

Which assets can I gift in my Will?

Estate Planning Client Guide

Do you personally own the assets you use, invest, occupy or control?

It is important to identify which assets you own personally so that you know which assets can form part of your estate. You should also be aware of how other assets in which you have an interest will be treated in the event of your death.

Estate assets and non-estate assets

Assets owned by you personally are estate assets, which means that you can specify in your Will to whom the assets should be gifted through your estate.

Non-estate assets are assets that cannot be gifted in your Will. This may be because you are not legally the owner of the assets (even though you have control over them during your lifetime) or because you own them jointly with another party.

Assets owned as joint tenants

Assets owned by you and another person in joint names (ie as joint tenants) are non-estate assets. Full ownership of this class of assets will automatically pass to the survivor upon the death of a joint owner. It is the Will of the last-surviving owner that will determine to whom the asset is eventually transferred.

You should note there is a presumption of joint ownership for many personal assets, such as household furniture.

Assets owned as tenants-in-common

Assets owned by you and another person as tenants-in-common are estate assets and are not affected by the principle of survivorship. Your share or interest may be gifted or otherwise dealt with in your Will in the same manner as assets owned in your sole name.

Superannuation

A superannuation death benefit will be a non-estate asset when paid directly to the beneficiaries by the fund trustee. However, the terms of the trust deed of the fund that holds your superannuation will determine what flexibility (if any) you have in deciding who will receive your superannuation death benefit and in what form that benefit may be received.

Under most public offer superannuation trust deeds, you are only able to nominate your preferred beneficiaries and the proportion of the death benefit each should receive. Ultimately, the choice of recipient is at the discretion of the trustee of the fund. Your nomination is an important factor taken into account but is not decisive.

It is only where:

- your superannuation trust deed offers a binding death benefit nomination
- the trust deed specifically removes the trustee's discretion to choose the recipient or
- you are in receipt of a pension and you have nominated a reversionary beneficiary that you can effectively direct the trustee to pay the death benefit in accordance with your wishes.

Your superannuation death benefit will only be an estate asset dealt with via your Will if the trustee of the superannuation fund pays the benefit to your estate's legal personal representative. Alternatively, the trustee may pay it directly to your dependants.



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Life insurance

The general rule is that the proceeds of life insurance are paid to the owner of the policy or to any nominated beneficiary. It is only where the owner of the policy is the life insured that the proceeds are an estate asset and are dealt with via your Will.

In some cases, a life insurance policy will be owned by your superannuation fund. Where this is the case, the life insurance proceeds will be combined with your superannuation balance to form your superannuation death benefit.

Assets held in a family trust

Assets held in family trusts are non-estate assets, as they are not owned by you personally, and cannot be specifically dealt with in your Will.

Although your Will cannot deal with the assets of the family trust, your Will can allow for either transfer of control of the family trust or termination of the trust upon your death.

A loan owed to you by a family trust is treated as an asset in your estate.

Assets held by a private company or unit trust

Assets held in a private company or unit trust are non-estate assets, as they are not owned by you. It is the issued equity you hold in the company or unit trust (in the forms of shares or units) that may be an asset in your estate.

Subject to the governing rules of the company or unit trust, you may be able to leave those shares or units in your Will. This may allow you to determine who will control the company or unit trust after your death.

A loan owed to you by a private company or unit trust is included as an asset in your estate.

Would you like further information?

For further information please contact your AET Estate Planner on 1800 882 218.

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