

Important Estate Terms



Brush up on your legal estate terminology

Wills

In your Will, you are legally able to determine how those assets owned by you are distributed after death. The key phrase is owned by you.

Unfortunately many Australians die 'intestate', which means they have not left a valid Will. The distribution of their estate then must be made under various probate laws. The rules are different in each State, so if you intend to move to another State, it is important that you update your Will.

Every family is different and the way you want to look after your family in the event of your death, will be highly personal. If you have children and/or you have assets, then you should have a Will. While a staggering amount of people don't have a Will, many that do have a Will, have a simple 'I love you' Will. This is a Will that says that everything goes to the other spouse, and if they have predeceased, then to the children. Not all Wills are created equal. If you have a complex family or financial situation, then a simple 'I love you' Will may not be enough.

It is important to remember that some assets cannot be dealt with in a Will. They include:

- **Joint assets** - Any asset held in joint names as joint tenants such as a bank account or residence. These assets usually revert to the other joint owner.
- **Superannuation funds** - The trustee of the fund usually has discretion as to whom the benefits are to be paid, and they are only guided by your wishes, unless you have lodged a valid Binding Death Benefit Nomination.
- **Life insurance policies** - Some life insurance policies actually specify to whom the benefits are to be paid. i.e. to your children. If a policy is taken out through a superannuation fund, then it is treated as a superannuation benefit.
- **Trust property** - Once you transfer assets to a family trust it is no longer possible to bequeath them in a Will, they are no longer your property and the trustee has control over them.

Testamentary trust

A testamentary trust is another option for you to consider when leaving assets via your Will. A testamentary trust is a trust set up to manage capital in a deceased estate. It is put in place by the Will maker (testator) within the Will and the trust can only be activated on death.

The trustee has the discretion to distribute the capital and income from the trust to the persons named or identified as beneficiaries of the trust.

A particularly useful feature of a testamentary trust is that the assets being held for the beneficiary are automatically protected from seizure by creditors. This can be very important in the event that, for example, a business venture goes wrong or the beneficiary becomes liable for damages of some kind. Assets held in a trust are not owned personally by the beneficiary and therefore do not form part of the beneficiary's personal estate. The assets held in the trust fund are protected from bankruptcy proceedings.

A testamentary trust can have advantages in divorce situations. For example, a house owned by a person outright might have to be sold, with some of the proceeds passing to an ex-spouse as part of a divorce settlement. A house owned by a trustee may be able to be retained and leased to the beneficiary for a minimal rent.

In addition testamentary trusts can be used for tax effectiveness for your beneficiaries, particularly where minor children are involved.

Enduring Powers of Attorney

An Enduring Power of Attorney (EPOA) is a formal document by which one person (called the donor) appoints another person (called the attorney) to act on his/her behalf. The EPOA is a separate document from the Will and operates only during the lifetime of the donor.

A Power of Attorney should only be given to someone you trust completely. If you own assets and lose mental capacity, someone will have to be appointed to look after your affairs. If you have granted an EPOA, you will have chosen that person (or persons) yourself. If you have not granted an EPOA, someone (e.g. your spouse, son or daughter) will need to apply to the Court or the Guardianship Tribunal to be appointed. It is likely that an officer from the Protective Commissioner's office will also need to be involved in the management of your affairs.

Advance Health Directive

Every competent adult has the legal right to accept or refuse any recommended health care. This is relatively easy when people are well and can speak for themselves. Unfortunately, during severe illness people are often unconscious or otherwise

unable to communicate their wishes - at the very time when many critical decisions need to be made. By completing an Advance Health Directive, you can make your wishes known before this happens.

An Advance Health Directive is a document that states your wishes or directions regarding your future health care for various medical conditions. It comes into effect only if you are unable to make your own decisions.

You may wish your directive to apply at any time when you are unable to decide for yourself, or you may want it to apply only if you are terminally ill.

Contact us

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