

Which Assets Can I Gift In My Will?

Estate Planning Information Sheet

Do You Personally Own The Assets You Use, Invest, Occupy Or Control?

It is important to identify which assets you own personally so that you know which assets can form part of your estate. You should also be aware of how other assets in which you have an interest will be treated in the event of your death.

Estate Assets And Non-Estate Assets

Assets owned by you personally are estate assets. This means that you can specify in your Will to whom the assets should be gifted when you die.

Non-estate assets are assets that cannot be gifted in your Will. This may be because you are not legally the owner of the assets (even though you have control over them during your lifetime) or because you own them jointly with another party.

Assets Owned As Joint Tenants

Assets owned by you and another person as joint tenants are non-estate assets and cannot be validly gifted to anyone under your Will unless you are the last surviving joint owner. Full ownership of this class of assets will automatically pass to the survivor upon the death of a joint owner. It is the Will of the last surviving owner that will determine to whom the asset is eventually transferred.

Assets Owned As Tenants-In-Common

Assets owned by you and another person or persons as tenants-in-common are estate assets. Your share or interest in those assets may be gifted or otherwise dealt with in your Will in the same manner as assets owned in your sole name.

However, whether the other co-owners are either related to you (e.g. family members or spouses of family members) or are non-related investment partners, it is recommended that all owners be parties to a Co-Tenancy Agreement. This type of agreement usually covers matters such as how contributions are to be made among the owners for expenses incurred in relation to the asset (e.g. for real estate, outgoings such as local authority rates and charges), allowing the remaining co-owners to acquire the interest of any co-owner who dies, becomes bankrupt or suffers some other type of crisis or critical event and how disputes between the owners are to be resolved without the asset necessarily having to be sold or the co-owners becoming embroiled in expensive legal disputes.

Superannuation

A superannuation death benefit will be a non-estate asset when it is paid by the fund trustee directly to a person or persons who qualify as "dependants" for superannuation law purposes. However, the terms of the trust deed of the fund that holds your superannuation will determine what flexibility (if any) you have in deciding who will receive your superannuation death benefit and in what form the benefit may be received.

Under a number of public offer superannuation fund trust deeds, you are only able to nominate your preferred beneficiaries and the proportion of the death benefit each should receive. Ultimately, the choice of recipient is at the discretion of the trustee of the fund. Your nomination is an important factor taken into account but is not decisive.

It is only where:

- Your superannuation fund trust deed offers a binding death benefit nomination that specifically removes the trustee's discretion to choose the recipient; or
- You are in receipt of a pension and you have nominated a reversionary beneficiary, that you can effectively direct the trustee to pay the death benefit in accordance with your wishes.

Your superannuation death benefits will only be an estate asset and be dealt with under your Will if the trustee of the superannuation fund pays the benefit to your estate's legal personal representative.

Alternatively, the trustee may as previously mentioned pay it directly to your "dependants".

Where are you a member of a Self Managed Superannuation Fund different considerations apply. In addition to putting in place appropriate arrangements about how your superannuation death benefits are to be dealt with on your death, the trust deed for the fund should also be reviewed to determine who will have control of the fund when you die. It may necessary to put in place arrangements to ensure that when you die the person or people you intend to benefit from the fund are entitled to control it.

Life Insurance

The general rule is that the proceeds of life insurance are paid to the owner of the policy or to any nominated beneficiary. It is only where the owner of the policy is the life insured that the proceeds are an estate asset and are dealt with by your Will.

In some cases, a life insurance policy will be owned by your superannuation fund. Where this is the case, the life insurance proceeds will be combined with your superannuation balance to form your superannuation death benefit.

Assets Held In A Family Trust

Assets held in family trusts are non-estate assets as they are not owned by you personally. These assets cannot be specifically dealt with in your Will.

Although your Will cannot deal with the assets of the family trust, your Will can allow for the transfer of control of the family trust upon your death. To permit this, it is sometimes necessary for the trust deed for your family trust to be amended. This needs to be done carefully to avoid incurring tax and stamp duty liabilities.

You should also have the trust deed for your family trust reviewed to make sure that if you lose capacity, there are appropriate provisions in the trust deed that address who will control the trust while you are incapacitated.

A loan owed to you by a family trust is treated as an asset of your estate.

Assets Held By A Private Company Or Unit Trust

Assets held in a private company or unit trust are non-estate assets as they are not owned by you. It is the issued equity you hold in the company or unit trust (i.e. the shares or units) that will be an asset of your estate.

Subject to the governing rules of the company or unit trust, you may be able to gift those shares or units under your Will. This may allow you to determine who will control the company or unit trust after your death.

Sometimes, where there are other non-related shareholders or unit holders in the company or unit trust, agreements commonly known as Shareholder Agreements, Unit Holder Agreements or Buy Sell Agreements may have been put in place to regulate what happens to a person's shares or units if they die or become disabled. If they exist, these types of agreements can override any gift of your shares or units in your Will and give the remaining shareholders or unit holders the right to acquire your shares or units usually in exchange for payment to your estate of an agreed value for the shares or units.

A loan owed to you by a private company or unit trust is an asset of your estate.

Disclaimer: This information sheet is for general information only and should not be relied on as, or substituted for, professional legal advice.