

Conflict avoidable with a will



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Losing a loved one causes great distress to family members left behind. They have to deal with not only their grief but also the associated legal issues – sometimes very soon after the death.

The role of an executor is to represent the deceased and act in the best interests of the beneficiaries. Executors are responsible for protecting the assets immediately after death. But, in the absence of a will authorizing someone to do what is required, uncertainty and conflict can abound between family members.

I continue to be amazed by just how many people never take the time to prepare a legally valid will. As a society, we increasingly focus on wealth creation and protecting our financial security to maintain our lifestyles. Many people, however, fail to consider that

that wealth needs protection after they die, through a will.

A will might be one of the most important documents you ever sign. It not only appoints one or more persons (executors) to manage your estate, but also gives you your one opportunity to express how you wish your assets to be distributed after your death.

Without a valid will, the laws of intestacy dictate how your estate will be divided, and this might not be in accordance with your wishes or intentions. Intestacy is governed by the *Administration and Probate Act 1919 (SA)*. This act defines how the estate of a deceased person, who had no will, is to be distributed.

From my years of practise in this area of law, I know that there is a general misconception that the assets of a deceased person who was married all pass to his or her spouse. This, however, might not always be the case.

Complications can arise for those in second marriages or domestic partner (de facto) relationships, particularly when they have children from previous relationships.

The law which relates to wills is complex and can be confusing in some circumstances. And, in preparing wills, there exists little

room for error. As a will-maker, you have no way, after your death, of explaining yourself, or expressing what your real intentions were if the will you have prepared is ambiguous.

Despite the importance of having a will, many people try to prepare their own. At first glance, home-made will kits appear to make the entire process easy and straightforward, with no possibility of mistakes. Don't believe it.

These kits are fraught with danger. Anyone who has a home-made will, or intends to prepare one, should reconsider the option of a professionally prepared will. Writing your own will might result in a small cost-saving but, in many circumstances, it can cause a number of problems which must be dealt with after your death.

I have acted for many clients who have had the responsibility of dealing with these problems. And, in each case, the expense to the estate was huge and therefore diminished the assets due to the family.

This situation also causes significant delays which, in most cases, would have been avoided had the will been prepared professionally.

The apparently casual approach which some people take to the preparation of home-made wills continues to surprise me, particularly when wills are so important. I have seen home-made wills which:

- » Give away assets the will-maker does not actually own.
- » Do not give away the entire estate and therefore leave a partial intestacy (which is distributed in accordance with the laws of intestacy rather

than what might have been expressed or intended by the will).

- » Make conditional gifts to beneficiaries.

In other circumstances, home-made wills have not met will-makers' responsibilities to provide for spouses or children, resulting in challenges to the wills at the cost of the estate.

In a significant number of cases, home-made wills do not comply with the formal requirements of signing the document. Affidavit evidence can be required from the people who witnessed the will and, sometimes, from family members, outlining the details which surrounded the preparation of the will, including how and when it was signed.

Further delays and costs are incurred in locating the witnesses and obtaining that information from them. Difficulties arise, too, when witnesses cannot be located or have themselves died.

If you have prepared your own will, you should consider having it, and your circumstances, reviewed by one of our experienced wills and estate planning lawyers. This is the only way to ensure that your family will not have to deal with the problems I see too often – problems which the right advice could have prevented.

Tindall Gask Bentley provides a free legal service to Police Association members.

Appointments can be made through the association to receive free preliminary legal advice covering all areas of law, particularly families and wills.