OUR AIM IN THIS GUIDE IS TO PROVIDE YOU WITH SOME KEY INFORMATION ON WHAT TO CONSIDER WHEN MAKING A WILL
I JUST BOUGHT A NEW HOME THEATRE SYSTEM

...so this will have to wait

Don’t worry, we’re all guilty:
- Christmas has just passed – I’ve got to save some money
- I’m too busy
- I’d rather not think about dying thanks!

Putting off doing your will until when it is convenient, when you can afford it, or when you’re ‘older’ is bad logic, bad planning and probably a bit irresponsible. But we’re not here to lecture you...

The reality is, your will can be the most important tool you’ll have to ensure your family and loved ones are protected and provided for after you pass away.

Is it really that bad if I die without a will?

If you die intestate – without a will – your assets will be distributed in accordance with the Succession Act by the State Government appointed Public Trustee, which can be a costly process and may not be how you’d want your assets distributed. Those assets might even end up with the State.

It could also mean:
- Your children may not be looked after by the people you intended;
- Some unintended people may benefit considerably, and some intended people may not;
- Assets you may have wanted passed on may need to be sold off so that unintended beneficiaries can be paid out, following a claim;
- You beneficiaries may lose major tax and asset protection benefits.

And you most certainly can do that. Drafting your own will is a far better option than doing nothing, but the same DIY pitfalls apply to will drafting as they do to everything else in life, but with potentially far more damaging consequences.

If things are not done properly, the perceived savings you might achieve in the short term in doing it yourself could be lost tens of thousands of times over after you pass away if you don’t get it right.

Here are some risks:
- if you don’t draft your will properly, part or all of it may be invalid. This means that your estate (or part of it) may be dealt with as if you had no will in the first place, rather than in accordance with your wishes;
- if because of incorrect drafting a gift to a loved one fails, it may pass to someone else, or at worst, pass to the State;
- assets you think form part of your estate when you pass away may not (such as superannuation, life policies, trust assets). What you think you’re allowed to pass on may not be even available to pass on in the first place.

All of these things can potentially send the cost of administering a will (after a person dies) skyrocketing – what could be avoided by a little time and maybe a week or two in wages suddenly becomes a major problem.

When you consider the potential value of your estate in years to come, with houses, businesses, cars, loans, bank accounts, shares, children, and the affordability of professional advice, there’s no logical reason why anyone ought to risk doing it themselves.

An investment in my future

Our experienced team can meet with you, obligation free to discuss your needs, what you should consider and let you know what we think it will cost. You can then decide.

We also offer payment terms which can be useful when managing a tight budget.

I’d rather do it myself
WHERE DO I START?
WITH A GOOD ESTATE AND SUCCESSION PLAN

When considering your estate plan, you should at least think about the following:

- For you:
  - a will
  - an enduring power of attorney
  - possibly life insurance to ensure that you don’t leave your loved ones in difficult circumstances
  - advance health directive (in concert with your doctor)

- If you have a business:
  - partnership or shareholders agreements, buy / sell agreements
  - life insurance to ensure your loved ones receive the benefit of your interest in the business you worked hard to build up over the years.

- Who should you involve:
  - your loved ones
  - your accountant
  - your doctor
  - your lawyer
WHO WILL TAKE CARE OF EVERYTHING?

Who do I choose as an executor?

For most people in relationships, their spouse or partner is the best and most practical choice.

For those not in relationships, other family members or close friends are often the best choice, but not always.

Also, Mum or Dad may not be a practical choice if they are likely to pass away before you.

When making a decision about who to choose as your executor, think about whether:

- your choice will cause family tensions;
- you executor has a good knowledge of your affairs, and is easily accessible as they will be required to make many decisions and sign documents as part of their role, and whether or not they have you and your loved ones’ best interests at heart.

It’s not always an easy choice, and can be quite consuming in terms of time as well as emotionally.

In terms of the number of executors, we suggest that only one be appointed, with another back-up executor in case the person you appoint is not prepared to act or does not survive you.

The decision to pay executors for their efforts is a matter of choice for every family. However, in our experience, family members are generally not compensated. If you do decide to pay your executors for their efforts, you need to expressly state this, as it is not automatic. Although you should bear in mind the effect any payment will have on their own taxation position.

What about the kids?

You can appoint a guardian of your choice to take care of your children until they reach the age of 18.

