# Estate Planning – Wills

Estate Planning involves managing the transfer of wealth to your chosen beneficiaries. Putting a valid Will in place is one aspect of estate planning.

Having a valid will in place gives you peace of mind knowing that your wishes are more likely to be followed in relation to your financial and personal matters in the event of your death.

## How it works

A Will is a legal document that sets out how you want your assets to be distributed when you die. You must have both legal and mental capacity to be able to make a valid Will.

Some important items that you need to consider when drafting your will include:

- who should benefit from your estate
- whether special bequests of assets are to be made to specific beneficiaries
- who the executor of your estate should be – this can be more than one person and they should be willing and able to accept the role, and
- what assets can be distributed under the terms of your Will – and whether you might need to make other arrangements for certain types of assets that are not automatically distributed in accordance with your Will.

The executor has the duty of carrying out your wishes in the Will and is granted power to administer the estate assuming probate is granted by the relevant Court (if required).

You may also wish to consider whether to leave assets to your beneficiaries directly, or through a testamentary trust, whether you wish to establish a life interest for a particular person, or whether guardianship provisions need to be made for a certain beneficiary.

- Testamentary Trust – a trust may be particularly useful if you have beneficiaries who are young, have a disability, face the potential for a divorce or other litigation, or have problems with the control of money. Using a trust can allow for certain assets to be controlled and managed by the trustees on behalf of the beneficiaries of the trust. This could provide a number of key benefits, including asset protection and tax planning opportunities.

- Life Interest – a life interest can be used if you want to give someone the right to use an asset during their lifetime but have another beneficiary take ownership of the asset at a later point. A life interest is commonly used to enable a surviving spouse to continue living in a home, with the ownership of the home eventually passing to the children at the end of a specified period, or when that person passes away.

- Guardianship – if you have young or disabled children, your Will can include the nomination of your preferred guardian for those children. Your guardianship nomination is a declaration of your intentions only and can be overruled by a court if the nomination is not in the best interest of the child.

## Estate and non-estate assets

Before you start planning your estate, it's important to understand the way different assets are treated and the options available to you.

Making sure your assets go to the right people after you pass away is not always as simple as stating your wishes in your Will. How your property is distributed may depend on a number of factors, including:

- whether you owned an asset individually or jointly,
- the legal structure of ownership, if an asset is owned by more than one person,
- the terms of your Will, and
- state or territory based legislation.

An asset you own individually (or your ownership interest in a particular asset that you own with someone else) will be categorised as either an 'estate asset' or a 'non-estate asset'. This will play an important part in determining how the asset is dealt with when you pass away.

Assets that are automatically form part of your estate when you pass away and are dealt with through your will are called 'estate' assets. Examples include:

- assets held solely in your own name such as shares and bank accounts, and
- your share of assets that you hold as tenants-in-common with another person.

Assets that do not form part of your estate are called 'non-estate' assets. Any provision in your Will relating to a non-estate asset will be invalid. Your non-estate assets include:

- assets that you own as joint-tenants with another person, where ownership will automatically pass to the surviving owner,
- personally-owned life insurance policies where there is a valid beneficiary nominated,
- money held in superannuation (except in certain situations), and
- assets held in a family trust.

### Challenging a Will

Your Will may be challenged after your death in certain situations. Examples of these situations include where:

- the Will was not your last will, or it is not completed correctly
- you did not have mental capacity at the time you signed the Will
- you were forced or pressured into making the Will
- a person you had a responsibility to provide for believes you didn't adequately provide for them.

Family provision legislation exists to ensure that certain people are provided for after a person's death. The list of people who can challenge a will on these grounds can vary across the states but may include your spouse (whether married or defacto), children and step-children. It can also extend to other family members or individuals.

Having your will drafted by a solicitor and reviewed as your circumstances change can reduce the chances of your will being challenged.

## Benefits

The benefits of having a Will may include:

- Your estate may be administered faster and with fewer complications because your intentions will be known.
- Your assets are more likely to pass to your intended beneficiaries.
- There is reduced potential for family disputes.
- You have opportunity to manage tax implications and reduce costs for beneficiaries.
- You will have opportunity to nominate a suitable guardian for your young children.

## Risks, consequences and other important things to consider

These include:

- Once in place, you should review your Will every few years or when your circumstances change.
- If you die without a valid Will, you will have died 'intestate' and the distribution of your assets in is determined by state/territory legislation.
- The tax and social security implications of leaving assets to certain beneficiaries should be considered when drafting your Will.
- Superannuation is generally not automatically an estate asset (unless for example you make a valid binding nomination to your legal personal representative). It is important to make appropriate arrangements in respect of your super when reviewing your overall estate plan. This may include making a beneficiary nomination with your fund, and/or making provisions in your Will if appropriate.
- It is important to ensure that your executor and/or family know where to find a copy of your latest Will and other important documents.

Version: 3.0
Issue date: 01 July 2021