

# When is a Will not a Will?



## A Will

Your Will is a legal document that sets out directions for the administration and disposal of your assets after death. It must comply with fairly strict formalities to be valid. However, even a valid Will can sometimes be totally ineffective if it does not achieve what you intend because of assets you do not actually own.

## Your Sole Assets

This is because a Will can only control the sole assets that you owned in your sole name as at the date of death. Therefore, any assets held in a company, a trust (such as a family trust) or a superannuation fund will not form assets of your estate. Put another way, your Will can only give away what you own.

This can be confusing to some who think that they own everything, even those assets that have been placed in a company, trust or superannuation fund, and that their Will can automatically control the distribution of these non-estate assets. On the other hand, having assets held by other entities can also be of benefit to those seeking to protect those assets against claims after their deaths.

## Non-estate Assets

For example, you do not individually own assets held as follows:

- **Jointly-owned assets** are not part of your estate. These assets pass by the laws of survivorship directly to the survivor, and do not pass through your Will.
- **Company or trust assets** are not part of your estate. Company assets are governed by the company constitution, (although you may, or course, own the shares) and not your Will. The distribution of trust assets are governed by the trust deed and not by your Will.
- If assets are held in a trust such as a family trust, it will be important to confirm the effect your death will have on the trust, and the tax implications of any family trust election you may make. It will also be important to ensure that you have complied with the land tax notification requirements for land held by the trust.
- **Investments in Superannuation Funds** do not normally form part of your estate. This is because the superannuation assets are held by the fund's trustees on your behalf. If you have a SMSF, it is prudent to ensure that your trust deed is up to date to take into account the significant number of legislative changes that have occurred over the past few years. In particular, you may wish to have a clause allowing you to make a Binding Death Benefit Nomination if the circumstances are appropriate.

Only if assets are transferred from these other entities to your sole name prior to your death can your Will control their distribution. However, it is important to note potential stamp duty and CGT liabilities for any asset transfers.

The chart below shows how important it is to take into account all of the different entities that you may have in which assets are owned. Only in this way can effective estate and succession planning be achieved.

**ESTATE PLANNING FLOWCHART:  
Assets (Source, Control & Destination)**

**FINANCIAL PLANNER  
ACCOUNTANT  
TOPDOCS LEGAL**

