



STRUCTURING & ESTATE PLANNING IN BRIEF

MACGILLIVRAYS

S O L I C I T O R S



ASSETS, WILLS AND ESTATE PLANNING

Making a Will is just one part of developing an effective estate plan. There are many other factors to consider that will affect the distribution of your assets on your death.

Your Will only deals with assets that form part of your "estate". These are assets that you personally own and control. However, these days many people have considerable assets that do not fall into their estate. Some examples are set out below.

- (i) **Joint property interests** (i.e. bank accounts, motor vehicles) and real property held as joint tenants do not form part of your estate, as on the death of one joint holder, the property passes to the surviving joint holder. If you are the remaining surviving joint holder, only then on your death will these assets form part of your estate.
- (ii) **Life insurance policy** proceeds will be paid to the nominated beneficiary on your policy. This may be your spouse or children for example. If you want the proceeds to be distributed in accordance with the provisions of your will, then you must ensure that your legal personal representative of your estate (your executor) is the nominated beneficiary of the policy.
- (iii) **Superannuation entitlements** are not necessarily paid to your estate's personal representatives. It is the trustee of the super fund that determines where your entitlements will be paid upon your death. Given many people have saved a significant amount of money in their super funds, it is important to determine where the entitlements (which often include a life insurance component) will be paid to.

Generally super death benefits can only be paid to the deceased's spouse (which includes defacto), the deceased's children (including adopted, step and ex-nuptial children) or a person who was financially dependent or in an independent relationship (such as two elderly siblings living together) or the deceased's estate.

If you have made a valid nomination to the trustee before your death as to your preferred beneficiary, this will be considered by the trustee. Such nomination can be confirmed by a direction to the trustee in your Will and also assists the trustee in making a decision. However, the trustee is not bound by such nomination or directions. Some funds do allow the member to give binding death benefit nominations to the trustee and such nomination, if valid, override the trustee's determination. The trust deed must provide for these nominations and there are requirements as to the way in which such nominations are made to ensure they are valid.

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E X P E R T I S E



If you have a self managed super fund, it is equally important to consider who will have control of your trustee company on your death, as the trustee, barring any binding nomination, will decide who receives your entitlements. There have been cases where the remaining member of a family super fund, who became the sole shareholder of the trustee company on their parent's death exercised the trustees discretion for their own benefit.

(iv) **Assets held in family trusts.** People often do not realise that the assets they hold on trust, or as directors and shareholders of a corporate trustee, are not theirs to dispose of by Will. For people with significant wealth held in a trust it is critical to review the terms of the trust deed as to the succession of control. For example, who will hold the power to remove and appoint the trust (the appointor) on the death of the present appointor? Often trust deeds provide that this will be the legal personal representative of the appointor, so selection of executor of the Will is vital. It may be useful to prepare a statement of wishes to assist with the further management of the trust.

(v) Similarly, **businesses and other assets** owned by companies cannot be disposed of by Will. It is the shares that are held in the company that can be disposed of, subject to any shareholders agreement that may be in place.

WHAT IS YOUR FAMILY SITUATION?

Once the nature of your assets are ascertained, the function of estate planning is to ensure as far as possible that those assets, will on your death, fall to the persons that you wish to benefit.

Our family structures have changed significantly in the last few decades. Many families are blended families, with children from previous relationships whose needs have to be considered as well as those of a new partner and possibly children of that new relationship in determining an appropriate estate planning outcome.

It is somewhat of a challenge to determine what equates to a balance between the competing needs. It is not desirable to leave the whole of your estate to the new partner, on the basis that they will then provide for all children in their Will. It is quite likely that your children from the previous relationship will make a claim for family provision on your death as the risk for them is that the new partner may meet someone else, or simply change their Will to benefit their own children or a new partner.

If you do not have sufficient assets to make a division between all parties in a blended family, another solution is the use of a **capital protected trust**. This provides the spouse with income for life and leaves the capital for the children.

Trust structures within the Will may also be appropriate if any of the beneficiaries have gambling or substance addictions, have poor financial decision making ability, are in an unstable marriage or defacto relationship or suffer from a disability.

A **testamentary trust** set up in your Will, places your assets in the hands of a trustee appointed in your Will who then has the discretion to distribute income or capital to the persons you have nominated as beneficiaries. Thus the assets do not pass directly into the hands of your beneficiaries and offers greater protection against the likelihood of the assets forming part of the matrimonial asset pool in a relationship breakdown or loss of assets through poor financial decision making.

Should you wish to **leave a child out of your Will**, due to their conduct, it is useful to leave a statutory declaration setting out your reasons remembering that you will not be here at the time any claim is made to express your views. Such a declaration will not necessarily prevent a claim being made. You should obtain legal advice on your reasons for leaving a child out of your Will as in most cases your estate will bear the costs of litigation, thus decreasing the benefit your other beneficiaries will receive.

As you can see, estate planning is not simply a matter of making a Will except in the most basic of circumstances.

If you wish to discuss your estate planning needs, please contact our Structure & Estate Planning Solicitor, Sandra Bassett on 07 3228 5353.



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S U C C E S S F U L

