



What – No Will Power?

Issue 12 – 9 April 2009

A Will is said to be the cornerstone of any Estate Plan. A Will specifies how assets owned by the Will maker will be distributed. A comprehensive Will, will also specify how assets that are controlled by the Will maker may be dealt with. Hence without a Will there is no Will Power – to distribute assets within the Estate and control assets outside the Estate in accordance with the Will maker's intentions.

A person dying without a valid Will is said to die intestate – that is they died leaving no effective Will disposing of Estate assets or assets that they control. A partial intestacy may also occur where a person dies and their Will does not dispose of part of the assets within the Estate.

What follows is an overview of the issues concerning lack of Will Power due to a full or partial intestacy.

Intestacy

An intestate Estate will be fully intestate when:

- A person dies without formulating a Will; or
- Formulates a Will but the Will cannot be probated due to execution obtained by:
 - Duress;
 - Coercion;
 - Undue influence; or
 - Lack of testamentary capacity,

There may also be an intestacy if the last Will and Testament cannot be found.

A partial Estate affects the property not disposed by a Will. A partial intestacy may occur due to:

- Poor drafting of a Will. A Will in such circumstances may be incomplete not referencing all the Property in the Estate; or
- A particular bequest or gift made by the Will is considered invalid.

The Doctrine of Forfeiture may also produce an intestacy or partial intestacy.

The Doctrine of Forfeiture operates to prevent a person named as a Beneficiary in a Will from receiving an interest in the Estate of a deceased person if they are criminally responsible for the death of the deceased.

Consequences of Intestacy

The result of Intestacy can have a profound effect on the Estate including:

- Uncertainty during administration;
- Unequal distributions between beneficiaries; and
- Estate Shrinkage.

Estate Shrinkage occurs as a result of delays, disputes, costs and unforeseen tax consequences.

Some of the unintended consequences include:



Loss of the Right to Determine Distribution

Each State and Territory of Australia sets out a distribution formula for an Estate in the event of Intestacy. If a testator relies on the rules of intestacy the decision of how distribution is determined is delegated to a government formula without regard to any specific family circumstances. Should a person die intestate and without any next of kin the recipient of the Estate will be the state government.

No Differentiation of Assets

The intestacy formula of each State does not discriminate between assets. As such items of sentimental significance and heirlooms may not be distributed to intended recipients. As such family disputes and tensions could occur, which could result in Estate shrinkage. Delays and costs arising from legal fees could arise to determine who should receive a family heirloom.

Unintended Beneficiaries

If an Estate is distributed according to the rules of intestacy an unintended beneficiary may receive assets from the Estate.

Consider the following case study.

Anne and Bob have separated. They have two children. Anne realising the marriage has failed prepares a new Will in favour of her two children but forgets to execute the Will. Bob fails to make any payments for the welfare of her children. Anne suddenly dies. Bob her estranged husband will

now benefit from Estate assets, together with the children, despite Bob not contributing to the welfare of the Children or Anne.

Absence of a Competent Executor

Failure of a valid Will may result in the administration of an Estate being delayed until an application has been made for the appointment of an administrator of an intestate Estate. As a result there may be an unnecessary delay in dealing with Estate Assets such as a business which may cause a significant loss of value.

Furthermore there may be disputes as to the choice of an Administrator.

The choice of Executor is especially important in complex Estates dealing with various assets and their ongoing management before distribution. If an administrator is not familiar with all the assets, delays in coming to terms with the specific nature of Estate assets may lead to significant loss of values and thus causing such Estate Shrinkage.

Unintended Tax Consequences

An intestate Estate may result in unintended tax consequences such as a person on the highest rate of tax inheriting substantial assets personally. As a result a beneficiary may have little or no flexibility in distributing income generated from the investment of their inheritance to other beneficiaries.

Non Estate Asset Consequences

A correctly prepared Estate Plan covers the transfer of both Estate and Non Estate assets. A failure to prepare a Will may therefore impact on non Estate assets. For example



should a Discretionary Family Trust reference appointment powers of the Trust to be found in a Will, the absence of a Will may result in a failure to adequately deal with the control of the Trust.

As well there may be no means of adjusting the distribution of the Estate to take into account benefits received by the beneficiary from non-Estate assets, such as Family Discretionary Trusts and or a superannuation fund.

Failure to Provide for Special Needs

Where there is no valid Will or failure to structure an appropriate Will for the particular circumstances of Beneficiaries with special needs - such as vulnerable or disabled beneficiaries, loss of

government benefits and protective safe guards -may result in disastrous consequences.

The preparation of a Will may avoid a number of potentially disastrous consequences of dying intestate. For information in respect to the next ili workshop covering Family Provision Planning visit the ili website www.ili.com.au.

Copyright Notice

©ili.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, transmitted or copied in any form or by any means (graphic, electronic, mechanical, photocopying, microcopying, scanning or otherwise) except as permitted under the Copyright Act, without the prior written permission of ili. Any enquiries should be addressed to ili.

Disclaimer

This publication is designed to provide accurate information regarding the subject matter which it covers. It is distributed on the understanding that ili is not engaged in rendering professional or expert services or advice (legal, accounting, financial planning or otherwise). The information provided in this publication does not constitute such advice or services and should not be relied on as such. If professional or expert assistance is required, the services or advice of a competent person should be sought.

Neither ili nor its directors, employees, associates, agents or other representatives and affiliates are liable for any liability, loss, damage or injury arising from or in relation to the direct or indirect use of, or reliance on, the whole or any part of the information contained in this publication. Without limiting the generality of the above, neither ili nor its authors, consultants and writers are liable or responsible for anything done or omitted to be done by any person in respect to this publication.

**For Further information please visit www.ili.com.au
or contact:
Melinda Wood - ili Enquiries
(02) 9251 3611
enquiries@ili.com.au**