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A Guide to Issues You Need to Consider When Making a Will

This guide explains a number of issues relevant to the accompanying form "*Will Fact Finder - Information we need from you*". The heading numbers below correspond to the numbers in that form.

1. Aliases

Some people use more than one name to refer to themselves. For instance, it is not uncommon for people from a non-English background to use both their birth name and an English name (e.g. the movie star Lee Jun Fan, who also used the name Bruce Lee).

Some people also use a different name from their legal name (e.g. "Bill" instead of "William" or "Meg" instead of "Margaret").

If you commonly use a name other than your legal name, you need to tell us so that we can consider whether a reference to that name should be included in your Will. This is especially important if you own assets or have accounts with banks or other financial institutions in that other name.

2. Real estate

If you own real estate jointly with someone else (e.g. with your spouse/partner), we need to know whether you own it as joint proprietors or tenants in common.

If you own a property with someone as joint proprietors and they survive you, your interest in the property will automatically pass to them on your death. It won't form part of your estate[1] and can't be dealt with under your Will.

If you own the property as tenants in common, your share of the property will pass to your estate and can be dealt with under your Will.

If you own real estate as joint proprietors but want to be able to deal with it in your Will, it is possible to change the ownership to tenancy in common. However, that generally requires the agreement of the other owner(s) and documents to be signed and registered at the Land Titles Office. It may also have tax or stamp duty ramifications.

If you don't know whether you own a property as joint proprietors or tenants in common, we may need to do a title search at the Land Titles Office to find out.

3. Life insurance

When you take out a life insurance policy, you are asked to nominate a beneficiary[2] of the policy. Any pay-out under the policy will be paid directly to the nominated beneficiary.

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[1] "Estate" – the assets you own at the time of your death.
[2] "Beneficiary" – someone who is gifted cash, property or other assets in a Will.

If you have nominated yourself or your legal personal representative as the beneficiary, the pay-out on your policy will be made to your executor and will form part of your estate. If you have nominated someone else as the beneficiary, the pay-out will go straight to them and won't form part of your estate.

If you have nominated someone other than yourself or your estate as the beneficiary of your life insurance, that may need to be factored into how you deal with your estate in your Will.

4. Superannuation

Many people wrongly assume that their superannuation will form part of their estate and be paid to the beneficiaries under their Will. In fact, this will only happen if your estate happens to be the recipient of your superannuation death benefit.

The legal position generally is that your superannuation fund can pay your death benefit to your spouse, any of your dependants or your estate, in its discretion.

Many (although not all) superannuation funds allow you to override this by making what is known as a Binding Death Benefit Nomination. As the name implies, this is a binding written nomination which directs your superannuation fund how to pay your death benefit.

You should consider whether you can and should give a Binding Death Benefit Nomination to your superannuation fund. You should also consider the taxation implications of how your death benefit is dealt with. Lump sum payments paid to dependants (as defined in income tax laws) will generally be tax free. Taxable components paid to non-dependants are subject to tax.

5. Interests in private companies, family trusts, private unit trusts or partnerships

If you control assets via a company or trust, we will need to discuss with you how that control is to pass to your beneficiaries when you die.

In the case of a company, this will involve a consideration of who should get any shares you own in the company upon your death. It may also require an examination of any rights you may have under the constitution of the company to appoint directors.

In the case of a trust, this will require an examination of any rights you may have under the trust deed to appoint a replacement trustee or to wind up the trust and direct how its assets should be disposed of. If the trustee of the trust is a company, it will also involve a consideration of who should get any shares you own in that company.

6. Foreign assets

If you own assets located in a foreign country, you may need to obtain legal advice from a lawyer in that country about whether a Will made in Australia will be recognised there and also whether there are any particular local law formalities that need to be followed (eg does it have to be signed or witnessed in a particular way, does it have to be notarised, does it have to be registered under local law etc).

7. Debts and other liabilities

When you die, your executor becomes responsible for paying your debts and other liabilities from out of your estate. If there's not sufficient cash in your estate to do this, your executor may need to sell some of your other assets to raise the required funds.

For example, you might own a house in your own name that you want to leave to your spouse/partner. If you don't have enough other assets to pay your debts, your executor may have to sell the house to cover your debts and your spouse/partner will be left without a home.

Ideally, you should plan for paying out your liabilities on your death through life insurance and/or superannuation.

8. Specific gifts of cash, goods or other property

You need to consider whether you want to make any specific gifts of money, goods or other property in your Will.

