

YOUR WILL DOESN'T COVER EVERYTHING – DEALING WITH NON-PERSONAL ASSETS ON DEATH

Your Will is a legal document that sets out directions for the administration and disposal of your assets after death. It must comply with strict formalities to be valid. However, even a valid Will can sometimes be totally ineffective if it does not achieve what you intend because of assets you do not actually own.

Your Sole Assets

This is because a Will can only control the assets that you owned in your sole name as at the date of death. Therefore, any assets held in a company, a trust (such as a family trust) or a superannuation fund will not form assets of your estate. Put another way, your Will can only give away what you own.

This can be confusing to some who think that they own everything, even those assets that have been placed in a company, trust or superannuation fund, and that their Will can automatically control the distribution of these non-estate assets. On the other hand, having assets held by other entities can also be of benefit to those seeking to protect those assets against claims after their death.

Non-estate Assets

For example, you do not individually own assets held as follows:

- **Jointly-owned assets** are not part of your estate. These assets pass by the laws of survivorship directly to the survivor, and do not pass through your Will.
- **Company or trust assets** are not part of your estate. Company assets are governed by the company constitution (although

you may, of course, own the shares) and not your Will. The distribution of trust assets is governed by the trust deed and not by your Will.

If assets are held in a trust such as a family trust, it will be important to confirm the effect your death will have on the trust, and the tax implications of any family trust election you may make. It will also be important to ensure that you have complied with the land tax notification requirements for land held by the trust.

- **Investments in Superannuation Funds** do not normally form part of your estate. This is because the superannuation assets are held by the fund's trustees on your behalf.

If you have a SMSF, it is prudent to ensure that your trust deed is up to date to take into account the legislative changes that occur on a regular basis.

In particular, you may wish to have a clause allowing you to make a Binding Death Benefit Nomination and/or appoint a Death Benefit Guardian, if the circumstances are appropriate.

Only if assets are transferred from these other entities to your sole name prior to your death, or to your estate after your death, can your Will control their distribution.

However, it is important to note potential stamp duty and CGT liabilities for any asset transfers in this manner.

A famous case of getting it wrong

Katz v Grossman [2005] NSWSC 934 is a famous precedent that demonstrates how a Will cannot deal with non-personal property.

***Katz v Grossman* [2005] NSWSC 934**

A Will cannot direct an SMSF trustee as to how that member's death benefits will be distributed.

The surviving husband of an SMSF fund died leaving two surviving children: a daughter and a son.

The father and the daughter had been co-trustees of the SMSF after the wife had died. The daughter was therefore the only surviving trustee of the family SMSF.

The son was neither a trustee nor a member of the fund.

The fund comprised the father's superannuation benefits of

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\$1,000,000.00, and his Will directed that his estate was to be split equally between his two children.

However, the daughter exercised her discretion as the surviving trustee to disregard her father's Will, and paid all SMSF fund benefits to herself.

The Superannuation Complaints Tribunal could not assist the son, as that body has no jurisdiction over SMSFs.

The son was unable to get the father's Will to make up the shortfall as the Will did not contain any equalisation clauses to even up the unequal payment of death benefits.

Further, the father had not made a Binding Death Benefit Nomination. In fact, the SMSF deed did not appear even to allow for a BDBN to be made.

In summary, the NSW Supreme Court held that:

- The daughter had validly exercised her discretion as a trustee to distribute the whole of the death benefits to her alone, even though the son had been unfairly excluded, and
- The Will could not direct the distribution of death benefits from the SMSF.

How can you ensure non-personal assets are distributed to your intended beneficiaries?

Whilst a Will cannot control how non-personal assets are dealt with after your death, you can take measures during your lifetime to ensure assets are directed according

to your wishes by putting in place control measures in companies, trusts and super funds that you have an entitlement in.

Examples of control measures for non-personal assets

- **SMSFs**
A well drafted SMSF trust deed will enable the members to control the distribution of their super entitlements on their death in a number of ways, including via a BDBN, death benefit rule, via a reversionary pension or the appointment of a death benefit guardian. By utilising one or more of these methods, you can ensure that your intended beneficiaries will receive your benefits in the Fund.
- **Unit Trusts**
As the beneficial entitlement in a unit trust lies with the units held in that trust, leaving your units in the trust to a beneficiary in your Will will provide that beneficiary with your entitlement in the trust.
- **Discretionary Trusts**
As the ability to receive entitlements from a discretionary trust lies at the discretion of the trustees of the trust, care should be taken as to appropriately structure the trustee of the trust, and the

appointor of the trust, so that the beneficiaries you intend to receive benefits from the trust will have the ability to do so.

■ Companies

The beneficial entitlement in a Company lies with the shareholders, with the management of the Company being handled by the directors. Appropriate provisions for the transfer of shares upon a person's death can provide the transfer of that person's interest in the Company to their beneficiary.

It doesn't stop there

The above examples are just a few measures that can be put in place during a person's lifetime to ensure all of their assets, not just their personal ones, are directed according to their wishes upon their death.

Our expert team at Topdocs Legal Pty Ltd can assist you and your clients with suitable estate planning strategies that allow them to successfully direct their benefits according to their wishes upon their death.

Should you have any queries or require more information, please contact the team at Topdocs Legal on 1300 659 242.

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