Wills and Deceased Estates

Q:

Are there tax implications when preparing a Will?

If so when planning a Will are there techniques for minimising taxes and ensuring the appropriate amount of money goes to the people I nominate?

A:

Depending on how you structure your Will, some of your family may pay tax if they receive your Superannuation whereas others may pay no tax on the same Superannuation.

Some super funds do not allow 'binding nomination forms' and the Trustee of the fund will then decide who receives your Superannuation funds.

Testamentary Trusts, for example, can save taxes. A testamentary Trust is a discretionary Trust established by a Will that comes into effect after you die.

Another example is Capital Gains Tax. In some cases a beneficiary pays Capital Gains Tax and in other cases not.

There are other situations where taxes may be payable but could be reduced or eliminated with proper planning at the time of making the Will.

Clearly, it is best to seek professional guidance. Take advantage of the offer Scammell & Co. to make where the first half hour of the first appointment is free. In that time we may be able to give you guidance so you know which is the best direction for your preparation and planning. Scammell & Co. are widely experienced in Wills and Estates.

Remember, Scammell & Co. offer the first 30 minutes of your first appointment free. Bring along all the detail you can and we may be able to resolve more than you may think, in the first 30 minutes.

Q:

Why do I need to make a Will and what are some of the key points you would make on this subject.

A:

A Will decides how your assets will be distributed after your death and who will administer your estate after your death. Your assets are frozen until the Probate Court issues a certificate called a Grant of Probate. This certificate confirms that you have left a valid Will and gives your executor authority to deal with your assets. If you don't have a valid Will your estate is distributed in accordance with South Australian legislation.

Home-made Wills and Will kits: Beware! Homemade Wills can be more trouble than no Will. They are designed for you to 'fill in' the gaps. They do not cover your individual circumstances. People who use them are usually not aware of succession laws.

Capital Gains Tax: This tax can apply on the disposal of your assets There are ways of legally minimising such taxes.

Unnecessary taxes: Your Will may create unnecessary taxes. The way your Will is worded can make the difference between high taxes being paid or tax liability being minimised.

Superannuation: This money is taxed if paid to non-dependents. Some of your family may pay tax if they receive your Superannuation whereas others may not. Be aware of the law.

Testamentary trusts: They can save taxes. These trusts are discretionary, established by a Will and come into effect after your death. The trustee (person managing the trust) can be family members such as your spouse or children. It is important that the legal aspects are explained to you.

Estate planning: This maximises your family's inheritance. Be sure to get legal advice.

Q:

What will happen to my superannuation when I die?

A:

A superannuation fund is a type of trust fund and any distributions of death benefits may be made at the Trustee's discretion. The Trust

If you have a particular person(s) who you wish to receive your superannuation death benefits upon your death, it is essential that a Binding Death Benefit Nomination Form ("BDBNF") be completed. If this form is completed and satisfies all the formalities required under regulation 6.17A of the SIS regulations then the Trustee must comply with the nomination.

There are restrictions on who you can nominate. The person you are nominating has to be either a legal personal representative (the executor or administrator of your estate) or your dependant. A dependent is defined in the SIS Act as including a spouse, any child or any person with whom you have an interdependency relationship with. . The BDBNF can usually be obtained directly from your superannuation fund.

Generally, nominations expire after three years so it's important to update or confirm your nomination with your super fund every three years.

Another common type of nomination form that exists is called a Preferred Beneficiary Form. This differs from the BDBNF in that the Trustee will consider your nomination but is under no obligation to follow it.

If you nominate that your death benefits be paid to your estate this means that your superannuation will form part of your estate and be dealt with in accordance with the provisions outlined in your Will or if you do not have a Will, under the laws of intestacy. It is important that your Will is updated to reflect your wishes regarding payment of your superannuation death benefits.

Q:

Should I pay a law firm to prepare a Will for me or should I make one myself with a DIY kit?

A:

Most people are unaware of the strict requirements involved in creating a valid Will and DIY Will kits are likely to be completed and/or executed incorrectly. Common mistakes include the Will not being witnessed correctly and beneficiaries and/or assets not being described adequately.

