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Information Sheet – Making a Will

What is a Will and why do you need one?

A Will is a legal document that sets out how your assets are distributed and dealt with when you die. Making a Will is the only way you can ensure your assets will be distributed according to your wishes. (It should be pointed out here that your Will deals with your estate assets as opposed to your non-estate assets. The latter can comprise real estate owned as joint tenants as well as superannuation and life insurance in many instances. (There is more detail on this below.)

If you die without a Will, your assets will then be distributed according to a pre-determined formula set out in the NSW Succession Act 2006 with certain family members or relatives receiving certain defined shares of your assets despite what you may have wished. This might result in unnecessary financial hardship and emotional stress for certain family members. In addition, the administrative process of dealing with your estate is also made a lot more complicated when you don't have a Will.

Formal requirements for a Will

A Will must conform to strict legal requirements in respect to its drafting and its signing, otherwise the Courts may decide it is not valid which can be effectively the same as dying without a Will. It is therefore recommended that a lawyer be involved in the drafting and signing of your Will.

What is included in a Will?

There are a few standard matters typically dealt with in a Will:

- Firstly, you need to nominate an executor or executors. An executor of a Will has the responsibility of administering the estate in accordance with the terms of the Will.
- Secondly, you need to set out how you want your assets distributed; that is, the Will needs to specify who are to be the beneficiaries and also specify which assets or what proportion of the estate they are entitled to.
- Thirdly, a Will usually details certain trustee powers which become relevant if any of the beneficiaries are children. The entitlement of a child beneficiary has to be held in trust until they turn 18 or such other age as the Will may specify. These powers enable, for example, the trustee (normally the same person as the executor) to apply monies from the beneficiary's share to assist in the child's education, health and accommodation needs, and to invest it so as to increase its value.

Duties of executor

Some of the duties of an executor include:

- Locating the Will
- Applying to the Supreme Court for a Grant of Probate of the last Will. Probate is a formal document that confirms the executor and gives them permission to administer the estate in accordance with the Will. It is the document whereby the court is effectively stating that it is satisfied that the Will forming part of the application is in fact the last Will of the deceased.
- Determining the beneficiaries
- Collecting assets
- Paying any outstanding debts and liabilities of the deceased
- Distributing assets according to the terms of the Will, including managing longer term trusts. Such trusts would typically involve beneficiaries who are children where their entitlement is held in trust until they turn 18 or some other specified age
- Preparation and management of accounts
- Lodging taxation returns
- Dealing with any claims on the estate.

Choosing an Executor

You should take care in choosing your executor as they will be responsible for the management and distribution of your estate after your death. Notwithstanding that executors will typically engage a solicitor to assist in administering the estate, it is the executor who has the ultimate responsibility, so choosing someone suitable is important. An inappropriate executor may lead to additional stress for your family or beneficiaries. Executors will often be close family member (typically, a spouse or child) but may also be a trusted friend or advisor.

It is possible to appoint more than one person as your executor although we would not recommend more than two executors as the process can become unwieldy. It is also preferable that your executor doesn't live overseas or interstate. It is generally advisable to appoint an alternative executor in the event that your first choice of executor predeceases you or is unwilling to act in the role. In appointing an executor, it is recommended that you discuss your intentions with that person first.

Distribution of Assets

A Will sets out how your estate assets are to be distributed on your death. A person who is entitled under a Will is a beneficiary. You can make specific gifts of specific assets (for example, a specific item of jewellery, an amount of money or a property) or you can give to beneficiaries a specified share of the estate. Typically, where the testator has more than one child and those children are beneficiaries, the children will take equally; that is, they will be entitled to equal shares.

In some estates there can be some advantage in setting up testamentary trusts rather than giving assets or a share in the estate directly to a beneficiary. A testamentary trust is created by a will and operates in the same fashion as a family trust. A testamentary trust will usually give the trustee the discretion to allocate income and capital amongst the beneficiaries. This can be beneficial in reducing potential tax liabilities for beneficiaries or protecting certain beneficiaries whose assets might be

exposed to claims by creditors, ex-spouses and the like. It would normally be on the advice of your accountant or financial advisor that a testamentary trust be included in your Will.

Where should I keep my Will?

