

MELISA SLOAN



LEGACY

Taking care of the most important people
in your life when you are no longer here

LEGACY

Taking care of the most important people
in your life when you are no longer here



First published in 2021 by Melisa Sloan

© Melisa Sloan 2021

The moral rights of the author have been asserted

All rights reserved. Except as permitted under the *Australian Copyright Act 1968* (for example, a fair dealing for the purposes of study, research, criticism or review), no part of this book may be reproduced, stored in a retrieval system, communicated or transmitted in any form or by any means without prior written permission. All inquiries should be made to the author.

A catalogue entry for this book is available from the National Library of Australia.

ISBN: 978-1-922553-05-8

Printed in Australia by McPherson's Printing

Project management and text design by Publish Central

Cover design by Peter Reardon

The paper this book is printed on is certified as environmentally friendly.

Disclaimer

The material in this publication is of the nature of general comment only, and does not represent professional advice. It is not intended to provide specific guidance for particular circumstances and it should not be relied on as the basis for any decision to take action or not take action on any matter which it covers. Readers should obtain professional advice where appropriate, before making any such decision. To the maximum extent permitted by law, the author and publisher disclaim all responsibility and liability to any person, arising directly or indirectly from any person taking or not taking action based on the information in this publication.

Contents

Introduction	ix
What will your legacy be?	ix
Dying without a Will	x
What happens when you die without a Will?	xi
What's in this book?	xii
Chapter one: What happens when I die?	1
The role of the executor	1
Grant of probate	3
Asset distribution	4
Chapter two: The importance of an Estate Plan	7
Getting started	8
Choosing your executor	9
A Memorandum of Wishes	10
Power of Attorney details	12
DIY Wills	12
Chapter three: Appointing your executor	15
Who is your most trusted ally?	15
Appointing your partner or spouse	15
Appointing your children	15
Appointing a parent	16
Appointing joint executors	16

Chapter four: The importance of trusted advisors	21
Being able to work together	22
Chapter five: Joint assets	24
Joint ownership	24
Tenants in common	25
Chapter six: Personal vs trust assets	28
Personal assets	28
Trust assets	29
Chapter seven: Do an inventory of assets and liabilities	34
Keep it simple	35
Making changes	36
Chapter eight: International assets	41
International wills	41
More complicated estates	43
Chapter nine: Taking care of business	46
Sole proprietor	46
Company	47
Discretionary Trusts	49
Chapter ten: Family businesses and maintaining family harmony	52
Different family expectations	52
Discord in the family	54
Involving your advisors	58
Chapter eleven: The blended mix	61
The basics	61
Not leaving anything to your spouse	65
Chapter twelve: Get your super right	68
What happens if you do not have a nomination in place?	70

Chapter thirteen: The insurance conundrum	73
Total permanent disability insurance	73
Life insurance	74
Family dynamics	75
Insurance and blended families	77
Chapter fourteen: Caring for your children	80
Choosing a guardian	80
Living arrangements	82
Guidance for guardians	85
Chapter fifteen: Gifts to VIPs	90
Personal items	90
Monetary bequeaths	92
Leaving money to charity	92
Chapter sixteen: Who will receive your legacy?	95
Whole family dying at once	95
At what age can children access the inheritance?	96
People with no children	99
Chapter seventeen: Intergenerational Trusts	102
Testamentary Trust Wills are common	102
Asset protection	103
How much money do you need?	104
Chapter eighteen: Making provisions for Children who cannot control their inheritance	109
Capital Protective Testamentary Trusts	110
Chapter nineteen: Caring for disabled children	114
The options	114
Special Disability Trusts	117
How much to leave to a disabled child?	119

Chapter twenty: Leaving someone out of your Will	122
Estranged children	122
Blended families	126
Chapter twenty-one: Let's not forget the fur babies	128
Providing for future care	128
Chapter twenty-two: Technology, passwords and social media	131
Memorialising accounts	131
Deleting accounts	132
Passwords	133
Chapter twenty-three: Your important wishes	136
Leaving directions and wishes	137
Financial instructions	138
Chapter twenty-four: Write those lists	143
Important documents	143
The King of Lists	144
Chapter twenty-five: The final farewell	148
Funerals	148
Disposal of your body	149
Chapter twenty-six: Still here, but incapacitated	153
Don't wait	154
The different types of power of attorney documents	156
Who should you appoint as your attorney?	157
When does a power of attorney come into effect?	158
How long does a power of attorney last?	159
What happens if you do not have a power of attorney in place and you become incapacitated?	163

Chapter twenty-seven: Letting others know your medical wishes	167
Discussions with your family	167
Advance Care Directives	168
Chapter twenty-eight: Different ways to leave a legacy	172
Financial legacies	172
A local legacy	173
Documenting your life	174
Family traditions	175
Reputation	176
Where to from here?	179
About the author	181

If you're going to live,
leave a legacy. Make a
mark on the world that
can't be erased.

