

The Importance of Estate Planning

Why do I need to consider estate planning issues?

It is important for all of us to ensure that the assets we have accumulated over a lifetime are left for the benefit of those people or institutions we wish to support, and left in the way that is most beneficial to the recipient. The only way to ensure this is to make a valid Will, having first obtained the appropriate advice.

What if I have already made a Will?

You may believe that your current Will is perfectly adequate (and that may well be the case). However, it is strongly recommended that you review your Will regularly. When you marry or a marriage is dissolved, when a major asset is acquired, when a business is commenced or sold, when the circumstances of your beneficiaries change, when your personal financial circumstances change or the financial circumstances of your beneficiaries or, importantly, when changes are made to existing tax laws, then a serious review of your Will should be undertaken, even if your intentions regarding who you wish to benefit have not changed. Marriage or divorce can revoke either partially or in full an existing Will, hence there are some people who believe they have a Will when they in fact do not.

What happens if I do not have a Will?

If you do not have a Will then your assets will be distributed among your next of kin in accordance with a formula set out by legislation, regardless of whether or not this is in their best interests or the result accords with what you would have wanted. If a person dies without any living relatives, then the whole of his or her estate will at the first instance pass to the government.

What do I need to consider when making a Will?

Some of these issues are set out under the sub-headings below.

1. Appointment of Executors

Should I appoint a family member, family friend, professional adviser or trustee company? The answer to this question cannot necessarily be determined without careful consideration of the proposed gifts and the circumstances of the intended beneficiaries. Thought must also be given to the question of remuneration of an Executor and Trustee, especially in circumstances where that person is not a beneficiary.

2. How do I best provide for my spouse or de facto spouse?

This will depend on your family and financial circumstances. It is important that the needs of a spouse or de facto spouse are carefully considered and balanced against the wish to benefit children or subsequent generations. One cannot automatically assume that a surviving spouse will not remarry and such an occurrence can significantly affect the rights of children to share in an estate.

3. What if I have a child who is in financial difficulties, is someone who is unable to properly manage money or who suffers from a disability?

Much thought needs to be given to balancing the needs of a beneficiary against the risk that a gift will be lost or wasted. The establishment of trusts under a Will can be an effective means of dealing with this issue. Similar issues need to be considered if a child is in a relationship that may be unstable.

4. What are the advantages of establishing a trust within my Will?

Not only can there be important asset protection advantages arising from establishing a trust within the Will, but there can also be significant tax advantages to the beneficiary. A trust established in a Will is often a simple method of providing a significant benefit to a beneficiary, compared with making an absolute gift to that beneficiary.

Superannuation

Many of us now have significant assets in superannuation. You should not presume, however, that the proceeds of any superannuation policy will be distributed in accordance with the terms of your Will. This will only occur in the event that you leave no dependents (usually a spouse or children, including children who are not financially dependent on you) or if you have made a binding nomination in favour of your estate to the trustee of your superannuation fund. Binding nominations must be renewed every three years to be effective and a distribution of superannuation assets can often be overlooked by inexperienced Will makers.

Family trusts

Assets contained in a family trust do not form part of an estate for distribution under a Will. Careful examination of the trust needs to be undertaken to ensure that the Will maker's intentions can, as far as possible, be implemented in relation to trust assets.

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Who will pay my debts after I die?

Again this is an issue that requires careful thought, especially considering the transfer of an asset (such as a house) to which a mortgage liability is attached.

Unintended financial consequences

Thought must also be given to the consequences when making a gift that may arise in the hands of the beneficiary for payment of Capital Gains Tax or on a beneficiary's entitlement to receive pensions or other entitlements.

This is only a sampling of the issues surrounding estate planning and does not touch on the possibility that assets may be held interstate or outside of Australia, that there may be minors or disabled children who require the appointment of a guardian, the wish for certain beneficiaries to have options to acquire particular assets, the powers of Executors and Trustees to deal with assets and many other considerations. The importance of obtaining proper advice for making a Will cannot be underestimated.



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