Who you appoint is again a matter for you. A common-sense approach will deliver the best results. It’s important to consider where your children will be most comfortable, taking into consideration your guardians’ personal circumstances, your values and beliefs, and your views on how your children should be raised. It’s a good idea to avoid older family or friends as they might pass away before you do.

To make sure your guardians are not out of pocket, they’re allowed to utilise your estate assets and income to care for your children in accordance with the powers given to them under the will. This lets them provide for your children’s education and general needs.
YOUR BODY

ORGAN DONATION, CREMATION AND BURIAL

This is a matter of personal choice, and something you ought to discuss with your family to make sure everyone is aware of your wishes before the time arrives. We can reflect your wishes in your will.

Although this is a matter of personal preference, bear in mind the cost of carrying your wishes out: your estate will bear those costs. Elaborate or unique wishes may only serve to reduce the amount of available assets or funds to your loved ones.
IS IT ACTUALLY MINE TO GIVE AWAY?

It’s not what you might think...

Clark thought he left everything to his spouse Lois ...

Clark looked upon lawyers like kryptonite, and figured he could do a fine job of drafting his own will. After Clark died, Lois sought advice on winding up his estate. The news wasn’t good.

- The investment property Clark bought years earlier was co-owned as joint tenant with his sister, so his share in that property was transferred to his sister;
- His ‘super’ fund nominated his mother to receive death benefits;
- The life policy Clark had taken out some 13 years ago still had his former wife listed as beneficiary;
- Clark’s work car was owned by the company Clark co-founded with his business partner and was never his to give away.

Because Lois witnessed Clark’s will (they did it themselves) any gifts to her were invalid, so the remainder of his estate assets passed to his siblings and mother. Lois couldn’t afford to make the payments on the house they owned together and had to sell in a falling market. She then began very expensive legal proceedings to try to recover some of the money she felt rightfully entitled to.

Not all of the assets you enjoy or utilise in life form part of your estate asset pool. This can have disastrous results for remaining family if the gift promised to them fails to eventuate.

Following are some examples of assets that can sometimes fall outside of your estate:
- life insurance policies
- superannuation
- jointly owned assets
- assets owned by private companies and trusts
- foreign owned assets

Make a list

Make a list of all your assets and liabilities, paying attention to the owner is (individual or joint, company or trust name etc) and what level of debt is on them.

Life Insurance

As a rule, beneficiaries under life insurance policies and superannuation funds will receive their benefits under those policies, regardless of the content of your will.

If you’ve nominated a beneficiary under a life insurance policy that nomination will take precedence over whatever you say in your will, and the proceeds of that policy won’t form part of your estate.

If you are unsure you should check with your insurer.

Superannuation

More and more, super proceeds can often be the single biggest part of one’s estate and can seriously distort plans for an equitable distribution if those proceeds don’t go where you intend.

Superannuation proceeds will be paid either to nominated beneficiaries, or to those the trustee of the fund considers appropriate under the terms of the fund deed. This means super proceeds can either be directed into:
- the deceased estate where they will be dealt with in accordance with the will, or
- directly to nominated beneficiaries, where they will not form part of your estate asset pool for distribution to the beneficiaries under your will.

If the beneficiary under your will and under your superannuation or life insurance policy, is one and the same, then the issue is limited only to matters of taxation where the way in which the beneficiary receives it will determine how the money is treated.

Jointly owned assets

Remember that if you own property as a joint tenant, then that property will pass to the joint owner regardless of what you state in your will. Although this is what most people, particularly in family relationships, intend, it may not be the case if parties separate.

Assets owned by private companies and trusts

Usually, assets owned by companies or trusts may not be yours to pass on, and these entities will continue on after you pass away, subject to any instructions you leave for your executor.

You’re entitled to leave any company shares in your name to beneficiaries under your will.

Foreign owned assets

It may be that any assets you hold in foreign jurisdictions will fall under and be dealt with under that foreign law. We can let you know how this will affect you if it applies.
UNHAPPY BENEFICIARIES

CONTESTING THE WILL

Briefly, anyone who is your spouse, child or stepchild or a dependant may make a Family Provision claim (often known as contesting the will) on your estate if they believe they have not been adequately provided for.

