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Why a Will and Preparing for Incapacity are Important

Why do I need a Will?

When a person dies without a Will, the deceased dies "*intestate*" and his or her assets are required to be distributed in accordance with the *Administration Act 1903* of Western Australia. This Act stipulates a fixed distribution, which in almost all cases is different to the way in which the deceased might have wanted to leave their estate. Importantly, it may leave a spouse without adequate provision. The administration of the estate also becomes more cumbersome and costly.

Under this Act, in a normal first family situation where a deceased dies intestate, leaving a spouse or de-facto partner ('partner') plus one or more children, the surviving partner is currently only entitled to:

- the household chattels;
- an amount of up to $50,000; and
- one half of the balance of the estate if one child survives the deceased, or, where two or more children survive the deceased, one third of the balance.

Even when there are no children or grandchildren, a partner must share a varying portion of the estate with the birth family of the deceased. A deceased leaving a partner *as well as* an ex-partner with whom the deceased had not settled their family law financial affairs, leaves those partners potentially having to share the partner's fixed entitlement in the estate, between themselves.

If the deceased left any child under 18 years, trustees for the child's share must be approved by the Supreme Court. All persons over 18 having an interest in the estate must apply (or must consent to others applying) to administer the estate.

Although making a Will is often an overwhelming process for clients or neglected in the hope that "my time is not yet up" the lack of a will or an out-of-date Will, can thus cause great difficulties.

Could I do my own Will?

A well drafted Will and a clearly thought out succession plan are the only sound reliable basis for passing your personal wealth to your family and other beneficiaries. This involves a thorough understanding of:

- your assets and liabilities

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- how your assets are held, such as the difference between assets held as joint-tenants and tenants-in-common, or assets held in a trust
- all the entities in which you hold assets and how these entities or assets are affected by your death, (eg family trusts, superannuation, life insurances, companies and other business vehicles)
- the law of succession and tax implications, so that both legally effective and tax efficient outcomes are achieved.

The availability of cheap so called “solicitor approved” will kits, or worse, blank Will forms, seems to suggest that Wills can be made without any special skill. As anyone with legal knowledge and experience will readily confirm, a homemade will is unfortunately often the cause of expensive litigation, either to establish that the will itself is valid, or its legal effect. On-line will-making remains simplistic and requires the user to take the risk of the input being completely accurate and does not properly cover superannuation and trusts, nor anything other than very simple situations.

Only where both the assets are very simple and the distribution of the estate is straight forward (such in a first marriage one spouse leaving all assets to the surviving spouse, with the substitution of children for any predeceasing spouse) may simple wills suffice.

What is involved in making a Will?

Some of the matters which require careful consideration by the will-maker and his/her solicitor include:

- The careful choice of the executor(s) who will administer the estate.
- Complications caused by multiple marriages or relationships, children of varying ages and parentage and the fact that a will can generally be revoked and re-made at any time by a surviving spouse or de-facto partner. The possible options to overcome these problems vary significantly and in each case they carry different (often conflicting) risks. However it is worth persevering until a best compromise is reached, rather than having no Will!
- Whether marriage or divorce are contemplated, since each event revokes a previous Will under WA law unless otherwise stated.
- Whether during life gifts, financial assistance or even superannuation entitlements should be “brought into account” by children, and equalised, so that all children benefit equally in the overall asset distribution before an after death.
- Detailed provisions may be needed for beneficiaries with special needs due to physical or mental disability.

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- Some beneficiaries may need a "protective trust" to prevent them losing their inheritance.
- A "life interest" may be need to be created, whereby some or all assets are left to a nominated beneficiary who may only enjoy the use of, or income from, those assets during his or her lifetime, and on the death of that beneficiary, the assets must be distributed to other stated beneficiaries. Life interests require specialised gifting clauses.
- Family business or investments held under the umbrella of a company or discretionary trust, and superannuation distribution considerations. Many people misconceive that they are the "owners" of assets held by such entities, failing to realise that they do not have the capacity to distribute such assets via their will.
- Income tax and capital gains tax issues (CGT) impact on will-making in many ways and particular assets left to different beneficiaries can result in different CGT outcomes for the estate or the beneficiaries. For example the gifting of certain assets to non-resident beneficiaries may trigger a CGT and capital gains tax becoming payable by that beneficiary, or by the executor.
- Assets gifted by Will into a testamentary trust (a discretionary trust set up for a beneficiary within the will) can provide significant tax advantages for that beneficiary and their future family for up to 80 years and can also assist in protecting the assets from bankruptcy, mental incapacity and, to some extent, family law claims.
- Any mortgages or other liabilities (such as personal guarantees by the deceased) can affect the estate and the distribution under a Will.
- The consequences of possibility claims under the *Family Provision Act 1972 (WA)* which allow certain family members and/or financial dependants to claim against the estate.
- The consequences of unresolved Family Law proceedings.
- The mental capacity of the will-maker. The Court will require proof of mental capacity where a death certificate specifies "dementia" as a cause of death.

What other crisis management steps could I take?

When someone loses mental capacity, their financial affairs and assets are left at risk of being misapplied, and all institutions aware of the incapacity will freeze assets, ceasing to accept the authority of those customarily acting for them. An Enduring Power of Attorney (EPA) is a document in which a person (the 'Donor') appoints one or more trusted persons to control, their financial affairs in the event of the Donor's losing their mental capacity to conduct those financial affairs. This very useful document can therefore save much anguish, time and cost. Although relatively simple compared to a Will, an EPA must still be carefully considered and prepared. At Murfett Legal we currently provide free EPA's whenever we prepare clients' Wills.

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An Enduring Power of Guardianship may also be desirable to ensure the right person(s) are empowered to make decisions about your welfare and medical treatment when you are no longer able to make those decisions.

Advanced Health Directives can be made if there are concerns about the form of medical treatment you might receive after you become incapable.

Australian studies have shown that currently only about 5% or people have made formal end-of-life plans.

Next steps

The above brief outline does not cover the entire range of issues which might arise but may give an indication of what is involved in sound succession planning. For more information or advice please contact our experienced team of lawyers at Murfett Legal.

For further information contact Murfett Legal by telephone on +61 8 9388 3100, via our website at www.murfett.com.au or email one of the following directors:

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