

WILLS: TAKE THE INITIATIVE...

Introduction

Gifts made to others can take many forms. Some gifts may be intended to be made during the donor's lifetime and others on his or her death. Gifts which are contemplated as taking effect upon the death of the donor are usually made by **will** and are classed as **testamentary** gifts.

Why You Should Have A Will

Making a valid will is the only way to ensure your assets will be distributed according to your wishes after your death. This may save family and friends considerable hardship and heartache in the future. Without a valid will, statute law will dictate the way in which your assets are divided. This could produce a result that may mean a hardship to your family and be contrary to your wishes. When you make your will, you can also select the executor of your choice. This ensures that a person whom you trust is responsible for administering the estate and distributing it in accordance with your wishes as set forth in your will. Despite this, one in three South Australians does not have a will, leaving such important issues to chance.

What Does A Will Do?

A will is a formal legal document that must be prepared, signed and witnessed in a particular form and following particular legal formalities. In essence, a will has the effect of disposing of the whole or part of the property of a person (the **testator**) to a **beneficiary** or beneficiaries with effect, broadly speaking, on the death of the testator. Besides disposing of property, a will may also be used exclusively to:

- Appoint a **legal personal representative** (i.e. the person, or **executor**, who administers the testator's **estate**);
- Appoint a testamentary **guardian** of a child;
- Appoint a **trustee** other than the legal personal representative in respect of a trust created under the will;
- Provide direction as to interment, cremation or the use of the **testator's body** after death for medical reasons;
- **Revoke** a previous will;
- Provide special powers to trustees to administer a trust created by a will (known as a **testamentary trust**).

It is becoming increasingly common for persons to establish one or more testamentary trusts in their will. Testamentary trusts are discretionary trusts in favour of particular beneficiaries that do not take effect until the death of the testator. Testamentary trusts provide **significant tax** and **asset protection benefits** for beneficiaries. Readers can learn more about testamentary trusts by referring to the related information sheet on that topic published by us.

What Does A Will Not Do?

Certain property is outside the ambit of a will and must be considered and addressed separately. The following arrangements and assets are generally outside the ambit of a will:

- Gifts made during your lifetime;
- Assets (including land, bank accounts and other property) held in joint names;
- The benefit of life insurance policies;

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- Superannuation entitlements;
- Property (e.g. investments, holiday house) held in a discretionary trust which you may control.

When you prepare your will, your legal adviser should also consider any of the above assets and arrangements that are applicable to your circumstances and advise you how best to deal with such assets and arrangements to reflect your wishes. For example, many people hold investment or business assets in a family trust for tax or asset protection reasons. If at the time of your death you are the appointor or guardian of such a trust, the assets held in the trust may not be distributed as you wish unless the trust deed contemplates a replacement appointor or guardian of your choosing.

A Few Other Things For You To Consider...

- **Executors.** The executor is named in the will as the person (or trustee organisation) responsible for the administration of the estate until the final distribution of assets is made to the beneficiaries. You should be aware that, although most trustee organizations (for example, the Public Trustee) will prepare your will for you for free, they will insist on acting as executor in return. Significant commissions (in the form of a percentage of the value of your estate) are then charged for acting as executor. These commissions obviously erode the amount of assets in your estate for your beneficiaries. Accordingly, you may prefer for a solicitor to prepare your will at a modest cost and for a trusted friend or family member to act as your executor.
- **Divorce or Separation.** Divorce revokes certain aspects of a will while separation does not. If you are going through divorce or separation, you should seek legal advice on the effect of these on your will.
- **“Do it yourself” will kits.** It is possible to make your own will, but you should be aware that if it is not properly written, signed or witnessed, it may be invalid. Succession law is a technical area – you should not risk unnecessary difficulties in the distribution of your estate in accordance with your wishes simply to save a few dollars in preparing the will. Also, a lawyer with appropriate experience will be able to advise and direct you in relation to your will, the appointments required by it and the tax consequences of your gifts. In practice, our experience is that many such wills contain significant defects - which translates to additional cost, legal fees and delay when the will maker dies and the will is administered.

In addition to preparing a will, we usually recommend that people appoint a **general and enduring attorney**, and a person to make medical/ lifestyle decisions under an **advance care directive** as part of their estate planning arrangements. In contrast to a will, these arrangements take effect **before** the death of a person. These arrangements are explained in a related Guide published by us.

If you have any queries in relation to the above, or would like to discuss these types of documents and arrangements, please contact **Andrew Baggio** on **8132 5000** or at **andrew@baggiolegal.com.au**.

About Us

Baggiolegal is a boutique law firm, specialising in commercial, taxation and private client law. **We understand** our client's objectives and provide clear and independent advice. Service is paramount to us. **We deliver** technically sound, timely and commercially oriented solutions. **We know** and understand the South Australian landscape, but our international perspective is unique in Adelaide. Our people have excelled in the legal profession in private practice and industry all over the world. **We apply** international best practice to our local client's needs. **We work** with our clients. **We listen** to our clients. We are approachable, accessible and personable.

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Before acting on any of our views expressed in this publication, careful consideration of the case specific facts should be undertaken by a qualified lawyer.