

What's the big deal about having a Will?

By Carolyn Middleton

This is the first of two articles on the topic of Wills.

Everyone is familiar with the word “Will.” But not everyone appreciates why an adult should have a Will and why it is important to review or update your Will at certain stages of your life or when your personal circumstances change. Relationships may start or break down, or it may be time to pass the executorial baton to mature adult children.

A Will is a legal document setting out the testator's¹ instructions as to what should happen to his/her assets or property after death. Sounds simple. Not quite. Many people are surprised to learn that not all their assets or financial resources will form part of their estate

Title to a jointly owned asset will pass to the surviving joint tenant upon the death of a joint tenant by operation of law. Jointly owned assets will not form part of a deceased person's estate². Whereas co-owners who hold their interests in property or assets as tenants in common are in a very different situation. The property interest held by a deceased co-owner will form part of that deceased person's estate. Depending upon the nature of the property or asset then this could raise issues for the surviving co-owners or the disposal of the part interest, particularly, where a business is concerned. This can impact upon the ongoing operation of the business or worse its viability as well as affect others such as employees, suppliers and customers.

Generally speaking, superannuation does not form part of a deceased person's estate. Superannuation is a complex issue because of the variety of funds, the particular legislation applying to a fund or superannuation fund rules. Public sector superannuation funds are regulated by legislation which prescribes whom may receive the superannuation funds upon the death of a member. Industry funds or self-managed superannuation funds are trust funds held for the benefit of the deceased member. A member may nominate the recipient of the death benefits and depending upon the type of nomination and whether it is current at the time, a superannuation trustee may not be compelled to pay the death benefits in the manner nominated. This article does not deal with all the variables that may arise in relation to superannuation death benefits.

A Will needs to have a contingency plan. No-one knows or should assume who will survive whom. Obviously, you cannot deal with every conceivable scenario. It is important to deal with reasonably foreseeable contingencies to ensure your estate passes in a manner which you wish.

Once made, a Will remains in place unless revoked or upon the later marriage of a testator unless the will is made in contemplation of that marriage. Many years may pass between the date of a Will and the date of death when the Will comes into effect and in such

¹ Testator is the will-maker

² In NSW there is an exception in family provision claims for jointly owned assets to be included as notional estate of a deceased.

circumstances the last Will may not reflect the deceased's current intentions or apply in the intended or desired manner because of changed circumstances.

For example, a person makes a Will following the birth of his/her first child and appoint a spouse as executor and a sibling as alternate executor. If the Will has not been updated and many years later when the testator dies, the children are mature adults and the spouse or sibling nominated as executor or alternate executor may have passed away, be too frail to perform the role of an executor or lost mental capacity. In that scenario, what is a time of mourning may be made more difficult and result in higher costs to administer the estate in order to address these issues.

All Wills should:

- (1) have a revocation clause cancelling all earlier wills and a declaration that this is the last will and testament of the will-maker;
- (2) appoint an executor and preferably, an alternate executor as a back-up;
- (3) dispose of the deceased's estate by specific gifts or division of the estate: and
- (4) have a clause disposing of the residue of the estate.

A Will should be tailored to the individual's family and personal circumstances taking into account the nature and composition of the assets, property and liabilities. The best way to ensure your wishes are carried out is to seek professional legal advice in the preparation and execution of your Will. This may give you peace of mind and make things easier for those left behind to deal with your estate.

Contact us at Middleton Gardiner & Associates on telephone 02 8005 4057 or by email carolyn@middletongardiner.com if you require advice or assistance on making or updating your Will or estate planning.

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