

Assets that you cannot make provision for in your Will



By MELISA SLOAN

MANY PEOPLE come unstuck thinking that you can make provision for all your assets in a Will — you can't.

A Will only allows you to make provision for assets you own in your own name.

Superannuation

Superannuation is an asset that catches many people unaware, as they think they can make provision for this asset in their Will, and we often see Will kits that make provision for super.

Superannuation is a trust asset held in trust by the Trustee of your superannuation fund until you reach the age at which you can access your superannuation, or you die.

Given that for many of you, your superannuation will be one of your biggest assets, you need to ensure you make adequate provision for where this ends up.

You can do this by putting in place a Binding Death Nomination or a Non-Lapsing Binding Death Nomination.

These forms can be downloaded from your superannuation fund's website and allow you to stipulate where you would like your superannuation to be paid if something happened to you.

By providing the Trustee of your superannuation fund with a direction of where you would like your superannuation paid, you will have peace of mind that your

superannuation will end up with those you would like to receive it.

When putting this in place, it is also important to consider the tax implications of paying superannuation to dependants and non-dependants.

When considering who you would like to receive your assets upon your death, your superannuation should be looked at holistically in relation to your Will.

Joint assets

Often, people mistakenly make provision for assets that they jointly own.

One of the common joint assets that people mistakenly make provision for is property.

They may own a house with somebody as joint proprietors and wish to make provision in their Will for what they think is their "share" of the house.

Owning a property as joint proprietors means that upon your death, the property automatically passes to the surviving party or parties, and you cannot make provision for this property in your Will, as it is not an individual asset.

It is important to note that this contrasts with owning a property as tenants in common with another person, as in this instance, you would be able to make provision in your Will concerning what is to happen to your equity in this property upon your death.

If you hold a joint bank account with your spouse, this would automatically pass to your spouse upon your death.

Photo: PIXABAY



Discretionary Trusts

Many people hold assets in a Discretionary Trust (often called a Family Trust).

This means that the assets in the trust are owned by the Trust, and you cannot make provision for specific trust assets in your Will.

The most important role in a Trust is that held by the Appointor or Guardian of the Trust, as they determine who will receive any benefit from the assets of the Trust.

If you are the Appointor or Guardian of the Trust, subject to the Trust Deed of your Discretionary Trust allowing you to do so, you may make provision in your Will for who will hold control of these Trusts and be the Appointor or Guardian of your Discretionary Trust, subsequent to your demise.

If you have a Unit Trust that holds assets, you cannot make provision for the assets of the Unit Trust in your Will.

However, you can make provision for who you would like to receive the units you hold in the Unit Trust.

Business assets

If you operate your business as a sole trader or are the sole director and shareholder of a company operating your business, you can make provision in your Will for your business assets.

However, if you operate your business as a partnership or with several parties, then any Partnership Agreement or Buy Sell/Succession Agreement will determine what will happen to your equity in the business.

Assets that do not belong to you

This one should be commonplace,

but it is surprising how often people make provision for assets that don't belong to them in their Will.

If it is not yours, you can't make provision for it.

So, if the asset belongs to your parent, sister, child, or friend, they must make provision for their assets in their own Will.

The content of this article is on a general basis.

It is a good idea to seek the appropriate advice when putting your Estate Planning documents in place to ensure you and your family are adequately covered.

Melisa Sloan is an Estate Planning Lawyer based in Park Orchards madisonsloanlawyers.com.au.