

Making a Will today

The issues you need to consider and the challenges you face.

Today it is important to consider who to include in your will. The challenge though is the importance for everyone to understand not only the consequences of including a beneficiary in a will but also excluding someone.

Since 1998 in Victoria the legislation has been amended to extend the group of people who can make a claim on the estate beyond the spouse of the deceased and the children of the marriage to include anyone.

The Court now must consider a number of issues for a claim to be successful. The legislation has been amended so that the Court must consider a number of issues to determine whether the deceased had a responsibility to make provision for that claimant and if so whether it was adequate.

The issues the Court must consider

- The nature and length of the relationship between the deceased and the applicant and the obligations or responsibilities of the deceased to them and other estate beneficiaries.
- The size and nature of the estate and the financial resources of the applicant and the beneficiaries.
- Any physical, mental or intellectual disability of any applicant or beneficiary.
- The age of the applicant.
- Any contributions made by the applicant to building up the estate or to the welfare of the deceased or their family.
- Any benefits given by the deceased person to any applicant or to any beneficiary.
- Whether the applicant was being maintained by the deceased person and whether anyone else had a liability to maintain the applicant.
- The character and conduct of the applicant or any other person and any other matter the Court considers relevant.
- An historic New Zealand case in 1920 spelt out the fundamental principles applicable to a family provision claim which stated "The Act is designed to enforce the moral obligation of a testator to use his testamentary powers for the purpose of making proper and adequate provisions after his death for the support of his family and children having regard to his means, to the means and deserts of the several claimants and to the relative urgency of the various moral claims upon his bounty.

The provision which the Court may make in relation to the application under the Act is that which a wise and just testator would have thought it his moral duty to make in the interests of the relevant applicants.

This moral obligation has now been extended in many recent cases to persons other than family members who are persons for whom the deceased had responsibility to make provision for in his will.

Examples of recent claims and decisions:-

- Grandchildren making a claim against grandparents estate – this was unsuccessful.
- A brother claiming against a sister's estate. This was held successful.
- A child next door promised by the deceased to see him through university was successful.
- Estranged children of the deceased who have not seen their parents for many years have been successful.

Financial and estate planning.

- When making a will you should consider certain key issues, not only because of the size of the estate but the needs of the beneficiary. It may therefore be necessary for you to consult with your solicitor with respect to making a comprehensive will taking into consideration testamentary trust provision or provisions which will assist in asset protection and minimization of tax.
- A comprehensive solution to an estate plan is to tailor make your will professionally so that, amongst other things, it offers such asset protection and the ability for blood relatives to control the estate funds, take care of family trust assets and minimize tax benefits including those that flow from superannuation. This offers peace of mind for special circumstances such as children from previous marriage or those children who have financial problems.
- These are some examples of why each person should consider whether to make a comprehensive will or not:-
 - tax on income from an inheritance. Usually the testator makes a will whereby he releases assets to his surviving spouse. In that circumstance these funds when invested create income. However such income is taxed at the spouse's marginal tax rate. There are better ways to optimize the return and use of testamentary provisions in your will can save a great deal of tax.
 - family trusts. Although normally children under the age of 18 are excluded from distribution of family trusts this does not apply to deceased's estates. However the will must include special provisions which enable the exemption to apply.
 - second marriages and the consequences for estate planning. Assets of a previous relationship where children are involved usually create dilemmas for individuals wanting to ensure financial comfort for their second wife but also ensure that their children of a previous marriage are also protected. There are many ways of achieving this by creating provisions severing joint property to that of a tenancy in common so that life interests are created for the benefit of the second spouse.
 - unforeseen financial problems and protecting the inheritance. By creating testamentary trusts for such children. If for example such child is conducting a business or is in financial straits, receipts of such inheritance may not be totally for his benefit but may be for the benefit of his creditors. A testamentary trust can give him a choice as to whether to take his inheritance in his own name or in a testamentary trust at the time of inheritance and therefore avoid having to hand the inheritance straight over to the trustees in bankruptcy or creditors.

Therefore making a comprehensive Will gives you:-

- asset protection where your beneficiaries can choose to have their inheritance received through a testamentary trust which they can control rather than receive the assets in their own name. This protects those assets that you have spent a lifetime accruing from bankruptcy or creditors.
 - To minimize tax the beneficiaries can take advantage of tax provisions which relate specifically to income generated by testamentary tax and

minimize the tax they pay on income or capital gains from their inheritance.

- Maintain control by your own relatives. You can limit the beneficiaries and relatives who can be included particularly when there is concern about funds falling into the hands of beneficiaries, current or future partners or extended family.
- In addition to a general testamentary trust there are a number of more particular testamentary trusts that can be included in a comprehensive will:-
 - superannuation proceeds trust which is designed to minimize the tax advantage that applied to super proceeds on death;
 - life insurance proceeds. Often used to protect an inheritance from estate challenges or deter estranged partners from managing the proceeds for their child.
 - childrens' trusts. To provide for younger children in the event both parents die.
 - special care trusts. For special care children to restrict access to children who cannot be trusted with money.
 - life benefits trusts. That is, providing care but without handing over ownership of the assets to the beneficiary.
 - capital preserved trusts. Which are used to preserve capital in an estate whilst allowing the income to be accessed.
 - preserved pension trusts. These are to help maintain a pension when a partner dies.

There are many other things you should know including:-

- appointing the right executor.
- appointing the right guardian.
- providing for your dependants.
- marriage or divorce issues.
- personal gifts.

Conclusion

It is imperative to have a valid will in place today, in particular, with today's tax, business, family and inheritance complexities. A standard will is often not sufficient to properly manage the range of assets and the beneficiaries.

Most people need a comprehensive will to address all these issues and ensure the best possible outcome for the ones they leave behind.

We are happy to discuss the making of or a review of your wills and the making of enduring powers of attorney.

Please do not hesitate to contact Jeannette Eid on 9009 5800 for help with making your Will.