Estate assets and non-estate assets: What assets do not form part of your estate in NSW?

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When preparing a Will or administering an estate in New South Wales, it is important to understand that not everything a person owns will automatically form part of their estate.

This distinction between estate assets and non-estate assets is an important part of effective estate planning in New South Wales, and it has important consequences for probate, administration and any family provision claims. It can affect who receives certain assets, whether probate is required, and can impact many estate disputes.

This distinction often becomes critical for executors, beneficiaries and families trying to navigate what can and cannot be dealt with under a Will.

What are estate assets in NSW?

Estate assets are assets that are owned personally by a person at the time of their death and can be distributed under the terms of their Will.

Common examples of estate assets include:

- A bank account held solely in one person's name
- Real estate owned solely by the deceased

- An interest in real estate owned as tenants in common with other owners
- Company shares owned personally
- Units in certain types of unit trusts
- Personal belongings such as vehicles, jewellery and furniture
- Money owed to the deceased

These assets form part of the estate and are generally controlled by the executor appointed under the Will once a Grant of Probate has been made. The executor is responsible for collecting the assets, paying liabilities, and distributing the estate to the beneficiaries in accordance with the terms of the Will.

In many cases, the executor will need to apply to the Supreme Court of NSW for a Grant of Probate before they are able to deal with estate assets.

What are non-estate assets?

Non-estate assets are assets that do not automatically form part of the estate, and are not necessarily distributed under the terms of the Will. They are not necessarily controlled by the executor.

These assets may pass directly to another person, be controlled by another legal structure, or require a separate decision by a third party.

Common non-estate assets include:

- Superannuation
- Real estate owned as joint tenants
- Assets held in a family trust
- Assets held within a company
- Certain life insurance policies

As the Will does not automatically determine how non-estate assets are dealt with, failure to correctly address non-estate assets in estate planning can lead to unintended outcomes or disputes after death.

Understanding which category an asset falls into is essential because it determines who controls the asset after death and whether the Will has any effect on it.

Jointly owned property

Joint ownership is one of the most common examples of non-estate assets in NSW.

Where property is owned as joint tenants, the principle of survivorship applies. This means that when one owner dies, their interest in the property passes automatically to the surviving joint owner, regardless of what the Will says.

For example, a family home owned by spouses as joint tenants, the surviving spouse will generally become the sole owner automatically upon the death of the other spouse. The executor typically has no authority over that property. The surviving spouse would need to register a Notice of Death to record the change in title.

However, where property is owned as tenants in common with others, then each owner has a distinct share of the property. In that case, the interest owned by the deceased does form part of the estate and would be typically distributed under the terms of the Will.

This distinction, if overlooked, can create significant issues for an estate and beneficiaries.

Superannuation

Superannuation is another common category of non-estate assets.

Although a person may have accumulated substantial wealth in superannuation, and their membership entitlements are ‘theirs’, the funds are not automatically controlled by their Will.

Instead, the trustee of the superannuation fund would be entitled to decide who receives the death benefit, unless other steps have been undertaken to direct where the death benefits are paid. This can include where there is a valid binding death benefit nomination in place, or where a reversionary pension has been established.

A valid Binding Death Benefit Nomination, often referred to as a BDBN, may direct the trustee of the fund to pay the superannuation proceeds in a particular way and remove discretion for the trustee to decide where the proceeds are paid. However, a BDBN may be ineffective if:

- The BDBN does not strictly comply with the rules of the particular superannuation fund; or
- The nomination expires or becomes invalid prior to death.

This can mean that a person may intend for their superannuation to be distributed under their Will, but unless the correct arrangements are in place, the superannuation may instead pass directly to another person outside the estate.

There is no one-size fits all approach, as every superannuation fund has different rules and requirements.

Depending on the circumstances, the superannuation entitlements may be paid to:

- A dependant under superannuation law
- The legal personal representative of the estate
- Another eligible beneficiary

This distinction can have tax consequences and can also affect whether the asset is available in the estate.