After your death, any document you have signed as a Will must be submitted to the Probate Registry at the Supreme Court where the court will determine whether the document complies with legislation and the rules of the court. If the Will is compliant, Probate will be granted.

If the formalities of a valid Will are not met, the Will may be found by the court to be invalid.

Consequently, you will be deemed to have died intestate and your assets will be distributed in accordance with the statutory requirements, which outlines who will be entitled to benefit from your estate and in what order of priority. This may result in people benefiting from your estate that you may not wish to have benefited.

DIY kits may seem more cost effective now but if they are completed incorrectly, which can include something as simple as holding the Will together by a paperclip or the testator and witnesses not using the same pen when signing, this can result in lengthy delays in finalising your estate and increased legal costs after you die. This can reduce the amount available to the beneficiaries from your estate. Therefore, it is important to seek legal advice when creating a Will to ensure that it complies with legislation and the rules of the court.

Other benefits of getting a law firm to prepare your Will include getting advice on asset protection and the potential tax savings that can be provided to your beneficiaries.

Q:

My partner and I own property together. If one of us dies does this mean the surviving partner automatically receives the property?

A:

When two or more people purchase property there are two options available to them in how they wish to hold the property:

1. Joint Tenants

This means that when one person dies the property will automatically pass to the surviving registered proprietor under the rule of survivorship. This is the most common form of ownership amongst couples.

2. Tenants in Common

This means that each person owns a portion or percentage in the property and when one person dies their portion forms part of their estate and is dealt with in accordance with their Will or if they do not have a Will, under the laws of intestacy. This is

more commonly used when two or more people purchase real estate as an investment property.

It is important to seek legal advice when you purchase property to see which type of ownership is better suited to your particular circumstances, for if the wrong mode of holding is used this could have a negative impact on your family after you die.

For example, you and your partner may be a 'blended' family where one or both of you have children from a previous relationship. If you both purchase property together as joint tenants and you die, this will result in the property being solely in your partner's name.

After you die there is nothing stopping your partner from updating their Will to exclude your children from being a beneficiary in their Will and unless your children are dependent on your partner they are unlikely to have a claim against your partner's estate as stepchildren. This could leave your children without any inheritance.

Q:

My uncle died last month. He and his wife (who died a couple of years ago) both made Wills before they died. We found my aunt's Will but not my uncle's Will. I am his next of kin and I think he named my aunt and me as his Executors.

What should I do?

A:

The fact that your uncle's Will could not be found, but other important papers such as your late aunt's Will and the Certificate of Title for the house could be found, creates a suggestion that your uncle may have destroyed his Will with the intention of revoking that Will.

From the various Australian Superior Court cases it may be well established that there is a presumption that if a Will is lost then it has been revoked.

If you were to decide that your uncle destroyed his Will, with the intention of revoking it, anyone who disagrees with you would bear the burden of proving, on the balance of probabilities, that your uncle did not intend to destroy and revoke his Will.

In the absence of evidence you may say that your uncle's Will was presumed to be revoked.

As his next of kin, you have the right to apply to the Supreme Court for written approval (a document called Letters of Administration) so that you can administer his estate and distribute the proceeds to beneficiaries in accordance with the entitlements specified in the Administration and Probate Act.

However, as there is no Will, the transfer of any assets from the estate to any beneficiary will be subject to stamp duty

Remember, at Scammell & Co. the first half hour of the first meeting is free (in most cases). If you are faced with a similar matter and want to discuss it then make an appointment with us.

Q:

I need to get a Grant of Probate of my late father's Will.

How much will it cost for me to apply for the grant?

A:

The application fees have recently changed. From 28 February 2016, the Court has moved away from a fixed fee to an asset based application fee structure.

Gross value of deceased estate:	Fee:
$200,000 or less	$750
More than $200,000 but less than or equal to $500,000	$1,500
More than $500,000 but less than or equal to $1 million	$2,000
More than $1 million	$3,000

The application fee is calculated on the gross value of the estate. That is, the value of the estate without deduction for debts, encumbrances or funeral expenses.The new rules further provide that if the gross value of the estate is less than originally disclosed to the Court, a refund will be paid to the applicant for the difference between the application fee paid and the application fee that should have been paid if the gross value disclosed was accurate.

