

FAQ on Estate Planning

While many people are unlikely to nominate estate planning aka “Thinking about what will happen to my assets when I die” as being on their “most wanted things to do” list in reality, this is something that should be on all our “must do” lists.

Proactively planning for how you would like your assets distributed after your death can save many hours of heartache for friends and family and can also aid in ensuring that the assets you have spent a lifetime accumulating are not eaten up by costly legal battles after your death which arise simply because no direction has been left as to how you wish your estate to be divided.

To help you to get started we have set out below some of the most common questions that arise when considering planning for your estate.

What is a ‘Last Will & Testament’?

A ‘Last Will & Testament’ (often simply referred to as a ‘Will’) is a written record of how you would like your assets shared or distributed after your death. A Will is different to a Power of Attorney (“POA”). A POA allows a person or company to manage your assets while you are alive. A separate legal Will is needed to deal with your assets after your death.

I don’t own very much do I really need to have a Will?

The short answer to this question is ‘YES’. There are a number of reasons why it is important to have a valid Will.

Firstly, having a Will gives you peace of mind that you have made your wishes clear and that your assets will be divided up and administered in accordance with your wishes.

Secondly, regardless of the size of your estate, you do not want costly legal disputes to end up eating into those assets. This can be particularly important if the assets of an estate are relatively modest. Disputes between would be beneficiaries quickly eat up an estate and it is very possible that very little of an estate will be left for the beneficiaries if this occurs.

I made a Will some years ago but should I think about updating it?

Even though a Will does not generally have an expiration date it is sensible to consider reviewing your Will periodically. In addition, if your personal circumstances change it is important to review your Will to take into account those changes.

Important life changes such as marriage, divorce, the birth of children and any change in personal financial circumstances such as receiving an inheritance or buying a property are also relevant milestone points at which to consider updating a Will.

It is important to seek legal advice prior to updating a Will. Sometimes the implications of a seemingly minor change to a Will are not always readily apparent and it is also important that any amendments to the Will are properly documented, signed and witnessed to ensure a Will remains valid.

Are there rules about who I must leave my assets to?

While in theory you are able to prepare a Will leaving your estate to whomever you please, even if that is a home for stray cats, in reality it is very important to seek legal advice on this point.

Relevant matters may include whether you have any infant children or other dependents. In situations involving blended families or estranged children careful consideration also needs to be given to the likely impact of leaving individuals out of a Will and whether this is likely to lead to a costly legal dispute and contest about the Will.

Who should I appoint as my Executor?

The role of an Executor is one that carries with it great responsibility and while it can be tempting to choose your best friend or eldest child simply because it seems the right thing to do, it is important to consider whether the person you are thinking of naming as Executor has the capacity to carry out the role.

The duties of an executor can include everything from arranging the funeral to managing the assets of the Estate during the period before probate is granted and the assets are distributed. Depending on the size of the estate debts may need to be paid and the tricky waters of any potential dispute in respect of the Will may need to be navigated.

In circumstances where there is a potential for conflict between family and friends it may be sensible to consider appointing an independent Executor rather than a family member or friend. This can assist in ensuring the estate is dealt with fairly and without favour and also means the burden of the Executor's role does not rest with a loved one.

The downside to appointing an independent Executor can be that considerable fees may be incurred depending on who or what organisation is appointed. Again, this is a matter where proactive legal advice can be of great assistance in determining the best way forward.

What happens if I die without a Will?

If you die without a Will you will be said to have died 'intestate'. If this occurs your assets will be distributed according to the relevant State law. This will of course be outside your control and may mean that your assets are not distributed in the way that you would have liked.

Can a Will be disputed or changed after I die?

It is possible that even with the most careful planning someone may wish to challenge your Will. If a Court finds that you did not make adequate arrangements for a person for whom you have responsibility, such as a dependent family member, then it may overturn your Will and put in place alternative arrangements for the distribution of your assets. Depending on where you live this could potentially occur even if the claim is by a non-family member.

Another basis on which a Will can be overturned is if a Court were to find that you were not of 'sound mind' when you made the Will. Being of 'sound mind' means that you had sufficient intellectual and physical capacity to make a Will. Matters that will impact on the question of 'sound mind' will be whether the person making the Will had an intellectual impairment or disability or suffered from memory loss, dementia or some other serious illness.

A validly prepared, properly witnessed and current Will is a good step in the right direction in ensuring that your assets are distributed how you want and to whom you want after your death. A carefully drafted Will can also aid in reducing the likelihood of a successful challenge to how you choose to distribute your estate.

The potential fall-out from a poorly prepared Will is significant both in dollar and personal terms and we strongly recommend that you seek legal advice before preparing or updating your Will. This is an area of law that we have considerable experience in and we are happy to discuss any questions you may have.

If you or someone you know wants more information or needs help or advice, please contact us on (03) 9459 5764 or email admin@rtlegal.com.au.