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Homemade Wills – The Dangers

A Will is one of the most important legal documents that any of us will sign during our lifetime. The law relating to Wills and their administration is vast and complex. The consequences of failing to adhere to the legal requirements for the preparation of a Will can be significant.

Notwithstanding this, many people attempt their own Will. While this may result in a small cost saving, it can also produce a number of expensive problems down the track, the most common of which are as follows:

- The Will attempts to dispose of assets that the Willmaker does not own. For example, the Willmaker may attempt to give away their interest in a property that they own jointly with another person, or dispose of assets held in a family trust or superannuation fund.
- The Will does not dispose of the entire estate, leaving a partial intestacy. This usually happens where a Willmaker has attempted to dispose of the estate by description but fails to include a clause distributing the remaining balance of the estate.
- The preparation of the Will does not comply with the legal requirements for a valid document. This usually means that the Will is invalid and ineffective in disposing of the estate (resulting in an intestacy).
- The Will fails to meet the Willmaker's responsibility to make provision for a spouse, children or others financially dependant on them. This can result in a challenge being made to the Will.
- The Will fails to adequately take account of the specific circumstances of a beneficiary such as an intellectual disability, business risk, an addiction or an inability to manage money.
- The Willmaker includes conditions that are impossible to satisfy thereby preventing the administration of a gift or the distribution of the estate.
- The Willmaker's handwriting is illegible and therefore incapable of interpretation.
- The Will fails to revoke earlier testamentary documents.

In most cases, the cost of dealing with an ambiguity or informality arising from a homemade Will exceeds the Willmaker's cost saving at the point of preparation.

If you have prepared your own Will, you may consider having it reviewed by a lawyer to ensure that it complies with the legal formalities and adequately disposes of your entire estate. Our Elder Law team can assist.

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Challenging a Will

Each of us has the right to leave our estate to whomever we choose. This right is commonly referred to as the “freedom of testation”. However, legislation exists in Victoria that enables the Court to interfere with this freedom in certain circumstances. For many people, this comes as a surprise. It usually results in comments such as “if that’s the case, why would I bother making a Will?”. This is a reasonable response. However, most Wills are not challenged.

In considering the terms of your own Will or if you are contemplating challenging a Will, the first thing to remember is that the Court is not interested in equality or fairness between beneficiaries. The mere fact that you have treated beneficiaries differently or the fact that you have received less than another beneficiary is not, of itself, sufficient for a Will to be challenged. Secondly, when a challenge is made to a Will, it is not the Court’s role to rewrite the Will.

The Court should only interfere with the Will to the minimum extent required to ensure that the Will makes adequate provision for those to whom the Willmaker owed a responsibility.

In considering whether a responsibility exists, the following are the kinds of matters that the Court will consider:

- The relationship the Willmaker had with the aggrieved person.
- The length of the relationship.
- The size and nature of the estate.
- The financial resources and the needs of the aggrieved person.
- The financial resources and the needs of other beneficiaries of the estate.
- The physical, mental or intellectual disability of the aggrieved person and other beneficiaries.
- The age of the aggrieved person.
- Any contributions made by the aggrieved person to the building up of the estate.

As would be expected, the extent of provision required to remedy a Willmaker’s failure to provide for an expectant beneficiary depends upon the beneficiary’s own financial position.

It is unlikely that the Court will make an order for provision for a person who is financially well off themselves.

Tips

1. Think carefully before you prepare a Will that excludes your spouse and/or children.
2. If you have strong reasons for excluding a spouse or child from your Will, record these reasons in writing.
3. Avoid creating expectations in potential beneficiaries that you do not intend meeting in your Will. The strength of an applicant’s claim may increase if they can demonstrate that they acted to their detriment on the basis of representations made by you about how you intend distributing your estate.

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4. If you are contemplating a challenge to a Will on the basis of lack of provision, remember that it is not the Court's role to rewrite the Will nor is the Court interested in equality and fairness. In addition to demonstrating that the Willmaker owed you a responsibility, you will need to demonstrate that you are in a position of financial need.

If you require advice regarding protecting your Will from a challenge or about your rights to make application for further provision please contact Andrew Simpson or Anna Hacker on (03) 9843 2163.