Similarly, if the gross value of the estate is more than originally disclosed to the Court, the applicant will have to pay the difference to the Court.

You don't always need to apply for a Grant of Probate or for Letters of Administration. Depending on the value of the assets owned by the deceased and how those assets are held, a deceased's estate may be administered informally.

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Q:

I am a widow with three children. One of my children lives with me. When I die,

I want my three children to receive my house equally but also want to ensure my child can continue to live in the property.

How do I do this?

A:

The best way to ensure your child can continue to live in the property after you die is to give them a Right to Occupy the property in your Will.

You can alter the terms of the Right of Occupancy ('Occupancy') to suit your particular circumstances. It is important to outline the conditions of the Occupancy. For example, your child occupying the property must ensure they: Pay all outgoings;

- pay for the property's upkeep and repair;
- insure the property;
- reside in the property as their principal place of residence; and
- allow the Trustee of your estate access to the property to check the property's condition.

You can state when you wish for the Occupancy to end. For example, when your child:

- Ceases to reside permanently in the property;
- dies; or
- the Trustee terminates it because your child has failed to comply with the conditions.

As your child's future circumstances may change, you can provide your child with different options in the Occupancy to accommodate this. For example, you may include the option that the property can be sold to purchase a substituted residence or be sold to enable your child to live in residential care.

When the Occupancy ends you can include a clause in your Will to state that you wish for your three surviving children to receive the property in equal shares.

Contact Scammell & Co. today who can assist you with drafting the terms of the Right of Occupancy in your Will to ensure it suits you and your family's circumstances. Remember - the first half an hour is free!

Q:

Will all of my assets automatically form part of my estate when I die?

A:

Many people are surprised to hear that not all assets will automatically form part of their estate when they die. Some examples are outlined below.

Joint Ownership

If you own assets jointly with one or more other people then these assets will not form part of your estate but will instead automatically pass to the surviving person under the rights of survivorship. Examples of assets that can be held jointly include real estate, shares, bank accounts and motor vehicles.

Superannuation

If you have completed a Binding Death Benefit Nomination form ("BDBN") that satisfies all the formalities required under superannuation regulations then the Trustee must comply with the nomination. If you have

nominated a dependent as defined in Superannuation legislation to receive your death benefits upon your death, which includes any children or spouse, then the death benefit will be paid directly to your nominated beneficiaries and will not form part of your estate.

Life Insurance

If the deceased owns a life insurance policy then, similarly to superannuation, the deceased can nominate the beneficiary that they want to receive the proceeds upon his or her death.

Family Trusts

Any assets held by a family trust will not form part of your estate. This is because a trust is considered to be a separate legal entity and the trustee is the person who has control of these assets. If you are an Appointer of a trust then you can nominate a successor Appointer in your Will.

Companies

A company is a separate legal entity and can own assets. Any assets owned by a company will not form part of an estate. However, if you are a shareholder you can bequeath your shares in your Will.

Q:

I am a sole director and only shareholder of a proprietary company.
I want the company to continue after my death.
What happens to the company when I die?

A:

When preparing your Will, it is important to consider how your death will affect the proprietary company, if you are its only director and shareholder.

If you are the only director and shareholder you can appoint another director by recording the appointment and signing the record. However, if you die then it is the personal representative (executor) of your estate that can appoint a new director of the company, noting that they may also appoint themselves as director.

Therefore, it is important that the executor you appoint in your Will is also the person who you want to have the authority to appoint a new director of the company after you die. The newly

appointed director can ensure the company runs until the shares are transferred to the beneficiaries pursuant to your Will. Once the shares have been transferred the shareholders will then be able to appoint new directors if they wish. It is equally as important you specify, in your Will, who you want to receive the shares in the company when you die.

If you die without a Will there will be no one with authority to immediately continue running the company, such as making management decisions and dealing with trading accounts. It would only be when an Administrator of your estate is appointed that someone would then have authority to appoint a new director, which could have severe consequences for the company during the interim period if it takes several months for that authority to be granted by the Court.

If you are a sole director and shareholder, contact Scammell & Co. to ensure the survival of your proprietary company after you die.