

Should I gift specific assets in my Will?

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Many people, when writing their Will, will choose to simply allocate their estate in full to their surviving partner or equally between certain beneficiaries like, for example, any surviving children. Some, however, will choose to gift specific assets to specific beneficiaries. Detailing the distribution of specific property or other assets to individuals in your Will needs careful consideration.

Your Will enables you to choose how your assets will be dealt with after death. It's a powerful document that, when well-drafted, ensures the beneficiaries to your estate are who you intended and that they are receiving what you intended.

Reviewing your Will

It's not only highly recommended that every adult has a valid Will but also that they review their Will from time to time and, in particular, when personal circumstances or relationships change.

Our earlier blog, "When should I review or update my Will?" gave 10 key reasons for you to consider updating your Will. But there are more triggers to consider based on some recent experiences we have had.

In this blog, we look at three matters where the Will-maker left specific items to specific people in their Will. Those instructions led to some inequity for beneficiaries when dealing with the deceased estate.

Father left bank account to his son only

Dad had made his Will about 5 years ago and decided that a certain bank account should be gifted to his son. At the time, his daughter was an attorney under a Power of Attorney made by

Dad.

Without realising the effect of the clause in the dad's Will, to leave the bank account to the son, his daughter moved the funds to another higher-interest account.

Although this is more an issue as to the duty of attorneys, the issue remains that Dad probably thought, at the time the Will was done, that the gift was fair. However, with further consideration, he may have realised that the gift was too specific. For example:

- he may have needed to use the money in that bank account for other purposes, such as an accommodation bond for a nursing home; or
- the gift became unfair as the value of other assets given to other children increased in value while the bank account remained fairly static, or vice versa.

Mum gifts life interest in family home to intellectually disabled daughter

Mum made her Will to ensure that her daughter, who had a mild intellectual disability, could remain in the family home for her lifetime. She left other assets of shares and money in superannuation to her son.

Although commendable at the time, the value of the home increased significantly whilst the other assets got expended on day-to-day living expenses for Mum. The end result was that the outcome of the Will distorted her wishes beyond her initial intentions, significantly in favour of her daughter.

Mum gifts specific assets without consideration for funeral and other expenses to be paid from the estate

Mum made her Will and decided to specifically gift a number of her main assets to her children based on their needs at the time of writing her Will. Her sons were to receive real estate, and her daughter was to receive bank accounts.

But the person who drafted the Will did not take into account where Mum's funeral and other expenses would be paid from. Usually, those expenses are paid from the residue of the estate (that is, from any assets remaining after all the specific gifts of assets have been dealt with). In this case, there were no remaining assets after all specific gifts were made.

The result was that the expenses had to be apportioned against the value of all the specific gifts. This is a fairly complicated calculation and one which distorted the relative outcome for each child. This could have complicated matters further if the sons (whose specific gifts were real estate) were unable to pay their share of expenses from their own assets. That situation may have

required them to sell the real estate to pay the expenses of administering the deceased estate.

How to gift specific assets in your Will

There are a few points that arise from these experiences:

- Gifts of a specific asset or a specific sum of money need to be carefully considered on a regular basis having regard to their relevant value compared to other assets given to other family members. The substantial increase in real estate values compared to the low interest paid on bank accounts over the last few years highlights how quickly things can change.
- You need to ensure that if you have provided for a specific gift in your Will, your attorney under a Power of Attorney is aware of that or is authorised to view your Will. That authority can be in the Power of Attorney itself.
- Consider having the Will-maker consult an experienced estate planning lawyer to review the last Will and provide guidance as to whether that Will correctly reflects the Will-maker's wishes or what changes might be made to ensure the Will maker's wishes are recorded. This should occur even if a diagnosis of dementia or other mental incapacity has been made.
- Irrespective of any change of relationships (for example, marriage or separation/divorce), financial positions do change and can change substantially within a very short time. So, a regular review of your Will, maybe every 3 to 5 years, is recommended, even if the review merely confirms that the expectations in your Will remain valid and appropriate.

Get help from a Wills and estate planning lawyer

As we have always advocated, having a valid Will is important. It reduces costs and stress associated with dealing with a deceased estate. However, it's also crucial that your Will clearly stipulates your wishes, with no ambiguity or unfair clauses.

Having your Will professionally drafted by an experienced estate planning lawyer will ensure its validity and will reduce the potential of a contested estate. Your lawyer will raise any concerns with you about the content of your Will and bring to your attention any matters that you may not have considered.

Contacting E&A Lawyers

For more information or to arrange a consultation with a lawyer, you can call or email us.

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