

Aspects of Financial Planning

The role of a Will

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The importance of having a valid Will cannot be underestimated. A Will is used to effectively distribute the assets of a deceased estate. Without one, how your property is divided will be determined by law.

Background

If you die without a Will (i.e. you die intestate) control over who will receive the assets in your estate is taken out of your hands and is determined by law. To die without having a legal Will may leave those you love with unnecessary distress, uncertainty and expense.

Everyone has a right (and perhaps a responsibility) to determine how the assets they have accumulated throughout their life are to be distributed after their death. The decisions as to how you might prefer to make distributions may be influenced by personal, financial and taxation factors. If, however, you fail to prepare a Will, state legislation dictates how your estate must be shared and appoints an Administrator.

A Will is personal

The law is impersonal and does not specifically recognise the relative who you might like to leave a special gift, nor does it recognise those who you might prefer to exclude. Without a Will, many people may be entitled to share your estate using a rigid formula set out in legislation.





Prior to any distribution a family tree will have to be constructed, proven and family members located. This will take time and cost money.

Time lost will be very inconvenient to those dependent on your estate and the additional legal fees and Court costs will deplete the capital of the estate. Both are avoidable with a legal Will.

Changes to families are increasingly common. Even if you and your spouse have been in a single, life-long marriage, your sons or daughters or your parents may not. You may not wish a particular son-in-law to be able to access your daughter's (or her children's) share of your estate. Intestacy is a certain way of introducing friction and disharmony to your family.

If you or your current spouse are not in your original marriage, and particularly if there are children of a previous marriage, the complications are even greater and intestacy will ensure a lengthy, messy, unhappy and expensive series of battles for your survivors. Furthermore, past members of your family may be included while present members are excluded and vice-versa.

A Will is your opportunity to apply your personal preferences to your estate.

Executor

An important decision a person will have to make in drafting their Will, is who to appoint as an executor of their estate. The executor of a deceased estate is the person/s nominated in the deceased's Will with the responsibility of administering the estate. This may be a person/s, a trustee company and/or a professional adviser who is deemed competent and trustworthy by you and who is prepared to accept the task.

The role of the executor can be quite onerous as they are expected to collect all the assets and account for all debts, taxes and other liabilities of the estate before distributing assets to the beneficiaries. In addition, they may also be required to arrange the deceased's funeral, undertake investing and/or insuring the assets of the estate whilst it is being administered, and handle any challenges on the Will. A Will provides you with the opportunity to decide who is going to take on this role.

Beneficiaries

Beneficiaries are the people who are going to benefit from the estate. It is through a Will that you can assign property, cash or bequeath certain assets to your nominated beneficiaries.

It is useful to check your Will on a regular basis to ensure that the beneficiaries named continue to be those you wish your estate to be divided amongst. Where there are second marriages or beneficiaries with mental or physical incapacity, drug dependence or alcoholism, careful consideration is required in drafting the Will.





Guardians

If you have children under 18, your Will is your opportunity to name your preference for their guardian. If you die without a Will or without making such a nomination, the government will appoint a guardian.

Ownership of assets

The only assets that can be distributed via a Will are those that you own personally. These may include cars, shares, property and other investments in your name. Assets owned in conjunction with others are distributed according to the legal status of the ownership. This may be either as joint tenants or tenants in common.

Assets owned as joint tenants pass automatically to the surviving joint owner on the death of the other. Thus joint assets in a joint tenancy arrangement (which would normally include your family home) cannot be distributed by a Will. In contrast, tenants in common arrangements are set up so that the property belongs to all involved, however, each person owns a separate portion of the asset. On death, the deceased's portion transfers to their estate and is distributed according to their Will. In some cases, property may have been purchased by a husband and wife for example, with each owning 50% as tenants in common. Instead of the asset transferring to the surviving spouse, the 50% portion transfers to the estate of the deceased spouse.

Some assets may have been bought nominating an owner after death. This may be the case with some pensions or annuities (immediate or deferred) where a reversionary annuitant has been named; Insurance and Friendly Society Bonds where a beneficiary has been named or with some Life Insurance policies.