For example, many women like to leave their jewellery to their daughters or other female relatives so that it "stays in the family". Some people like to leave an amount of money to a favoured relative or friend or to their favourite charity. You may also have a coin, stamp or other collection or a special piece of furniture or artwork that you want to leave to a particular person.

You need to be careful that any cash gifts you make in your Will are not so large that they unduly eat into the size of the gift you want to leave for your main beneficiaries (see 9 below). Your main beneficiaries will receive whatever is left over after your debts are paid and any specific gifts in your Will are made. The larger the cash gifts you make, the less your main beneficiaries will receive.

To the extent you can, you should also try to plan your affairs so that your estate will have sufficient cash or other liquid assets to cover any cash gifts you make. If it doesn't, your executor may have to sell some of your non-liquid assets to raise the money to make the gifts. This could mean that assets you might otherwise want to go to your main beneficiaries have to be sold. Depending on the assets in question, the sale could also trigger tax liabilities.

Non-cash gifts to charities can trigger capital gains tax liabilities. You should seek specific advice from your accountant or tax adviser about the tax consequences involved before including in your Will a non-cash gift to a charity.

9. Main beneficiaries

Someone who is married or in a committed domestic relationship will typically leave the residue[3] of their estate to their spouse/partner.

If they have children and their spouse/partner pre-deceases them, then they will usually provide in their Will that their estate is to go to those children in equal shares. They will also provide that if any of their children dies leaving children of his or her own (ie the Will maker's grandchildren), the gift the deceased child would have received if he/she had survived is to go to those grandchildren.

If you want to do something different to that, we will need to discuss with you the potential for your spouse/partner or children to bring a claim against your estate under family provision laws (sometimes also called "testator family maintenance laws"). These are State and Territory laws that enable certain categories of persons who are dissatisfied with their entitlement under a Will to apply to the court for further provision out of an estate. The court can make such an order if the court decides that the Will does not make adequate provision for that person's needs. The categories of persons entitled to make a claim vary in each of the Australian States and Territories, but generally include a spouse, de facto partner, same sex partner, former spouse, child and certain other past or present dependants.

[3] "Residue" – the balance of your estate remaining after your debts and funeral and testamentary expenses have been paid and all specific gifts of money and property have been distributed. This may include gifts that have failed because a beneficiary has died before the gift to them has vested.

10. Back-up beneficiaries

You need to consider what is to happen to your estate in case the gifts to your main beneficiaries don't take effect. This might happen, for example, if your main beneficiaries die before or at the same time as you do (say, in a common accident) or, in the case of minors, if they die before reaching the age of 18 years or any higher “vesting age” you specify in your Will (see below).

If you have 2 or more grown up children who live away from home, the likelihood of this happening may be fairly remote and therefore you may not need to nominate back-up beneficiaries.

However, if you don’t have children, you only have one child, or your children still live at home with you, then you really should consider nominating back-up beneficiaries.

Most people will nominate as their back-up beneficiaries their closest living relatives apart from their spouse/partner or children. In the case of a younger person, this might be their parents. For someone older, it might be their brothers and sisters or nephews and nieces.

Someone who doesn’t have close living relatives might instead nominate friends or charities to be their back-up beneficiaries.

11. Executor

The executor of a Will is responsible for carrying out the instructions it contains.

Who to appoint
Your executor should be someone you trust and, preferably, someone who is familiar with your affairs. For that reason, most people appoint a close relative or friend to be their executor. If you do this, you really should talk to the person first before appointing them to make sure that they’re happy to take on the role.

Couples will often appoint their spouse/partner as their first choice and, if they have one, an adult child or another close relative as a back-up executor.

You can, if you wish, appoint a trusted adviser (eg your lawyer or accountant), the Public Trustee or an authorised trustee company to be your executor. “Professional executors” will usually only act if they can charge their normal fees. Often, those fees will be related to the size of your estate and can be significant.

In working out who to appoint, you should think about the gifts you are going to make in your Will. For example, if you have appointed back-up beneficiaries to cover the contingency of your main beneficiaries dying before or at the same time as you, then you will want to appoint someone who is not a main beneficiary to be one of your executors or otherwise there will be no-one to administer the gifts to the back-up beneficiaries if they have to be made.

