



# Contents of a Will – Part 1

Issue 23 – 2 July 2010

## 1. Overview

While no two Wills are identical, all Wills contain a number of similar provisions. These provisions represent the minimum clauses required for the preparation of a valid and effective Will.

An understanding of the provisions of a Will will enable an Adviser to identify planning opportunities to prevent Estate Shrinkage and provide for all beneficiaries. There are twenty five points that should be considered in respect to the Contents of a Will.

What follows is Part 1 of an overview of the Contents of a Will in respect to planning and funding opportunities.

## 2. Name and Address of the Willmaker

Check the name and occupation of the Willmaker. The purpose of this information is to clearly identify the Willmaker and understand their occupation.

**Implication:** Check for changes in occupation which will quickly indicate any changes that may have occurred to the Willmaker.

## 3. The Date of a Will and Revocation of Previous Will

It is usually the intention of a Willmaker that a later Will revokes the contents of an earlier Will. If this is the case, the first clause of a Will should clearly state this.

**Implication:** The date is exceptionally important as it will indicate the date the Will

was executed and may highlight the need for a review which may require funding.

## 4. Appointment of Executors and Trustees

The nominated Executor and Trustee must be clearly stated in a Will. More than one Executor and Trustee can be appointed.

**Implication:** Check that the appropriate Executor has been appointed. An inappropriate Executor may cause unnecessary delays and thus contribute to Estate Shrinkage. (*In this respect see ili Strategy Update No.23, 2009*)

## 5. Payments of Debts and Testamentary Expenses

It is the Executor's obligation to identify and meet all debts of the Estate up to the value of the Estate. These debts and liabilities take priority over the distribution of the Estate to the Beneficiaries. This is why the clause comes before the distribution clause in the Will.

**Implication:** Identify and value all debts of the Estate and fund accordingly to prevent Estate Shrinkage and correctly provide for all intended beneficiaries.

Furthermore there are some assets that do not need to be applied to meet liabilities of an Estate unless the Will expressly allows for their payment. This includes superannuation death benefits and life insurance proceeds. (*In this respect see ili Strategy Update No.2, 2009*)



## **6. Distribution of Residue Estate**

After the Executor has paid all debts and liabilities of the Estate, the remaining assets, termed the 'residue', can then be distributed to the nominated Beneficiaries.

**Implication:** Unless as noted above an appropriate Executor is appointed and liquid funds are available to meet payment to residual beneficiaries, Estate Shrinkage may occur and beneficiaries may receive inadequate funds for their benefit, maintenance, advancement or education. (*In this respect see ili Strategy Update No.4, 2009*)

## **7. Powers of Executors and Trustees**

The Willmaker should specify the powers that can be exercised by an Executor. These powers should be broad and enable the Executor to do all things necessary to implement the Willmaker's intentions.

**Implication:** Inappropriate powers of an Executor may prevent the Executor to exercise his duties to preserve the value of estate assets and thus contribute to Estate Shrinkage. (*Again see ili Strategy Update No.23, 2009*)

## **8. Special Request**

A Testator is able to provide directions in a Will relating to matters such as:

- Funeral arrangements;
- Disposal of the body (for example, burial or cremation); and
- The content of the funeral service.

The inclusion of these requests provides assistance to the Executor in planning the nature and content of the funeral service. Such requests are usually expressed as a wish rather than as a binding direction.

**Implication:** In many instances such requests may involve the necessity for liquid funds to be available.

## **9. Who Gets What**

A Will specifies how and when the assets of an Estate are to be distributed. The clauses of the Will dealing with asset distribution are the most important clauses in the Will.

**Implication:** It is these clauses that the Executor will rely on when distributing the assets of the Estate, whether they are personal chattels, real estate assets or share or cash investments. The more detail provided to the Executor, the better for an Executor, but make sure there are adequate funds for all intended beneficiaries or else disputes may occur.

## **10. Gift of Investment Assets**

Extreme care should be exercised when making a specific gift of investment assets to a Beneficiary.

**Implication:** A specific gift of this nature assumes that the asset will still be in existence at the date of death. However, circumstances change. Further, the investment asset may be subject to a liability. The treatment of such a liability can also create uncertainty during the administration of the Estate. The following discussion of redemption, encumbered assets and capital gains are examples of why careful planning and expert advice is a good idea.

## **11. Redemption**

Consider the following instruction:

*I give You all of my interest in the property at Your Town provided You survive me.*

While a Bequest clause of this nature appears simple and non contentious, a change in circumstances may significantly alter the distribution of



assets of the estate. For example, if at death the Willmaker no longer own the property, the gift fails (is 'adeemed').

A number of events affect the substance of the Estate and bring about an Ademption. The property may have been sold during the Willmaker's lifetime, compulsory acquired by a third party or altered in a material way so as to change the nature of the property. In most cases, the proceeds of sale of property disposed of cannot be traced through the Estate and be distributed to Beneficiaries entitled to the Residuary Estate.

**Implication:** Usually this outcome is unintended and is caused by a failure to update a Will to reflect a change in circumstance.

In some States and Territories, sale proceeds can be traced through the Estate if the asset was disposed of the actions of the Willmaker during their lifetime.

In gifting specific investment assets, an Ademption can be avoided in a number of ways:

- Altering the Will regularly as circumstances change. However, this is not always possible and practical. If an asset is disposed of and the Will is not changed immediately, any subsequent loss of capacity will make it

impossible for an alteration to occur.

- By including a clause in the Will that provides an alternative distribution of death. This may be a gift of cash in lieu or a sum equivalent to the net sale proceeds of the asset.
- Refraining from specifically gifting substantial assets to a Beneficiary.

## 12. Encumbered Assets

In the absence of a contrary intention in the Will, an asset given to a Beneficiary that is subject to a debt or encumbrance remains subject to the liability in the hands of the Beneficiary.

**Implication:** If it is the Willmaker's intention that the gift be received free from debt, the Will should clearly specify this and appropriately funded.

The second part of this topic will conclude in next week's Strategy Update.

To find out more about ili courses and workshops in respect to the contents of a Will and Funding Requirement, Estate and Succession Planning please visit our website [www.ili.com.au](http://www.ili.com.au).

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Melinda Wood – ili Enquiries (02) 9251 3611 [enquiries@ili.com.au](mailto:enquiries@ili.com.au)**