

## Wills

Approximately 50% of adult Australians do not have a Will or do not have a valid Will. This is a sobering statistic when you consider the potential outcomes include:

- Your estate will be distributed according to a statutory formula with no regard to your or your family's wishes. This may result in your estate assets being paid to unintended beneficiaries.
- Your estate assets may be significantly reduced because they were needed to fund expensive court costs associated with proving what was a poorly drafted or potentially invalid Will.
- Distribution of your estate may be delayed causing your family significant financial hardship.

An investment in a professionally prepared Will is a sound investment if it means these outcomes are avoided.

### What assets are distributed by your Will?

Many people today, especially those in "high risk professions" (for example, doctors, lawyers and alike) choose not to own assets in their own name, instead opting for ownership through companies and trusts. While your Will only deals with assets which you own personally the provisions of your Will are still important for most people in dealing with the following:

- Personally owned assets. This can sometimes include control of the investment vehicles in which substantial assets are owned.
- Assets which may subsequently be owned personally because you survive your joint tenant, for example, if you own your family home as joint tenants, then if you survive your partner you will automatically own 100% of your home in your personal name.
- Assets inherited personally. This is an important but often overlooked situation. While you may not own many assets personally, you may personally inherit substantial assets under someone else's Will in the future.

Assets held in family companies, trusts (including family trusts and superannuation) are not personally owned and therefore you need to make separate arrangements regarding the control of assets within those vehicles.

### Important provisions in your Will

Every Will is different. However, apart from the provisions dealing with the division of your estate among your chosen beneficiaries there are some important provisions which a professionally drafted Will should include (depending on the circumstances of each case):

- In many cases we recommend your Will contain provisions to allow assets to be transferred into testamentary trusts rather than directly to the beneficiaries. There are a number of significant advantages of testamentary trusts. For more detail about the advantages and disadvantages of testamentary trusts please refer to our "Testamentary Trusts" fact sheet.
- If your intention is for each of your assets (estate and non-estate assets) to be shared equally among your children, then your Will should include a provision which allows your executors to take into account the distribution of assets among your children outside your Will. For example, there may be significant tax advantages in one or more of your children receiving a larger share of your superannuation and you may want this to be taken into account by your executors when distributing assets under your Will.
- If you have young children, then your Will should nominate a guardian for your children in the event both parents have passed away. We also recommend you take the time to leave detailed instructions for your guardians about how you would like your children to be raised. For more information about this important topic please refer to our "Guardianship Guidelines" fact sheet.
- Your Will should be consistent with any business succession agreements you have in place. At the very least your Will should alert your executors to the fact such agreements exist so your Will can be administered in light of the terms of those other agreements.

## What assets are not distributed in your Will?

Your Will only deals with assets you personally own. These days, for a variety of reasons many people's most significant assets are not owned personally. This is one of the most important reasons why a comprehensive estate plan should be prepared which adequately deals with all the assets under your control, including those not owned by you personally.

Set out below is a table of assets which are reviewed as part of a comprehensive estate plan. In each case we have identified the likely governing document and the person or entity likely to be in control of the asset. From an estate planning perspective it is important to make sure the underlying documents are consistent with your wishes in terms of the future control of the asset in question.

Asset	Likely decision maker	Likely governing document
Self managed superannuation fund	Executor and surviving members	Trust deed
Unallocated reserve in self managed superfund	Executor and surviving member(s)	Terms of trust deed applicable on winding up
Superannuation/allocated pension or annuity (binding nomination)	Fund member	Binding nomination
Superannuation/allocated pension or annuity (no binding nomination)	Fund trustee	Trust deed or terms of annuity
Personal asset (owned individually)	Will maker	Will
Joint tenancy (e.g. family home)	Surviving joint tenant	Will of survivor
Share of tenancy in common	Will maker	Will
Discretionary (family) trust	Appointor	Trust deed
Private company or unit trust	Shareholder or unitholder (potentially any of the above)	Will or trust deed
Loan to company or trust	Lender	Will or trust deed
Unpaid allocation from trust	Beneficiary	Beneficiary's Will
Business assets subject to a business succession agreement	Power of attorney / Executor / Other principal (business partner)	Business succession agreement
Life, total permanent disability, trauma or other insurance	Nominated beneficiary	Relevant insurance policy

McMahon Clarke Legal specialises in estate planning and wealth management for private clients. We work with you to develop an estate plan that takes into account your personal circumstances.

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