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Take Control - With Your Independent Financial Adviser

Estate planning *gives you a final say*

Planning for what happens when you pass away or become incapacitated is an important way of protecting those you care about, saving them from dealing with a financial and administrative mess when they're grieving.

Your will gives you a say in how you want your possessions and investments to be distributed. Importantly, you should also establish enduring powers of attorney and guardianship as well as a medical treatment decision maker and/or advance care directive in case you are unable to handle your own affairs towards the end of your life.

At the heart of your estate planning is a valid and up-to-date Will that has been signed by two witnesses. Just one witness may mean your Will is invalid.

You must nominate an executor who carries out your wishes. This can be a family member, a friend, a solicitor or the state trustee or guardian.

Keep in mind that an executor's role can be a laborious one particularly if the Will is contested, so that might affect who you choose.

Around 50 per cent of Wills are now contested in Australia and some three-quarters of contested Wills result in a settlement.[i]

The role of the executor also includes locating the Will, organising the funeral, providing death notifications to relevant parties and applying for probate.

Intestate issues

Writing a Will can be a difficult task for many. It is estimated that around 60 per cent of Australians do not have a valid Will.[ii]

While that's understandable – it's very easy to put off thinking about your own demise, and some don't believe they have enough assets to warrant writing a Will – not having one can be very problematic.

If you don't have a valid Will, then you are deemed to have died intestate, and the proceeds of your life will be distributed according to a statutory order which varies slightly between states.

The standard distribution format for the proceeds of an estate is firstly to the surviving spouse. If, however, you have children from an earlier marriage, then the proceeds may be split with the children.

Is probate necessary?

Assuming there is a valid Will in place, then in certain circumstances probate needs to be granted by the Supreme Court. Probate rules differ from state to state although, generally, if there are assets solely in the name of the deceased that amount to more than $50,000, then probate is often necessary.

Probate is a court order that confirms the Will is valid and that the executors mentioned in the Will have the right to administer the estate.

When it comes to the family home, if it's owned as 'joint tenants' between spouses then on death your share automatically transfers to your surviving spouse. It does not form part of the estate.

However, if the house is only in your name or owned as 'tenants in common', then probate may need to be granted. This is a process which generally takes about four weeks.

Unless you have specific reasons for choosing tenants in common for ownership, it may be worth investigating a switch to joint tenants to avoid any issues with probate.

Having a probate is favourable if there is a refund on an accommodation bond from an aged care facility.

Super considerations

Another important consideration when dealing with your affairs is what will happen to your superannuation.

It is wise to complete a 'binding death benefit nomination' with your super fund to ensure the proceeds of your account, including any life insurance, are distributed to the beneficiaries you choose. You can nominate one or more dependants to receive your super funds or you could choose to pay the funds to your legal representative to be distributed according to your Will.

If a death benefit is paid to a dependant, it can be paid as either a lump sum or income stream. But if it's paid to someone who is not a dependant, it must be paid as a lump sum.

If your spouse has predeceased you and you have adult children, they may pay up to 32 per cent on the taxable component of your super death benefit unless a 'testamentary trust' is established by the will, naming them as beneficiaries.

A testamentary trust is established by a Will and only begins after the person's death. It's a way of protecting investments, cash and other valuable assets for beneficiaries.

Rights of beneficiaries

Bear in mind that beneficiaries of Wills have certain rights. These include the right to be informed of the Will when they are a beneficiary. They can also expect to hear about any potential delays.

You are also entitled to contest or challenge the Will and to know if other parties have contested the Will.

Unexpected outcomes

David died in his early 60s. He left his estate to his wife Sally in accordance with his Will.

It seemed sensible at the time. But after a few years, Sally remarried. Unfortunately, the marriage did not last. When Sally died some 20 years later, her estate did not just go to her and David's children but ended up being shared with her estranged second husband.

A testamentary trust, stipulating that the beneficiaries of both David's and Sally's estates were to be only blood relatives, may have solved this issue.

If you want to have a final say in how your estate is dealt with, then give us a call.

i https://willandestatelawyers.com.au/success-rate-of-contesting-a-will

ii https://www.finder.com.au/news/australians-have-no-estate-plans

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