

irongroup lawyers

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What You Can't Leave in Your Will

● Ignorance is not bliss...

When you build up expertise in a particular area it's sometimes easy to forget that what you might take for granted can be 'news' to a lot of clients.

When it comes to planning an estate, we find people are often surprised at what they can't leave to their loved ones via their Will. We acted for a few clients last year who were left to manage estates where it appears the Willmaker may not have fully understood what would happen to their assets when they died.

Depending on how someone's financial affairs have been structured, some assets are excluded from an estate. For example, if an asset is purchased jointly or in the name of a family trust those assets do not form part of an estate and cannot be passed on via a Will. Similarly clients may not realise that superannuation funds, including insurance policies, do not automatically form part of an estate.

In these circumstances, the client should be made aware of what will happen to those assets when they die and be given an opportunity to address the consequences.

Following are some examples of the more common non-estate assets where clients can be caught unawares.

● The Family Home

When two or more people buy property they can buy it either as joint tenants or as tenants-in-common. Property held as tenants-in-common can be held in equal shares or in different proportions, for example it could be held in shares of 1/3 and 2/3. The defining feature of this arrangement is that each tenant owns their own share independently.

Conversely, if property is bought as joint tenants, the interest of each joint tenant is not separate or distinct from the other. Each is entitled to an undivided interest in the whole property. That is, they each own the whole.

The consequences of this on estate planning are that a share in a family home held as a tenant-in-common can be bequeathed via a Will as that share is considered a distinct and separate asset. However if the home has been bought as joint tenants, the deceased's share in that home automatically passes to the other surviving joint tenant/s and by-passes the estate.

For many people, this is not an issue. The family home passes from husband to wife or vice versa. However if there has been a second marriage or perhaps if it's a fairly recent de facto relationship, the individuals involved may prefer to keep their share in the home separate so they can pass it on to other beneficiaries via their Will.

If your client has already purchased a home as a joint tenant, there may be costs associated with changing the ownership structure, however advising them of the consequences will mean they can at least make an informed decision about what happens to the rest of their assets.



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● Case Study 1:

In this situation, a young de facto couple had purchased a home as joint tenants. The de facto wife (who had a young son from a prior relationship) had contributed significantly more to the house deposit than the de facto husband. When she died in a car accident, the house title was automatically transferred to her de facto via a survivorship application and her son received nothing. Is that what she expected?

● Joint Bank Accounts or Shareholdings

Joint bank accounts fall into a similar category. Funds in these accounts are owned jointly. For example, if there are two account holders they don't own 50% each, they own 100% jointly. Similarly shares held by a couple belong to both parties jointly.

As these accounts and shares by-pass the Will and ownership transfers across to the surviving account or share holder, the Willmaker's beneficiaries may not receive what was intended.

● Case Study 2:

One of our clients came to us with a problem. His elderly father had re-married, sold the family home that he had owned with his first wife and deposited the proceeds into a joint bank account with his new wife.

The client had a dilemma. If his father died, his second wife would automatically assume ownership of the joint bank account and his prior children would receive nothing from the house sale as an inheritance.

Of course, if that's what the father intended, it's his right to do so. However as can often be the case, he may not have realised the consequences of depositing the house proceeds into a joint bank account.

● Superannuation

This is another issue that is usually 'news' to clients. Superannuation is not automatically an estate asset and without a binding nomination, the trustee determines who will receive the proceeds. Again, if the client is unaware of this, it may result in inequities amongst intended beneficiaries.

When it's a straight-forward situation, such as a first husband and wife with adult children, it may not be a problem. However if there are financially dependant and non-financially dependant children there can be concerns that the children won't get an equal share of the inheritance the Willmaker intended.

Similarly if there is a second spouse or de facto, and prior adult children, the trustee may pay the proceeds to the spouse or de facto alone and the children will miss out.

Again, if that's what the client wants, there is no issue, however we believe a large number of clients don't realise this is what will happen with their superannuation, which can form a significant

part of their accumulated assets.

● Case Study 3:

One of the probate applications we did last year involved an estate comprising an investment property and cash deposits. There was also a significant sum in his superannuation fund. The deceased person had recently remarried and had two adult daughters from his first marriage. He had left his estate to be divided equally amongst the three women.

The superannuation fund trustee paid all of the superannuation proceeds to the wife with the investment property and cash, as the only estate assets, then being split equally between the three.

The two daughters maintained their father had not realised the superannuation fell outside the estate and would have wanted it all shared equally. In this instance the stepmother agreed to an equal distribution that took the superannuation proceeds into account.

Not all clients are as fortunate however and usually appreciate advice on including an estate equalisation clause in their Will to deal with these issues.

● Family Trust Assets

Many business people hold assets in a family trust. These are discretionary trusts where a Trustee is responsible for managing the assets on behalf of the beneficiaries and has complete discretion as to whom they can give income and capital. The critical control position however, is that of Appointor who can change the Trustee at any time and who can therefore influence any capital and income distributions from the trust.

As the assets in the family trust do not belong to any one individual they cannot be passed on via a Will. The family trust deed however usually allows the role of Appointor to be changed via a Will.

If it's not taken care of in the Will, or worse still, they die without one, their executor or court appointed estate administrator takes on the role.

Neither of these possibilities may suit the Willmaker so again, clients need to be aware of the need to change the Appointor in their Will and if they choose, to prepare a statement of wishes about what they want to happen with the assets in the trust. This statement is not binding on the Appointor, which is why it is even more important to choose someone they trust.

● Contact Us

If you have any queries about any issues in this newsletter or would like to discuss clients' estate planning needs please call us on 03 8621 9000.

With our depth of experience and focus on providing positive outcomes for clients, we would be pleased to help.