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Mistakes in Wills can be costly

Around half of all adult Australians do not have a valid Will – and even those who do often make basic mistakes that mean their wishes are not properly carried out, says Mr Stephen Hardy, an estate planning specialist at Equity Trustees Limited (EQT).

“Some people who have a Will have made simple mistakes which can lead to confusion, or even mean their Will is invalid.

“A poorly written Will can make it less likely their intentions will be realised, and more likely that the Will is challenged.

“If a Will is successfully challenged, the legal cost of the challenge is paid for out of the estate, thus reducing the amount for distribution to beneficiaries,” he said.

“Not having a Will at all means that a statutory formula applies to the distribution of your estate. This may mean that people you do not want to give anything to, may receive part of your estate.

“People who spend a lifetime minimising any unnecessary dealings with government will end up leaving the distribution of their estate to a legislative formula, if they do not a Will.”

Mr Hardy said that for those who do have a Will, the task of choosing a suitable executor is commonly misunderstood.

“When appointing an executor, it might be easy, and seem sensible, to choose an old friend because they are someone who can be trusted.

“However, two major problems can arise if friends are appointed as executor. The first is that they may not be capable of doing the job required (ask yourself whether they are financially competent). The second problem is that if they are the same age as you (or older), they may die before you,” he said.

Mr Hardy warns that if your executor dies before you, and your Will is not changed with the appointment of another executor, then by law their executor will become your executor – and this may be someone you do not know, or who you do not trust.

Mr Hardy says that some common mistakes people make with their Wills include:

1. Executors

As already mentioned, Mr Hardy advises that appointing an executor needs careful consideration.

“Avoid putting anyone in a position of conflict (such as a business partner who may want to buy your shares) or people who are likely to die before you; people who may not be competent; or a family member if there is any prospect of family conflict concerning the estate.”

2. Give executors power

Make sure executors are given the necessary power to carry out your wishes easily.

“Otherwise executors may have to apply to the court for approvals to carry out fairly routine actions, a cost which will end up reducing the size of the estate,” Mr Hardy said.

3. Clarity of wording

Mr Hardy said that people who use “do-it-yourself” Wills often word them very badly, don’t make their intentions clear, or word bequests ambiguously.

“This is one reason to have your Wills drafted by professionals, particularly if there are complicated bequests,” he said.

4. Effect of debt

If you have debt against particular assets, such as a mortgage over a property, recognise the effect of this in your Will and specify that all debt must be repaid before distributions are made.

“For example, someone may have two investment properties of equal value and leave one each to their children,” Mr Hardy said.

“If one carries a mortgage, care needs to be taken that this debt is not inherited with the property, making the inheritance unequal.”

5. Tax effect

Not recognising the effect of tax, particularly capital gains tax (CGT), is another common mistake that can lead to unintended unfairness in bequests.

“If one child receives the family home and the other a holiday home of equal value, the second child will receive less because CGT will be payable,” Mr Hardy said.

6. Guardians

If you have young children you should name a guardian, Mr Hardy advises.

“Otherwise the decision will be made for you, possibly by the court.”

7. Only have one Will

Mr Hardy says this might sound obvious but often people prepare a Will, and subsequently write notes to show new estate planning considerations, which may be interpreted as a new Will.

“This can result in costly challenges to the Will and cause unnecessary family stress,” he said.

8. Not keeping it up-to-date

Review your Will when your financial or personal circumstances change.

“This includes family changes such as births, marriage and divorce, or financial circumstances such as sale of assets,” Mr Hardy says.

9. Leaving someone out

If you decide not to leave anything to a family member, Mr Hardy suggests obtaining professional advice on whether a statement providing reasons why the person has been excluded should be included in the Will or in an accompanying document.

“It may not prevent them challenging, but with proper advice a useful defence may be established. Also, if there is a good financial reason they have been left out, such as giving them various financial gifts over the years, details in the Will itself might well be helpful.”

10. Not providing for dependants

Dependants often contest a Will if they believe they are not adequately provided for.

“This may include a divorced spouse if you have not met maintenance obligations,” Mr Hardy says.

11. Nominating assets not owned

This problem often occurs when some of a person’s assets are held jointly, for instance by a family trust, a company, business or partnership, a superannuation fund, or a property owned in joint names rather than as tenants in common.

“A person can only leave assets directly owned by them,” Mr Hardy said.

“Another mistake that can be made is gifting an asset in a Will, such as a share portfolio, that is sold after the Will was signed.”

12. Hiding the Will

Not being able to find the Will is a fairly common occurrence.

“Make sure that the executor knows where it is and, ideally, talk through the contents so that he or she knows what you intend and why.

“It is also best to have a copy of the Will kept by the executor separately from other family papers,” he said.

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