Powers of Attorney

Your Will deals with the administration and distribution of your estate after death. However, what if you need someone to assist you to make decisions during your lifetime? How do you ensure that your legal, financial, medical and day to day matters are managed? Your Will does not take effect until you have died. Therefore, in addition to preparing a Will, you should also contemplate the preparation of Powers of Attorney to deal with these scenarios.

A Power of Attorney is a formal document by which you appoint another person to act on your behalf. While most people are aware of the Enduring Power of Attorney (Financial), fewer realise that medical and lifestyle decisions can also be delegated to another person.

We recommend the preparation of the following documents:

- Enduring Power of Attorney (Financial) – this enables you to nominate a person or people to make legal and financial decisions on your behalf. The authority granted can either be immediate or dependant on another event, such as incapacity.
- Enduring Power of Attorney (Medical Treatment) – this document allows the appointment of a medical agent to make medical decisions on your behalf, including the refusal of medical treatment. We also recommend that you prepare specific written instructions in relation to your preferences for medical treatment. The authority given only comes into effect when you have lost capacity.
- Appointment of Enduring Guardian – this document enables the appointment of a guardian to make lifestyle decisions for you. A lifestyle decision is best described as the kinds of decisions a parent would usually make for a child such as where you live, who you live with, what you eat, what you wear and who visits you.

If you do not prepare the above documents and you need someone to act for you, an application will need to be made to the Victorian Civil and Administrative Tribunal seeking the appointment of an Administrator and Guardian to act on your behalf. This can be a time consuming and stressful process.

The preparation of documents while you have capacity is a much simpler alternative.

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New Publication – “You Can’t Take It With You”

Many Australians spend a great deal of their lives actively creating wealth, but pay little attention to how to distribute that wealth after death.

Andrew Simpson’s “*You Can’t Take it With You*” is a practical and informative guide to estate planning. Inside you will discover how to:

- understand and distribute your assets
- plan your Will and protect it from challenges
- use trusts to safeguard your assets
- minimise the tax liabilities on your future beneficiaries
- plan your personal and financial affairs for retirement.

With helpful case studies that highlight key points in each chapter, “*You Can’t Take it With You*” makes the estate planning process easy. This book is your first step to ensuring peace of mind for you and those you leave behind.

To order this publication from our website [click here](#) or fill in the order form attached to this newsletter.

About the Author

Andrew Simpson is a Principal with Moores Legal in Melbourne and is head of its Estate Planning, Superannuation and Structuring group. He has been practising in the area of estate planning for 15 years. Andrew was awarded a “Churchill Fellowship” in 2004, and is an adjunct lecturer in estate planning at Charles Sturt University.

The Moores Legal Elder Law Team

We have a range of practitioners who are able to assist with any minor queries or major issues you may have. If you require further information, please contact a member of our Team

Andrew Simpson

Wills, Probate & Estate Disputes
Estate Planning & Structuring
Head of our Elder Law Team
Email: asimpson@mooreslegal.com.au

Narelle Mollet

Elder Law
Email: nmollet@mooreslegal.com.au

Anna Hacker

Elder Law
Email: ahacker@mooreslegal.com.au

Rohani Bixler

Elder Law
Email: rbixler@mooreslegal.com.au

Cecelia Irvine-So

Commercial
Email: cirvine-so@mooreslegal.com.au

Peter Andrew

Employment Law
Email: pandrew@mooreslegal.com.au

Eric Choo

Aged Care Advice
Email: echoo@mooreslegal.com.au

Chris Moloney

Probate and Powers of Attorney
Email: cmoloney@mooreslegal.com.au

Kay Larcombe

Wills & Probate
Email: klarcombe@mooreslegal.com.au

DISCLAIMER: *This Elder Law Briefing is of a general nature only. Specific legal advice should be sought rather than relying on this newsletter.*

MOORESLEGAL

9 Prospect St, Box Hill Vic 3128

Lev 10/350 Queen Street Melbourne 12/1140 Nepean Highway Mornington
Telephone: (03) 9898 0000 Facsimile: (03) 9898 0333
info@mooreslegal.com.au www.mooreslegal.com.au

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