

You have Questions We have Answers

WILLS

Wills, Executors, Beneficiaries, Trusts, what does all this mean and more importantly, what does it mean for YOU?

The world of Wills can be overwhelming and confusing, you may feel that its easier to do nothing, rather than try to understand it all! Have you been taking the Ostrich approach and burying your head in the sand?!?!

In legal terms, a will is the legal instrument that permits a person to make decisions on how their estate will be managed and distributed after their death.

Sounds simple enough doesn't it! In many instances, although not all, even identifying who you want to manage your Will and who you want to benefit from your estate are the easy parts.

The harder part may come with identifying an individual's assets and debts and more importantly, how they are owned, so that they can be correctly dealt with in a Will.

Great care must be taken when drafting a Will to ensure that the wishes of the Will maker are legal and able to be carried out and that the Will is worded and signed correctly.

What about Real Estate?

If you own Real Estate, what does the Title actually say? Who owns the real estate and in what manner?

If you own Real Estate as a Sole Proprietor or as Tenants in common with other parties, yes you are able to bequest you share of that real estate in you Will. In this instance, Probate of your Will, will be required at the time of your death to allow your Executor/s to deal with the Real Estate.

However if you own real estate with other parties as Joint Proprietors, upon the death of one of the joint Proprietors, the remaining proprietors will automatically be entitled to own the deceased proprietor's real estate and it cannot be dealt with in a Will. In this instance the transfer instrument is an "Application by Surviving Proprietor" and Probate is not required to deal with the real estate.

It is possible to change the manner of holding of a Title to Tenants in Common or Joint Proprietors, depending on your requirements and individual set of circumstances. This type of change to the Title does not attract a Stamp Duty fee.

Thought needs to be given when bequesting real estate!

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What should I do about my child who has no regard for the value of money?

On occasion parents are concerned that one of their children is irresponsible with money and while they want them to share equally in their estate with their siblings, they want to ensure that the money they are leaving will not be unnecessarily squandered and instead their hard earned will be put to good use.

One option is to set up a Trust for the Spendthrift Child in your Will so that their bequest can be used towards their benefit, but under the control of the Executor of the Will.

I have re-partnered later in life, do I have to leave my real estate to my partner so they have somewhere to live?

It is possible to set up a life interest clause in a Will that allows for someone to remain living in real estate for as long as they want to (or for a specific time or set of circumstances), but during that time the person with the occupancy right will never own the real estate, it will remain owned by the Estate and once the person passes or relocates (or as specified in the Will), the ownership of the real estate will be passed in accordance with the Will.

Of course thought needs to be given to whether this type of life interest is applicable in your particular set of circumstances and the clause needs to be carefully drafted in order to ensure that your wishes are accurately reflected.

Who can make a claim against my Will?

The simple answer is that anyone can make a claim against your Will! The Question is, how successful will their claim be? Obviously if a non family member made a claim against your Will and they had never even met you before, well then their claim is not going to be too successful!

The law has traditionally recognised the rights of individuals to freely dispose of their estates in whatever way they see fit. However, a Will can be challenged where a deceased has failed to make adequate provision for persons (usually family members) to whom a deceased owed a moral duty or moral obligation of responsibility.

If the aggrieved individual feels that a person who has died has not made adequate provision for them in their Will, they can challenge the Will and have the court make provision for them out of the deceased's estate. This is commonly known as a Testator's Family Maintenance application.

The court must decide whether the applicant has been left with adequate provision for the applicant's proper maintenance and support. The court will consider the applicant's financial position, including:

- The applicant's financial resources (including earning capacity) at the time of the court hearing and for the foreseeable future;
- any prior benefits given to the applicant by the deceased;
- whether the applicant was wholly or partly supported by the deceased before his/her death;
- whether any other person has a duty to support the applicant.
- Finally, the court will consider whether the deceased actually failed in his/her duty to adequately provide for the applicant under the Will.

Traditionally family such as spouses, defacto spouses, children, step children, grandchildren and parents are the ones to claim against Estates, however if the facts justify the challenge, anyone can.

An application may be refused if, the Court considers that the deceased owed no moral duty to the applicant, due to the applicant's questionable character or conduct.

These are some of many many examples of difficulties posed when drafting Wills. If the consequences of what is written in a Will are not properly thought out, then clauses in the Will may become invalid.

We have all seen the ads on TV for cheap or even free legal Will kits. These kits are great if they are completed and signed correctly and you understand exactly what the legal ramifications of your situation are, so that you can word your Will correctly to clearly set out your intentions, but unfortunately they do not provide advice relevant to your specific situation, which unfortunately most people need.

Leaving no Will, or an unclear or invalid Will may have saved you a bit of money, but will leave your loved ones with an extra headache and costs at a time when they are already suffering.

We Can Help!

If you do not have a Will, or have not reviewed your Will recently please do so. A little bit of time, effort and cost now, can save a lot of time, effort and additional cost in the future – we can help with all your Will requirements – ask us how!