

Estate Planning

Why it is more than just a Will

It is a common misconception that everything you “own” will be dealt with under your Will. This is not always the case.

An important part of estate planning is distinguishing between estate assets (which are divided in accordance with the Will) and other assets, entities or interests to be dealt with and properly dealing with these.

The following might not be estate assets.

1. Joint Tenancies

- (a) Any assets you hold as joint tenants will pass to the surviving joint tenant automatically, despite any provisions in your Will.
- (b) Assets commonly held as joint tenants include real estate, shares and bank accounts.
- (c) A joint tenancy can be “severed” so that the asset is held as tenants in common and your share can be left under your Will. This can be done without triggering any tax or duty.
- (d) There are several reasons why it might be appropriate to change a joint tenancy to a tenancy in common:
 - (i) you may not want the surviving joint owner to receive the asset; or
 - (ii) it may be better for your share to be left to a testamentary trust under your Will.
- (e) However, joint tenancies can also be a useful estate planning tool, particularly if the goal is to minimise the amount of assets that form part of the estate, for example, to avoid a Will challenge.

2. Family Trusts

- (a) You cannot deal with the assets in a family trust in your Will as the trust will continue after the death of the controllers.
- (b) Therefore it is necessary to transfer control of the trust (as opposed to leaving the trust assets to your beneficiaries).
- (c) Family trusts provide great flexibility while you are alive but this flexibility can be dangerous if the trust is not dealt with properly in your estate planning.
- (d) In your estate plan, you need to consider:
 - (i) how to leave your shares in the corporate trustee;
 - (ii) passing of the Appointor or Principal role (with the power to change the trustee); and
 - (iii) how to deal with any money you are owed from the trust (which often arises from unpaid distributions), as this will form part of your estate.

3. Companies

- (a) Assets held in companies will remain in the company and your shares in the company will be left in accordance with your Will.
- (b) It is important to check the constitution for the company as there may be unusual share rights or provisions governing transmission of shares.

4. Superannuation

- (a) On your death, your superannuation is not necessarily dealt with under your Will.
- (b) The trustee of your superannuation fund must deal with your benefit and can pay:
 - (i) your spouse;
 - (ii) your children;
 - (iii) anyone financially dependant on you
 - (iv) anyone with whom you are in an “interdependency relationship”; or
 - (v) your estate.
- (c) If the benefit is paid to your estate, it will be distributed in accordance with your Will.
- (d) For most superannuation funds, it is possible for you to sign a binding nomination which specifies how any superannuation benefit will be paid on your death. It is important to check the terms of the trust deed to ensure they allow a binding nomination, and then to follow the rules precisely.
- (e) However, unless there is a risk of a dispute over the superannuation, our view is that it is generally better not to make a binding nomination but rather to allow the trustee a discretion to ensure the superannuation can be dealt with in the most tax effective way when the time comes.
- (f) Binding nominations need to be considered as part of your estate plan and should not be done as a matter of course.

5. Life Insurance

- (a) Whether life insurance is dealt with under your Will depends on the owner of the policy and if there is a nominated beneficiary.
- (b) If you own your own policy and there is no nominated beneficiary, the proceeds will be dealt with in accordance with your Will.
- (c) Where there is a nominated beneficiary, the proceeds will be paid directly to the beneficiary and will not be dealt with under your Will.
- (d) If your life insurance is held in your superannuation fund, the proceeds will be dealt with as part of your superannuation benefit.

CPM10068997 2692633v1

These comments and opinions are of a general nature and are based on Cooper Grace Ward's interpretation of the law as at the date the document was prepared. The position may alter if the law changes as a result of legislation, new rulings or cases. Clients contemplating establishing a trust should obtain specific advice on the implications of that strategy.

