

Which assets can you gift in your Will?

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 (and therefore be given away under the terms of your Will). 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 and you can specify in your Will to whom those 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 the legal 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 assets held as joint tenants will automatically pass to the survivor/s 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. This most often applies to the family home.

You should note that 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 law 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. 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 some 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 that is taken into account but is not binding on the trustee.

Generally, it is only binding on the trustee if:

- your superannuation trust deed allows a binding death benefit nomination or direction, and
- 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.

Your superannuation death benefit will only be dealt with as an estate asset via your Will if the trustee of the superannuation fund pays the benefit to your legal personal representative (your estate). Alternatively, the trustee may pay it directly to any one or more of your dependants.

Life insurance

Generally the proceeds of a life insurance policy which is owned personally are paid to the owner of the policy (his or her estate) or to any nominated beneficiary. It is only where the life insurance proceeds are paid to the estate that they 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 part of 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, the trust deed may allow for either transfer of control of the family trust by deed or in your Will.

A loan owed to you by a family trust is treated as an asset of 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 form of shares or units) that would be an asset of your estate.

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

Would you like further information?

For further information please contact your AET estate planning specialist on **1800 882 218**.