Superannuation is often one of the largest assets a person has, so careful planning is essential.

Trusts and trust assets

There are a wide variety of different trust types, and the terms of the particular trust would need to be considered carefully.

Assets held in a trust are generally not estate assets because they are not owned personally by the deceased. Instead, the assets are held by the trustee of the trust and controlled in accordance with the terms of the trust contained in the trust deed.

What happens to trust assets on death depends on the terms of the trust deed and who controls the trust after death. Control of the trust itself is extremely important. Estate planning often involves considering:

- Who will control the trust after death
- Who will act as trustee
- Does anyone have a fixed interest in the trust assets
- Does a power to appoint or remove trustees exist and who will have that power
- Can these roles be controlled by the willmaker in a manner that aligns with their wishes

Because the assets that are held within a trust generally sit outside the estate, they are not distributed under the Will. If control of the trust is not properly addressed, unintended people may ultimately control or benefit from the trust.

Company assets

Assets owned by a company are also generally non-estate assets. The shares in the company may be owned and be estate assets, but the assets within the company are not directly dealt with by a Will.

Even where a person is the sole director and shareholder of a company, the company itself owns the assets, not the individual personally.

This distinction becomes particularly important for business owners. Without appropriate succession planning, the death of a sole director or shareholder can create uncertainty regarding control of the company and access to company assets.

How estate and non estate assets work with a will

A Will only governs estate assets. This means that the executor will usually have the authority to deal with assets that form part of the estate, they may not have authority to deal with non-estate assets. Non-estate assets will often pass according to their own rules, not the Will.

This can create situations where significant assets pass outside the estate to different people.

For example, a person may leave their estate to their children, but their jointly owned home passes to a new partner. The outcome may not align with the intended overall distribution.

This is why effective estate planning must consider both estate and non-estate assets together.

Implications for probate, estate administration and family provision claims

From an administration perspective, the distinction affects what the executor can and cannot do.

In some cases, if all assets are non-estate assets, it may limit the work required for the executor to administer the estate.

Non-estate assets are also particularly important in NSW because of the operation of family provision laws and notional estate provisions.

Generally in family provision claims, claims are made against the estate and only estate assets are directly available for distribution by the Court.

However, NSW law recognises that strict reliance on estate assets alone may lead to unfair outcomes. As a result, in some circumstances, the Supreme Court of NSW has the power to designate certain non-estate assets as “notional estate” for the purpose of a family provision claim. This is unique to NSW.

This means that assets that are not technically part of the estate can be brought back into consideration for the purposes of a family provision claim.

Examples where this may occur may include:

- Property transferred before death without payment in return
- Property that passes to a joint tenant by survivorship
- Superannuation paid directly to a beneficiary
- Assets held in structures such as trusts in certain circumstances

The Court can make orders affecting these assets if it considers it necessary to make adequate provision for an eligible claimant. This can significantly expand the potential pool of assets available in family provision claims in NSW.

Why this distinction matters for your estate plan in NSW

Understanding the difference between estate assets and non-estate assets, and how to adequately address non-estate assets in an estate plan, is fundamental to effective estate planning.

Many estate disputes arise because assets pass differently to what the deceased intended.

Reviewing your estate planning arrangements regularly can help reduce uncertainty and ensure your wishes are more likely to be carried out effectively.

Early advice can help clarify what forms part of the estate, what sits outside it, and how to manage potential risks. This ensures that the overall distribution aligns as closely as possible with your intentions.

Speak with an estate planning lawyer on the northern beaches

E&A Lawyers has extensive experience helping clients across the Northern Beaches and NSW prepare Wills that are practical, tax-effective and legally sound. Our approach is client-focused, we provide clear, practical advice to help you understand your options.

If you are considering preparing or updating your Will, or are unsure whether your existing arrangements cover all your assets, contact our Mona Vale office today to arrange a consultation.

If you are acting as an executor or are involved in estate administration in NSW, seeking advice early can make the process clearer, reduce delays and help you meet your obligations with confidence.

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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