Some Handy Information On Making A Will

What is a Will?

A Will is a document which sets out the wishes of the person (known as the "Testator") with regard to:

- the distribution and management of the Testator's property after death; and
- the appointment of the person or persons who are to carry out the instructions contained in the Will (known as the "Executors and Trustees").

Who should make a Will?

Anyone over the age of 18 years who holds assets in their own name and has mental capacity.

What are the consequences of a person dying without a Will?

If a person dies without a valid Will, he or she is deemed to have died **intestate**. If there is no valid Will then a person's assets are distributed according to the Laws of Intestacy set out in section 72 of the Administration and Probate Act 1919.

Even if a person dies leaving a valid Will, there may be cases where that Will does not effectively dispose of all the estate and the Laws of Intestacy will apply to that part of the estate not disposed of by the Will.

It is your right to make a Will so that at the end of your life, your assets will be distributed to the persons of your choice, subject only to any Court order relating to your estate.

By having a valid Will, you are providing your family and beneficiaries with the best chance of reducing unnecessary complications following your death.

How is an estate distributed under the Laws of Intestacy?

Here are some examples of the estate distribution under the Laws of Intestacy when a person dies without a Will.

If the deceased is survived by:

- **A spouse and no children**
  The total estate passes to the surviving spouse.
- **A spouse and children**
  If the total estate is more than $100,000 then the surviving spouse is entitled to:

  (1) The deceased's personal chattels (which includes all motor vehicles);

  (2) The right to purchase the deceased's home on certain conditions;

  (3) An amount of $100,000 from the net estate (so if the value of the estate is less than $100,000 then the spouse receives the whole of the estate);

  (4) One half of the balance then remaining over $100,000; and the children of the deceased are entitled to the balance of the net estate equally.

  It should be noted that "spouse" includes not only a legal spouse, but also a person declared to be a "domestic partner" i.e. a partner who has co-habited with the deceased person on a genuine domestic basis for a period of 3 years prior to the death, or otherwise satisfies the legislative requirements.

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This highlights the dangers that a couple might face if one of them dies without a Will. The result could be that almost half of the solely-owned assets are locked up in a trust for the children of the deceased with the trust being managed by the Public Trustee.

- **Children and no spouse**
  The children share the estate equally (if a child has died before the deceased and is survived by children, then those grandchildren take their parent's share).
- **None of the above but parent/s only**
  The parent/s share the estate equally if both are alive.
- **None of the above but brothers and/or sisters only**
  The brothers and/or sisters share the estate equally (if a brother or sister has died before the deceased and is survived by children, then those nieces or nephews take their parent's share).

The Intestacy distribution does not conclude here and extends to wider family members, but the estate may pass to the Crown as unclaimed monies, if no relatives are located.

What happens to a Will in the event of marriage?

A Will is automatically revoked by marriage or re-marriage. Subject to the next point, if you die without a Will made after your current marriage, your estate will be distributed according to the Laws of Intestacy set out previously.

Can a Will made before marriage remain effective?

Yes, you can make a Will before marriage and it will remain valid after the marriage providing it refers to the prospect of a particular marriage taking place in the future.

What happens to a Will in the event of separation or divorce?

A Will is not revoked in the event of separation or divorce. After divorce, any benefits for the divorced spouse are removed. It is important for persons to review and change their Wills should this situation occur.

Why should a solicitor prepare your Will?

A well-drafted Will that correctly expresses your wishes is essential to facilitate the smooth succession of your assets. A Will should not be prepared without taking into account your individual financial circumstances and the way your assets are held. The effectiveness of the provisions in your Will depends on knowing precisely what assets will form part of your estate, and what assets will not, and therefore need to be dealt with separately. A solicitor can advise on matters such as which property can be disposed of by a Will, superannuation, assets held jointly or in companies, trusts and partnerships, and the tax and capital gains tax implications.

Mellor Olsson has experienced practitioners who can provide advice and prepare Wills to suit your individual circumstances.

To find out more about our services & experience visit **www.mellorolsson.com.au**

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