

## Wills and estate planning

As accountants, we are not generally involved in the actual drafting of wills, but it is appropriate that we offer some advice on why and how they should be drawn up.

### Wills

A will is a document declaring the wishes of the person making it regarding the:

- Dispersion or management of their property on their death or; and
- Appointment of a person to carry out the instructions contained in the will.

A will is not intended to have any effect until the death of its maker and except in certain circumstances it is revocable at any time before this occurrence.

A will can be amended or updated by a subsequent document adding to or altering the terms of the original document.

The terms of a valid will are enforceable by the court and once death has occurred, the terms of the will can be varied only in exceptional circumstances.

### Why have a will?

All persons over the age of 18 years who have any property whether personal property or real estate should for practical reasons make a will.

There is no legal requirement which forces any person to make a will and the execution of this document is purely voluntary.

If no will is made it can become cumbersome and costly to deal with the assets of a deceased person and the distribution of the assets may not be in accordance with what the deceased person would have provided had they made a will.

Wills allow people to dictate how their property should be distributed amongst their family members. This can avoid creating bitter family arguments and hardship for dependent children.

In the absence of a will, the property will be distributed to the beneficiaries according to a priority list, where all the family members (including the surviving spouse) will inherit a share in set proportions.

## Missing wills

If nothing more is known than that the will traced to the possession of the deceased (and last seen there) is not forthcoming on their death, the natural inference is that the deceased destroyed the will with the intention of revoking it.

## Making your will

Both solicitors and trustee companies provide professional expertise in the execution of a valid will. Standard will forms are available for the making of wills but unless a person is familiar with the technical aspects of both the use of language in drafting and the law relating to the making of a will, we strongly advise you to avoid this method of making a will.

## Tax issues to consider

A major issue to consider is the possibility of accounting for GST where it is intended that assets will be bequeathed directly to the beneficiaries.

If the deceased was registered for GST and the assets to be bequeathed were part of the deceased's taxable activity, the transfer of assets to a beneficiary will constitute a taxable supply.

The deceased's estate is required to account for GST on the taxable supply.

The beneficiary who acquires the assets may not be registered for GST and if not, they cannot claim GST input tax.

Even if the beneficiary is GST registered they are only entitled to claim a GST input tax of one-ninth of the cost of the taxable supply.

Unfortunately the cost to them is nil.

The net result within the family group is a tax haemorrhage of one-ninth of the open market value of the GST assets bequeathed under the will.

The bequeathed assets also do not constitute a 'going concern' for GST purposes as they do not meet part of the requirement of 'going concern' – that is, it should be 'agreed in writing' by the parties and this is not so.

A possible solution to this dilemma could be that the will is altered to provide for the sale of the assets to the relevant beneficiaries, at the same time as a bequest of the resultant debt back on sale value.

## **When should a will be changed?**

Wills should be revised as circumstances change, for example when:

- A person marries or enters into a de facto relationship – marriage automatically revokes an earlier will unless it is made in contemplation of marriage to a particular person;
- A person separates from a spouse or partner. Divorce does not automatically revoke a will but gifts to an ex-partner will be rendered ineffective;
- Children are born;
- A person acquires significant property; or
- There is a change to relevant legislation, eg the Property (Relationships) Amendment Act 2001.

## **Summary of time for administration**

The following is a general guide only for relatively straightforward estates where there are no special complications.

Where special circumstances exist, the administration can take considerably longer.

1. Grant of probate: 1 month
2. Settlement of liability: 3 months
3. Sale of assets such as residence and investments: 5-6 months
4. Winding up of estate: 9/10 months

These are general guidelines only – speak to us.

## See Us First

Talk to us. If you consider that any of the issues contained in this fact sheet may affect you. Once you are committed to preparing a will we will be pleased to assist and advise on any financial or tax factors that you may need to consider for your particular circumstances prior to seeing a solicitor.

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