, your circumstances may change overnight. You may receive an unexpected benefit under another person's will, a windfall gain or significant death benefits from your own, an employer's or a third party's insurance policy. Any of these could result in a substantial increase in the size of your estate.

You may consider a will unnecessary because you hold most of your property as joint tenants with say, your wife, and therefore upon your death she would automatically take that property. However, what if your wife unexpectedly dies leaving you as the surviving joint tenant or both of you die at the same time in an accident? What would happen to your estate then?

Another reason to have a will drawn now is that if you attempt to execute a will when you are incapacitated the will may be challenged and declared invalid. If you make a will whilst you have capacity it will be valid and binding even though your mental capacity may be affected by a later accident or disease.

By having a will it is you who nominates who will take charge of your affairs when you die rather than having someone you did not choose (and may not want) imposed upon your estate and surviving family.

Most importantly, unless you make a will your estate may be distributed in an arbitrary manner in accordance with what are known as the Rules of Intestacy and not in accordance

with your wishes. This can cause great distress to your family at an already very difficult time.

What happens if I die without leaving a Will?

If you die without a will you are said to die “intestate”. There are statutory rules which provide for the distribution of your property in this instance.

For example, If you die leaving a surviving spouse (including a de facto spouse or same sex partner with whom you have co-habited for at least 2 years) and one child, the spouse now takes all of the household chattels, up to \$150,000.00 and one half of the residue of the estate with the child taking the remainder. If you have more than one child, your surviving spouse takes the chattels, up to \$150,000.00 and one third of the residue of the estate with the surviving children sharing the remainder.

Such a division of your estate could result in significant family disharmony and could cause much financial hardship to your surviving children or other dependents.

But even worse, if you were to die intestate with no beneficiaries who are eligible under the rules your estate could pass to the state government. (In the last 5 years the NSW state government has received a windfall of over \$47 million dollars from such estates!).

A Cautionary Note!

You have probably seen certain organisations offering to draft your will for free, for example the Public Trustee. However, in order to take advantage of the “freebie”, these organisations invariably require you to appoint them as executor and then charge scale fees for the administration of your estate with the scale amount depending solely on the value of the estate. Solicitors, on the other hand, usually charge either a set fee or an hourly rate regardless of the value of the estate. When considering your alternatives, you need to check the rates first to ascertain the likely charges as these fees can make for a very expensive administration.

Home-made wills or will kits can be disastrous and should only be used for the most straightforward of situations and even then with extreme care. I do not recommend that they ever be used.

Appointing an Executor

When making your will you should choose an executor who will be responsible for administration of your affairs. The executor will collect the assets, pay any debts and divide the assets amongst the beneficiaries in accordance with the terms of your will.

You should choose someone who is responsible and reliable and who has some commercial sense but there is no necessity to appoint a relative. You may appoint a professional adviser such as your solicitor, accountant or bank manager.

What if I have previous Wills?

Your new will automatically revokes any previous will but to avoid any confusion in the future it is usually best to physically destroy all old wills. (But only after the new will has been properly executed)

What effect does marriage and divorce have on a Will?

Following the enactment of the Succession Amendment Bill on 1 April 2006 the effect of marriage and divorce on wills has been significantly altered.

The rule that marriage revokes a will is retained. However, it is no longer necessary to specifically state that a will is made in contemplation of marriage. The new provisions also preserve any gift to, or appointment as executor, trustee or guardian of a partner provided you are still married to that person at the date of your death.

If you obtain a divorce, any gift to, or appointment as executor, trustee or guardian of your former spouse is revoked unless the will contains a contrary intention that such gift or

appointment shall continue following a divorce. The most practical use of these provisions may be to allow your former spouse to remain guardian for any of your infant children.

Can I leave specific gifts to certain persons?

Yes. You may leave, for example whatever money stands to your credit in your bank account at the date of your death to a particular person or you may also wish to leave a specific item of furniture or a motor vehicle to a particular person.

In addition, your will can also be drafted so that a certain number of people share whatever you own at the date of your death in equal shares or in other proportions that you specify.

Testamentary Trusts

When considering the terms of your will, you should consider the benefits of using a testamentary trust especially if you have young children or significant assets.

This is simply a trust created in your will which operates in a similar way to a family discretionary trust.

The benefits that flow from such a trust include:

1. If there is a risk that a beneficiary may become bankrupt, the trust can protect the assets from creditors and trustees in bankruptcy;
2. If there is a potential risk that a beneficiary's marriage may break up assets held within the trust may not be the subject of a Family Court Order in a property settlement;
3. If a beneficiary is unable to properly manage his/her own affairs, the trust is useful as it is controlled by some person other than the beneficiary. The trustee can ensure that sufficient funds are available to meet the needs of the beneficiary but the beneficiary does not get control of the assets.
4. A testamentary trust can provide taxation advantages where there are infants who are beneficiaries under the trust as children enjoy the normal tax free threshold of

\$6,000 per annum. Therefore, in a situation of a surviving wife and say three children rather than the wife alone paying tax on the income generated from the inherited property, she can lessen the “tax hit” by distributing to other family members who are lesser income earners.

Superannuation

When considering the terms of your will, you must consider your superannuation fund. In some cases benefits from a superannuation fund will not form part of your estate.

Superannuation may be paid upon your death in the following ways:-

1. To your executor so that it forms part of your estate;
2. To a nominated beneficiary in accordance with a “beneficiary nomination form”;
3. To such person or persons as your superannuation trustees are satisfied are financially dependent upon you at the time of your death.

It is important to check with the trustee or manager of the superannuation fund to ascertain how the benefits are likely to be paid and whether or not there is an option to nominate beneficiaries.

Family Trusts

If you have a discretionary family trust, it is important to note that you cannot dispose of the assets of the trust under your will. You must address who will control the trust upon your death. The terms of the trust should be carefully considered and may need to be varied.

Family Provision Application

Under Queensland Legislation, if you die without leaving adequate provision for the proper maintenance and support of certain classes of people, whether or not you had a valid will at the time of your death, an application can be made to the Court for further provision out of your estate.

Those persons entitled to make such an application are your spouse, de facto spouse - (in certain circumstances) children or dependants. If it is your intention to exclude one or more

of those potentially entitled you must advise the person drafting your will as there are certain ways of minimising the impact of these claims on your estate.

Conclusion

For the sake of a few hours of your time and relatively little expense you can put your affairs in order, obtain peace of mind and ensure your assets pass in accordance with your wishes. This will at least remove the additional stress and confusion caused to surviving family members by not having your wishes properly documented.

Completion of Instruction Sheet

We have provided on our website an instruction sheet for preparation of your Will. However, completion of this instruction sheet should only be carried out if your affairs are simple, straight forward and not out of the ordinary. If you have any queries whatsoever regarding estate matters and how your estate should be distributed upon your death, please do not hesitate to contact us.

From the information provided by you we will compile your Will. If there are any queries or you have not completed an instruction we shall contact you in order to ensure that you have provided us with all necessary information for the safe conduct of your estate matters.

If you wish clarification on a particular issue or wish to seek further advice before progressing with your estate planning please contact **Noel Duffy** direct on:

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