

It's a legal maze, if you Will

An article by this name appeared in the Sydney Morning Herald on 6 February 2013. It makes eminent sense and is reproduced on the reverse of this newsletter. The short article summarises some of the difficulties which arise if there is insufficient estate planning. The article alludes to the following difficulties:

- A will prepared in a jurisdiction which is different to where the willmaker is domiciled at death.



- The hidden death duties on death benefits that may be payable by a deceased's superannuation fund.
- Tax unfriendly estate planning.
- Not bringing superannuation entitlements into a comprehensive estate plan.



- Grossly inadequate homemade wills.
- The expenses involved in resolving issues that arise from badly drawn wills.

- The importance of estate planning documents that comply with the current law and the will maker's present circumstances.
- How an Enduring Power of Attorney is relevant as part of a comprehensive estate plan.



- The assistance that a "Hotchpot" (or adjustment) clause can make in your will.
- The costs involved in defending family provision claims.



- The benefits of detailed testamentary trusts.
- Desired credentials for an executor.
- Contingent arrangements in estate planning.



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It's a legal maze, if you will

Date February 6, 2013

By David Potts

Before you rest in peace, take steps to ensure your assets will reach their intended recipients.



Choose wisely ... Equity Trustees' Anna Hacker urges caution with your super nomination. *Photo: Jason South*

Don't leave home without a credit card, nor depart this world without a will.

A will makes life easier for your nearest and dearest, or tougher for the ex, as the case may be.

And you're never too young to die. Think Lisa Lopes, the American rapper who died in a car crash aged 30. Or Steve Irwin.

It's estimated one-third of Australians die intestate, potentially causing problems for joint assets, delaying distributions and even prompting the estate to finish up in consolidated revenue.

Dying in Victoria leaves you open to claims against your will from neighbours with whom you might have had financial dealings. In NSW, anything you've been giving away can be reeled back into your estate.

Death duties no longer exist but there's still a tax on dying when your will and super fund aren't speaking to each other. And you can bet your life, forgive the turn of phrase, that condolences won't figure prominently in the Tax Office's calculations.

Without a binding nomination - yes, there's such a thing as a non-binding one if you want the trustee to have some discretion - your super could finish up almost anywhere.

Incredibly, the trustee of your super fund, who you've probably never met, is going to have

more power than you did in framing your will. Nor does a trustee have to tell you where your super money will be going if you haven't made a binding nomination. That's decided at payout time.

Prominent among complaints to the Superannuation Complaints Tribunal, which is doing record business, are from those passed over by the trustee for a new partner or younger children.

That's why will kits from the newsagent or downloaded online, or free with a funeral plan, can give a false sense of comfort - any reference to super won't count there.

Worse, the will could do the rounds of the courts at the expense of those you were trying to help.

The senior manager of estate planning at Equity Trustees, former litigation lawyer Anna Hacker, says one unsigned will in the Northern Territory cost the estate a huge amount "to go to court even though no one was arguing against it".

It's essential to update your will as your financial and personal circumstances change. The same goes for your super nomination. Binding nominations lapse after three years.

It gets worse. Even Hacker almost fell foul of the super beneficiary rules.

"I had my brother as a binding nomination but I realise now it wouldn't have worked," she says.

The reason is that, as a non-dependant, her brother would have paid 16.5 per cent tax on the payout, a death duty by stealth.

Even if the super fund was paying a pension, the Tax Office converts it to a lump sum and taxes it. Fortunately, voluntary payments - those not salary sacrificed - to super always stay tax-free, no matter who benefits.

Otherwise, only super paid to dependants - usually a spouse or minors - escapes tax.

A way around the tax on non-dependants is withdrawing a lump sum from your super just before you die, if you don't mind having your accountant by your sickbed.

Most super funds also contain life insurance, which can be worth way more than the contributions. This will be taxed at 31.5 per cent in the hands of non-dependants.

The family of a young man who died with four small super funds was astonished to learn his insurance policies were worth \$800,000.

Life insurance is one of the easiest ways to ensure your estate is debt-free and distributed equitably between loved ones. Australian Unity gives an example of a businessman whose daughter wants to continue the family business but whose son wants out.

To give both the same benefit, the solution is to will the business to the daughter and increase life insurance cover to the same value, nominating the son as the beneficiary.

Wills are increasingly being challenged. In NSW, the average cost of a challenge to the estate is \$100,000.

"Since the GFC there's been more pressure to challenge, especially gifts to charity," Hacker says.

The best protection is holding assets in a family trust, then technically they're not yours and so not affected by your death. Well, you know what I mean. It can solve other problems, too. An 18-year-old beneficiary of your super will get it all in one go as a lump sum, taxed at 16.5 per cent, but if you nominate your estate you can set up a trust paying an allowance instead.

You need somebody you trust as executor because a will can't entertain every contingency.

Even then, if your chosen executor dies before you, your estate may not be distributed the way you'd want, irrespective of your will.

Advisers recommend appointing a power of attorney as well.

Unless you have somebody empowered to look after your affairs before you become incapacitated, they could finish up being administered by some government department.