It is important to store your original Will in a safe place. The original Will (not a copy) has to be lodged as part of any Probate application. It's therefore a good idea to tell someone close to you where your Will is stored. Many people keep their Will at their lawyer's office. Indeed, we store many Wills here at our office. You can also lodge a Will in a safe deposit box with your bank.

How often should your Will be revised or updated?

Your Will expresses your wishes at a particular point in time. It is advisable to regularly review your Will as your circumstances change so that it accurately reflects your current wishes. Situations where you may want to update your Will include:

- Marriage
- Separation or divorce
- Starting a defacto relationship
- The executor named in the Will having become ill, is unable to handle the responsibility or has died
- A beneficiary named in the Will having died
- Death of spouse or death of a beneficiary

- The value of legacies diminishing over time: while you may have left a sum of money that seemed significant when you last made your Will, what is it worth in 'today's' dollars?
- Retirement: this is an ideal time to be proactive in your estate planning and possibly look at setting up tax effective arrangements through your Will
- When you buy or sell assets: there are many examples of people bequeathing assets which they sold before they died. This resulted in some beneficiaries receiving nothing, while others received significantly more than was intended in the original Will.

If I get married or divorced does that affect my Will?

If you marry after you have made a Will, the Will is generally revoked or cancelled, unless it was made in anticipation of marriage. Making a Will in anticipation of marriage requires a specific provision in the Will to that effect.

If you divorce after you make your Will, it only revokes or cancels any gift to a former spouse. It also cancels your former spouse's appointment as executor, trustee or guardian in the Will unless the former spouse is trustee of property left on trust for beneficiaries that include children of both you and your former spouse. However, this won't apply if the Court is satisfied that the Will maker did not intend by divorce to revoke the gift or appointment. Such an intention would require a specific provision in the Will.

Who can contest my Will?

While you are entitled to leave your assets to anyone you wish, in some circumstances, friends or relatives who believe they have not been sufficiently provided for are entitled to contest your Will.

People who can contest your Will under the Succession Act 2006 are not restricted to your spouse and children. Claimants can include a defacto partner, any other dependants or a former spouse. A claimant needs to convince the Court that he or she should receive a share or greater share of your estate, based on their various criteria set out in the Succession Act which include such matters as the current financial needs of the claimant, contributions financial or otherwise made by the claimant to you in your lifetime, and evidence of testamentary intentions particularly if made in writing even if not included in your Will.

Non-estate assets

We mentioned above that not all your assets will necessarily be dealt with by your Will. Knowing that you may have such assets may have a bearing on the provisions in your Will. Below are some common examples of assets that will often not be dealt with under your Will.

Property owned jointly as joint-tenants

Many couples own real property as joint tenants as opposed to tenants-in-common. With a joint tenancy, under the principle of survivorship the property will become the sole property of the surviving owner when the other owner dies. The property would not form part of the deceased's estate. If you own as a tenant-in-common then you own a specified share which will form part of your estate and be dealt with by your Will.

Superannuation

How your superannuation money is dealt with upon your death (the superannuation death benefit) is determined by the trust deed of your superannuation fund. Generally, most people nominate a beneficiary or beneficiaries as part of paperwork they sign when joining a superfund. This nomination can be binding on the trustee or, alternatively, the trustee may have discretion as to whom the superannuation death benefit is paid. A binding death benefit nomination is only current for three years so it may well be the case that a nomination made by you may not be current. You should check this with your superfund. It is possible to nominate your estate in your death benefit nomination but if you have not done this, then the superannuation death benefit will not form part of your estate and will be paid either in accordance with your binding nomination assuming there is one that is current or otherwise by the trustee of the fund in a manner the trustee considers appropriate.

Life Insurance

If you have a life insurance policy and have nominated a beneficiary of the policy, then that nomination will take precedence over the terms of your Will and the proceeds will not form part of the estate. If you are the beneficiary of your own policy, then these proceeds will flow to your estate. If your superannuation death benefit has a life insurance component, it will be paid according to the rules of the superannuation fund.

Further Advice

This information sheet sets out some of the basic considerations and issues relating to the making of a Will. If you have any queries or wish to seek advice in relation to the making of your Will please feel free to contact us by phone of 9181 5764 or by email to tom@bealelawyers.com.au