How many to appoint
Unless you are appointing the Public Trustee or an authorised trustee company, you should appoint at least 2 executors, in case one of them dies before you or is otherwise unable or unwilling to act. This is especially important if an executor is substantially older than you (say a parent or parent-in-law) since, in the natural order of things, they are likely to die before you.

You can appoint 2 or more executors to act jointly, or one after the other (ie a first choice, and then a back-up in case your first choice can't or won't act).

Joint appointments
If you make a joint appointment, your executors will have to act by unanimous agreement, which can be inconvenient or cause delays in the administration of your estate. It can also lead to problems if they don't get along. You should only appoint joint executors if you are confident that they will be able to work together to administer your estate.

If you wish to appoint executors to act jointly, we recommend that you preferably appoint only 2, or at most 3, joint executors. Having any more than 3 joint executors will just make it too hard for them to administer your estate.

12. Guardian

If you have a child or children under 18 years of age, it is important that you appoint someone to be their guardian.

If you die while a child of yours is still under 18 and you haven't appointed a guardian and their other parent is no longer alive or able to look after them, a court or tribunal will have to determine who should look after them. It may appoint someone that you wouldn't necessarily have chosen for the role.

It's possible to appoint two or more people to act together as the guardian of your children but you should think carefully before doing so, especially if you're considering appointing a married couple or domestic partners as joint guardians. If their relationship breaks down, your children could end up under the joint care of two people no longer living together and perhaps no longer even speaking to each other. If you want your children to live with and be raised by a married couple or domestic partners after your death, it is usually better to choose one of them (the one with whom you have the closest affinity and with whom you would want your children to live if that couple broke up) to be their guardian.

13. Funeral and medical wishes

You can, if you wish, include a statement of wishes in your Will about your burial or funeral arrangements.

For example you may wish to express a preference to be buried and to specify the cemetery where your body is to be laid to rest, or to be cremated and to specify what is to be done with your ashes.

Other common examples of funeral wishes include:

- I want a small funeral with only family and close friends invited.
- It is my wish that people not bring or send flowers to my funeral but instead donate their money to a nominated charity.
- I would like to be buried in a simple coffin.
- I want my funeral service conducted in accordance with a nominated faith.
- I want a non-religious funeral service.
- I would like an appropriate headstone placed on my grave and the cost of that paid from out of my estate.

As your executor is the only person with the right to make these decisions, you should satisfy yourself that your executor will carry out your wishes.

You can also, if you wish, include a statement of wishes in your Will about medical matters. For example:

- Donating your body to be used for education, research or other medical or scientific purposes.
- Donating your body parts for transplant or other therapeutic purposes.
- If you have been involved in an IVF program, expressing your wishes about any frozen semen, ova or embryos you may have in storage.

14. Other matters

Vesting age for gifts
It is also usual in a Will to make a gift to a younger beneficiary conditional on them reaching a specified age. Lawyers call this a "vesting age". Until the beneficiary reaches that age, the gift is held by the executor "on trust" for them. This prevents the beneficiary getting their hands on the gift before they are mature enough to handle the responsibility and potentially wasting it as a consequence.

The minimum vesting age you can specify is 18 years, but many Will makers like to extend that to 21 or 25 years to allow time for a young adult to mature even further before they are given what could be a substantial sum of money to spend or invest.

If you are going to specify a vesting age, it should be no higher than 35 years as anything higher could run into problems under a legal principle called the "rule against perpetuities". Also, the higher the vesting age, the longer the administration of your estate has to run and the greater the burden on your executor.

Testamentary trusts
A testamentary trust is a trust established by someone's Will. It comes into existence only when the person dies.

In appropriate circumstances, there may be significant advantages in including a testamentary trust in your Will. It can be used, for example, to:

- Provide enhanced asset protection for a beneficiary.
- Make tax effective distributions to beneficiaries under 18.
- Prevent beneficiaries from inappropriately spending their inheritance.
- Care for children or a dependant who is incapacitated.

We can assist you in determining whether a testamentary trust is appropriate for you.

Enduring Powers of Attorney
In addition to thinking about what is to happen to your estate after you die, you should also consider what might happen if you become physically or mentally impaired and are unable to manage your affairs.

You can appoint a person to take care of your investments and other financial matters using what is known as an Enduring Power of Attorney (Financial). This is a special type of Power of Attorney that continues to operate after you become legally incapacitated.

In Victoria, you may also wish to consider appointing an enduring medical agent who can make health decisions for you if you become incapacitated and an enduring guardian, who can make lifestyle decisions for you if you become incapacitated.