If you think that, in light of how you want your assets to be distributed, this will end in someone being disappointed, you should let us know. There are various strategies you can adopt to minimise this risk, and although there are never any guarantees that someone won’t challenge regardless of your best endeavours, addressing it now is far better than hoping it will ‘go away’.
WHAT ELSE DO I NEED TO KNOW

Who gets what?

*Keep it simple*
We generally recommend keeping things as simple as possible when it comes to the gifting of one’s assets. Where suitable, a gift of your entire estate to your partner may be best, and if he or she does not survive you, then the remainder of your estate can pass to your children and grandchildren.

*Marriage and Divorce*
Marriage and divorce can revoke a will or some key part of it, so it is always important to think about this when your circumstances change. You can still make a binding will in contemplation of a pending marriage, but not in contemplation of the pending divorce.

This can be useful if you’re about to embark on the honeymoon of a lifetime and you’d prefer to get your affairs in order before your wedding day.

*Blended Families*
In situations where people have remarried with either or both of them having children from a former marriage, care needs to be taken to ensure that each person’s children from any prior relationship will be protected.

Depending on the circumstances, there are options available to make sure that your wishes are followed. These can include utilising separate life insurance policies, mutual wills, the splitting of gifts between children from a former relationship and one’s current life partner.

The key here is to get advice and be well informed before you make your decisions.

*Specific Gifts*
People often like to leave something special, or of a special significance to certain loved ones on their passing. If you are thinking about leaving a specific gift to family or friends, give some thought to the following.

- Do they hold that gift in the same regard that you do, or would they prefer (and would they get a greater benefit from) the money realised from its sale?
- Is it going to be a burden on them to maintain?
- Is it likely that you will still have it on your death?
- Is it likely that you may sell and replace it with a similar item before you pass away (in which case the gift may fail)?

What about tax?

Even though federal or state death duties or taxes don’t exist in Australia, tax planning is critical and we strongly recommend you take independent financial and taxation advice as part of your estate planning.

We have provided you with a brief summary below of how the impact of various federal and state taxes can affect your estate. It is important to remember that tax law is subject to frequent change. The following information is only general and should be read with this in mind.

*Capital Gains Tax (CGT)*
Generally speaking, any investments that you acquired after 20 September 1985 may be subject to CGT on disposal.

Although the passing of the asset from your estate (via your personal representative) to your beneficiaries will not result in tax being payable at that time, the ultimate beneficiary may (subject to certain exceptions) need to allow for capital gains tax when they sell.

Your beneficiaries also won’t have the benefit of any capital losses you may have carried forward.

*Income Tax*
If you leave an income producing asset to a beneficiary, any income generated from it will be taxed in their hands.

Your advisors and us

We can talk to you and your advisor further about this. If you don’t have one, we can recommend some for you to discuss your circumstances with.
BANKRUPTCY, DRUGS, & DIFFICULT DIVORCE

Testamentary Discretionary Trusts

A testamentary discretionary trust (TDT) is a trust, just like a discretionary trust, or any other form of trust that you may set up while you’re alive, except it comes into effect after you die.

You appoint a trustee, who is given powers and responsibilities to manage those assets you choose to place into that trust to the benefit of your beneficiaries, who are typically your children and other family members.

Benefits

- **Asset protection:** intellectually impaired children, an immature child, or a loved one who is or may become bankrupt, drug dependant, or embroiled in a difficult divorce, as the asset never passes to those beneficiaries on your death, but remains in the hands of the trustee for as long as you consider appropriate.

- **Tax minimisation:** if you die leaving children under 18, any income they receive from a testamentary trust is taxed at adult rates. This can save considerable amounts of money in tax when compared to alternatives such as leaving an asset to your spouse to invest and receive income from, on which tax will be paid. The savings occur year in year out depending on the situation of your dependents.
LAST WORDS

Don’t put it off any longer

Although a will is only part of what you should consider, it is definitely the cornerstone of your estate plan, and if you do nothing else, then this is a great place to start.

From here

Call us. This is what we do.

ABOUT PD LAW

PD LAW is a dynamic, progressive law firm offering a broad range of business and personal legal services.

We’re dedicated to ensuring:

- Our service is prompt
- Our advice is clear, straight forward and represents excellent value; and
- You’re a client of ours for life.

We look forward to working with you.

The Usual Legal Disclaimer

Although we are very proud of our publications, and we put a lot of effort into ensuring they are correct and current, this information is intended as a general guide only. You need to take specific advice before relying on it.