Maya Angelou

Introduction

What will your legacy be?

You have worked hard for your wealth. You have sacrificed so many things to get where you are today, and quite likely at times operated on autopilot in your quest for success. You have given it your all, plus more.

Right now, the last thing you would want to happen is that all your hard work comes undone, all the long hours, the grind, the tears, and the triumphs.

This could happen though if you do not have the appropriate documentation in place to prepare for when you are no longer here.

So, I encourage you to think about one question...

WHAT WILL YOUR LEGACY BE?

Legacy means different things to different people, or it may mean nothing at all. To some it means building an extremely successful business, to others it is receiving accolades and having a stadium named after them, to others it may mean helping others and providing inspiration in how they live their daily lives.

To most people though, the most significant legacy you can leave is to look after your family. To show them that they mattered, that you cared and loved them enough to ensure you took the time to put your Estate Plan in place. An Estate Plan that comprises of the relevant

documents, that clearly explains your wishes of what you would like to happen to your wealth when you are no longer here, to ensure that your loved ones are taken care of, to ensure that your wishes are clear, and to provide guidance and instructions in respect to what is to happen to your business interests and entities.

I am fortunate enough to wake up every day and do something that I love: helping people put their legacy in place. Sometimes it takes a few times to get all the pieces of the client's puzzle in the correct places, particularly if the client has complex asset and trust structures, however we persevere, and the end result is we collectively put a well-documented Estate Plan in place that is reflective of our client's wishes. It also provides our clients with much craved peace of mind, knowing that if they became incapacitated or died that everything will happen the way they want it to and that their family will be cared for.

DYING WITHOUT A WILL

Although I love what I do, like every job there are some not-so-good aspects, the 'ugly bits' I call them. Those ugly bits can revolve around the fact that almost fifty percent of Australian adults die without a Will. I personally find this figure astounding. It means that almost fifty percent of adults essentially do not take the time to put a Will in place that will take care of their family when they are gone.

As an estate planning and probate lawyer, I have extensive experience assisting grieving families to deal with the consequences of a loved one passing away without a Will and other estate planning documents in place. I can tell you, it is not pretty. Losing a loved one unexpectedly is horrific; there is the emotional trauma to deal with, the despair, the loss, the unexpected change to life, the family unit and financial circumstances.

When you die without a Will your estate is distributed in accordance with the intestacy provisions determined by the government. The intestacy provisions vary depending on your family circumstances,

such as whether you are married, whether you have children from your current marriage and whether you have children from other relationships, or no spouse or no children at all.

As a result, dying without a Will may mean that your wife can no longer continue to live in the house that you had both happily lived in for the last twenty years, your forever home, because she needs to sell it so your children from your previous marriage can receive their entitlement to your estate. Is this really what you intended to happen when you were gone? Did you really think there would come a time where your wife may now have to rent a property because she can no longer afford to purchase a new home with her share of your estate?

What happens when you die without a Will?

If you die without a Will your next of kin will need to make an application to the relevant Court to become an administrator of your estate and there may be a few stumbling blocks along the way, including your next of kin may be directed by the Court to find guarantors to provide a guarantee of a specified sum to satisfy the Court until such time that the estate is paid to all beneficiaries in accordance with the intestacy provisions. Until such time that your next of kin is granted Letters of Administration, it can often be difficult for them to access the relevant information they require, taking up considerable time and causing much stress and emotional turmoil.

So why do so many Australian adults not put a Will in place?

There are several reasons people don't put their Will and Estate Plan in place; for many it is something that they are going to do 'one day'. For others they think that it is only something that you put in place when you are old, and some people have a phobia that if they put a Will in place that they shall die. Fact: a number of clients have made this comment to me and they are still very much alive, so fingers crossed they have overcome this phobia.

I once met a charming man; he was seventy-six and proudly told me that he didn't have a Will in place. When I enquired why, he

very enthusiastically told me that both his parents had lived well into their nineties, so he was young by comparison and consequently had ample time to put his estate planning affairs into place. Let us hope he doesn't get hit by a bus any time soon.