In some circumstances, a Will is over-ridden by such nominations; consequently, if your circumstances have changed since the investment was purchased, a change to the nomination may be appropriate so that the Will can apply. This may involve tax consequences so professional advice must be sought.

Superannuation

Superannuation investments have special rules on death. These assets also fall outside of a Will and are not considered estate assets.

Generally you may direct the trustees of your superannuation fund to distribute your superannuation monies to a number of beneficiaries or into your estate. Trustees will take into consideration a nomination of beneficiary form that may have been completed, however unless a binding nomination is completed, the trustees have discretion as to whom to pay the benefit.





A binding death nomination is available with some funds and allows the member to determine who their super money is paid. (See our Aspect entitled 'Superannuation death benefits' for further information.)

Nominating beneficiaries allows the monies to be distributed quickly as it bypasses the time and costs associated with administering your estate and will protect the funds from the hands of creditors. To ensure estate planning consistency, your nominated beneficiaries should be made in consideration of the intentions expressed in your Will. If you choose to nominate your estate to receive the proceeds, your superannuation funds will be distributed according to the desires expressed in your Will. Bear in mind that this could potentially expose the funds to unnecessary tax consequences and to creditor hands.

The taxation of superannuation death benefits can be complicated and you should seek advice.

Trusts

Many people use discretionary trusts to structure their business or personal affairs throughout their lifetime. Any assets owned by the trust will not form a part of your estate on death but rather are held by the trustee for the purposes of the trust. It is important to consider your trust assets when determining your estate planning objectives. A financial adviser can help you in reviewing your trust deed to ensure it remains consistent with your overall estate plan.

Capital gains tax

Capital gains tax (CGT) has been described as a 'time bomb ticking away'. Assets distributed on death attract no tax (except certain gifts to tax exempt entities and beneficiaries who are non-Australian residents); however this does not necessarily mean they are tax free. It just means that someone else may have to pay the tax some time in the future (perhaps several generations away).

CGT is a complicated legal area full of traps for the trained and untrained alike and too large to even scratch the surface of in this Aspect. However, it is important to realise that CGT may be a liability on your estate beneficiaries upon subsequent sale of CGT assets inherited under your Will. There may be instances where certain assets of your estate can be distributed more tax effectively to some beneficiaries than others (e.g a taxable asset could be left to a beneficiary who has a lower taxable income, while the second, tax-free asset is left to a high tax paying beneficiary; the result may be that neither pays tax upon the eventual sale).

Just one of the critical elements in determining what will be taxed, when and how much, is the date the asset was originally purchased. Two assets of the same market value at the date of death may have two very different values net of capital gains tax because they were bought at





different times. Capital gains tax can be planned for and legally minimised by thoughtfully drafting the Will.

A further aspect to CGT is the importance of maintaining accurate records so that your beneficiaries are able to prove the costs of the assets and the purchase date. This will enable them to avoid penalties that may apply and possibly save them paying unnecessary CGT.

Responsible planning

Planning your finances without including a Will is to only partly complete the job. A properly drafted, current Will is one of the most responsible acts of planning you can undertake for your family. At the same time as you are drafting a Will, you might also think about setting up Powers of Attorney or an Enduring Power of Attorney. Please see our Aspect on these for more information.

If you don't leave an effective Will, you will leave problems!





Centric Wealth Advisers Ltd may be able to be of assistance

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Centric Wealth recommends that you obtain financial and tax or accounting advice based on your personal situation before making an investment decision.

How to Contact Centric Wealth Advisers Ltd

Level 2, 7 Macquarie Place
Sydney NSW 2000
PO Box R1851
Royal Exchange NSW
1225
Tel 02 9250 6500
Fax 02 9252 2702

Level 27, 150 Lonsdale
Street
Melbourne VIC 3000

Tel 03 9639 4848
Fax 03 9639 4343

Level 8, 120 Edward
Street
Brisbane QLD 4000
GPO Box 915
Brisbane QLD 4001
Tel 07 3230 6555
Fax 07 3221 2145

Level 1, 8 Phipps
Close, Deakin
Canberra ACT 2600
PO Box 3637
Manuka ACT 2603
Tel 02 6281 1477
Fax 02 6281 1476

www.centricwealth.com.au