Many people do not like talking about their mortality or what will happen when they are no longer here. They would rather plan a holiday, do gardening and catch up with family or friends. Anything to avoid the elephant in the room. There are many underlying emotions that relate to this topic that people put in the too-hard box and never address.

The underlying reasons many people do not put their legacy and Estate Plan in place are:

- they don't know where to start
- they don't make the time
- they are too busy creating a life to provide for their family
- they don't have their eyes on the final act
- they find it an overwhelming process with legal jargon that they don't understand.

But it doesn't have to be that way. It's my aim to make it an easier process for you, to educate you and support you along the way.

As an estate planning lawyer, I want to help all of those who don't know where to start. I want to help those who do not know how to navigate the elephant in the room. I want to help you put the best possible Estate Plan in place for your family. I want you to celebrate once you have done so because you are making a difference to the lives of those you love.

WHAT'S IN THIS BOOK?

This book has been written for you, for those of you who love and care for your family and loved ones and want to provide for them

in the event that something happens to you, whether you become incapacitated or if you die. It's written to help you understand the important concepts of an Estate Plan, and to provide you with the tools to identify what you want to implement so that you can articulate your wishes clearly and concisely to those who can assist you in creating your legacy and putting your Estate Plan in place.

This book aims to be thought provoking, and will perhaps raise issues you had not previously considered. There is no sample family: all family units are different – you may be single, married, a blended family, have children who cannot control their inheritance, estranged children, or perhaps disabled children. You may have a wonderful business operation, or you may have several. In addition, you may control Trusts and have superannuation. All these aspects are carefully detailed in this book to provide you with answers to the most common questions people ask.

Essentially, this book should be utilised as a guide to work through the different components of an Estate Plan that are relevant to your individual circumstances. As such, given that you may not read every chapter of this book in methodical order, there are some points that are repeated throughout this book, to emphasise relevant points.

This book contains general advice only. Like all legal matters you should obtain legal advice specific to your own circumstances from an estate planning lawyer when creating your Estate Plan to enable it to be tailored to your specific needs and requirements. Reading this book should allow you to attend your initial consultation with your estate planning lawyer armed with all the information you have accumulated in reading this book and with definitive instructions of what you would like to put in place.

Why am I so passionate about you creating your legacy and Estate Plan? I have seen the alternative, I have seen the pain, stress, emotional toll, and once close families destroyed when someone dies without a Will. It could have all been avoided, so simply, if the deceased had taken the time to put their Estate Plan in place. I want to educate and

encourage people to put their Estate Plans in place, I want to promote change so that the incomprehensible statistic of almost fifty percent of Australians dying without a Will is diminished as it will so greatly impact the lives of those left behind in a more positive way.

It is my wish that you, the reader, gain clarity, comfort, and reassurance in reading this book. That you are encouraged and empowered to create your legacy and take care of the people that matter the most in your life. You have worked hard to get this far, so why not make your ending your most significant act.

Putting an Estate Plan in place can be the greatest legacy that you leave behind when you are no longer here, and your family and loved ones will be eternally grateful that you took the time to put this in place, something so small but so beautifully touching to know they were loved.

We all die. The goal
isn't to live forever,
the goal is to create
something that will.

Chuck Palahniuk

Chapter one

What happens when I die?

There are many variables for what happens when you die, depending upon whether your death was expected or unexpected, where it took place, and the circumstances surrounding your death.

Upon your death it is your executor of your Will who has the most important role to play. If you passed away without a Will it would be your next of kin who would undertake this role. For the purposes of this chapter we will assume that you died leaving a Will so that we may expand on the role that the executor plays in carrying out your final wishes.

THE ROLE OF THE EXECUTOR

Starting from the moment that you die, it is the executor's role to advise the relevant people and organisations of your death. They would need to advise family members, friends, and your employer in the first instance, and this list would expand as the executor progresses through their role. If you leave a list of people who you would like the executor to contact on your death, they will be able to work their way through this list in a timely manner.

The executor would need to liaise with the funeral director to arrange your funeral in accordance with your funeral wishes stipulated in your Will or your personal papers. If no wishes are stipulated, it is

at the executor's discretion in respect to what funeral you receive and what happens to your body and how it is disposed of.

Any minor children you have need to be taken care of. If your child's other parent has predeceased you then arrangements would be made for your child to be placed into the care of the guardian you appointed in your Will.

If you had business interests or operated a business then your executor would need to review any instructions and wishes you left behind in respect of the ongoing operations of this business, and ensure that the applicable processes are put in place to facilitate this.

Next, the executor must ensure that all your assets are secured. That all keys are accounted for in respect to property that you may own, together with motor vehicles, boats, caravans, motorbikes and other similar assets. They need to confirm that all these assets are safely stored, and the appropriate insurances are in place for such assets.

Most people would think securing assets would be a simple task for an executor, however let me assure you people do the strangest things at the strangest of times. I vividly recall a frantic phone call from a client early one morning advising that her mother had died at 11pm the night prior. Around two hours later – at 1am – a truck had appeared at her mother's house and her mother's expensive grand piano and elaborate chandeliers were loaded into the truck and driven away. Her sister had determined that with her mother's passing those items should now belong to her and had arranged for the removal, literally within hours of her mother leaving this world. The executor had to act quickly to retrieve those items and restore them to their rightful place under her safe custody.

Your executor must undertake an inventory of all your personal assets and liabilities as at the time of your death. It is important to note that joint assets held by you with another person are treated separately and are not included in your assets for probate purposes. The treatment of joint assets is discussed later in this book (see chapter five). In some cases obtaining an inventory of all of your assets

and liabilities can be a relatively simple task if you held minor or simple assets such as one property and a bank account, with minimal personal assets, or if you were prudent and left details of all of your assets and liabilities, which would greatly assist your executor in preparing such an inventory.

In cases where you hold multiple properties, bank accounts, investments, trusts and business structures, if such assets are not clearly documented it may add an element of complication to your executor's role. In which case, your executor must make enquiries with financial institutions, share registries, your accountant and financial advisor to obtain the relevant information.

In respect to properties that you held, your executor would also need to engage the services of a real estate agent to obtain a market appraisal of the value of each property you owned as at the date of your death. This is for both probate purposes and to provide as a record for taxation purposes if required.

Grant of probate

Your executor must obtain a Grant of Probate of your Will if you die leaving personal assets valued at more than \$50,000 (in Victoria). Each state within Australia has different processes in respect to their probate requirements and lodgement, so your executor would need to familiarise themselves with the probate requirements of the jurisdiction in which you resided and held assets.

Unless your executor is familiar with such probate processes it would be expedient for them to engage the services of a probate solicitor to assist them with obtaining a Grant of Probate of your Will. On this matter, in my own personal experience, I have had many people come to me after attempting to undertake the process themselves only to realise it is beyond their comprehension and that the time they are investing in something they don't understand is wasted and they finally recognise that an expert who practises in this area day in, day out is the best person to attend to this matter on their behalf.

Asset distribution

Once a successful Grant of Probate of your Will is obtained your executor must administer the estate on behalf of the beneficiaries until such time that the estate is distributed in accordance with the provisions of the deceased's Will. In Victoria, the *Administration and Probate Act 1958* (Vic.) stipulates that the assets of the estate should not be distributed to the beneficiaries until six months from the date of the Grant of Probate, and if the executor determines to distribute such assets prior to this date then the executor will be personally liable should a claim be brought against the estate and be successful.

If your executor is obtaining a Grant of Probate in another Australian jurisdiction they would need to ascertain the applicable distribution requirements in the jurisdiction in which the probate is obtained so that they do not personally expose themselves to any successful claims brought against the estate.

In administering your estate your executor needs to ensure that the value of the estate does not significantly decrease during the period that they are administering it on behalf of the beneficiaries, and your executor has a strong fiduciary duty to the beneficiaries that they act in their best interests at all times.

It is therefore not prudent for your executor to invest the assets of the estate in highly speculative stocks, hoping for a quick profit. If your executor did in fact do this and the share market crashed depleting the value of your estate, then your executor could very well find themselves being sued by your aggrieved beneficiaries.

In the transition period from when a Grant of Probate is obtained to when your estate is distributed your executor would seek to sell or liquidate the assets of the estate (unless there were specific bequeaths to beneficiaries), and attend to any of your wishes in respect to their business or trust interests.

In some cases, at the expiration of the six-month period from the Grant of Probate, your estate may not be distributed. This may be the case where your Will stipulates that your beneficiaries are to

receive their inheritance at a specific age and your beneficiaries are yet to reach that age. In this case your executor would continue to administer that beneficiary's inheritance until they attain the age stipulated in your Will. Your executor could continue the role of executor for a number of years if the beneficiary is particularly young at the time of your death, or if you have included Capital Protective Trusts or Life Interests in your Will.

I hope this overview of the steps that need to occur after your death provide you with some clarification of what happens when you die. Some may not be relevant to your circumstances and some steps may require further clarification when putting your Estate Plan in place, so that you have a more comprehensive overview of what needs to take place.