Our suggestions

Consider the following before you provide us with your instructions regarding your Will

General notes

1. Capital gains tax: You are required by section 121-20 of the ITAA 1997 (Cth) to keep records in relation to those of your assets which are subject to capital gains tax. The records, which must be in English, must, broadly, enable ready ascertainment of:

   (a) if you acquire an asset:

      (i) the date it is acquired; and

      (ii) the cost to you (purchase price and other costs in buying, eg stamp duty); and

   (b) if you dispose of an asset:

      (i) the date it is disposed of;

      (ii) the cost to you (purchase price, costs in buying, improving and selling); and

      (iii) the sale price or consideration in respect of the disposal.

   You should therefore maintain a list of significant assets, directed at meeting these requirements, and that list should be kept with the copy of your will to simplify the task of your executors.

   The way in which this will is drawn, or the way in which you arrange or conduct your affairs, may affect the incidence of capital gains tax. You should discuss these questions with your accountant or tax adviser.

2. Pension entitlements: A gift under your will to someone who receives a pension (or who may become entitled to a pension) may have the effect of increasing their income or their assets, and so reducing their entitlements, or disentitling them altogether. This matter is complex. You should consult a specialist about it.

3. Property you cannot give by will:

   Jointly held property: This passes automatically to the surviving joint owner (or owners) on the death of the first dying joint owner — it does not form part of the estate of the first person dying. (If you own property with another person you may hold it either as
   “joint tenants” or as “tenants in common”. It is easy to confuse the two, and it is important to be sure what type of tenancy you have in the property. Joint tenancy and tenancy in common are described more fully below.)

   Property held in trust: This passes to or is held for the beneficiaries of the trust according to the terms of the trust.

Shares: Certain shares in private companies cannot be given by will.

Partnership property: Your interest in partnership property may be given by will, although partnership property itself cannot be given by will.

Superannuation: Your superannuation arrangements may not entitle you to dispose of your superannuation assets by your will. The rules differ from scheme to scheme — you should discuss the matter with the administrators of your superannuation fund.

The proceeds of life insurance policies: If the owner of the policy has nominated a beneficiary of the policy, the nomination takes precedence over the terms of the will. It follows that, where a nomination is made, the proceeds of the policy do not form part of the estate. If you wish the proceeds of the policy to go to someone other than the nominee you cannot do it by will: you must change the nomination. If you are not sure whether you nominated a beneficiary, or who you nominated, consult the insurance company concerned. Capital guarantee deposits: some capital guarantee deposits where a beneficiary is nominated (for example, with friendly societies, and some banks) cannot be given by will.

Property sold but not yet transferred: Property you have contracted to sell, but not yet transferred, cannot be given by will.

Property subject to a contract to leave by will: Property you have contracted to leave by will, and property subject to a mutual wills agreement, generally cannot be given by will, but the question is complicated and good legal advice is required.

Joint tenancy and tenancy in common

4. Joint tenancy: Joint tenancy is a form of co-ownership in which the following principles apply:

    (a) There are no shares. In theory each joint tenant has the whole of the property. No party has a specific share in the property while the joint tenancy continues. This means that the joint tenants must have equal interests in the property, and are entitled equally to its rents and profits. There can be two or more joint tenants.

    (b) The principle of “survivorship” applies. On the death of one joint tenant the surviving joint tenant gets (or joint tenants get) the whole property automatically by operation of law, irrespective of any will made by the joint tenant who died, and irrespective of the intestacy rules. This is the principle of ”survivorship”, which applies to joint tenancies. This gives considerable protection to a joint tenant.

    (c) It follows that property held in joint tenancy does not form part of the estate of a joint tenant who dies. This is important when deciding whether a grant of probate is needed. A grant of probate is required if the estate contains land (except in Queensland) — but this does not include property held in joint tenancy, as it does not form part of the estate. The property passes automatically, by operation of law, to the survivor or survivors without forming part of the estate of the first-dying. A grant of probate is therefore not required for transfer (to the other joint tenant or tenants) of property held by the deceased as a joint tenant. Further, a joint tenant cannot by her or his will deal with property held in joint tenancy, because the property goes automatically to the other joint tenant on the death of the testator.

(d) The principle of joint tenancy applies to real as well as personal property — it applies to land as well as to property like cars, shares, furniture and bank accounts.

(e) Joint tenancy is usual in marriage where the spouses want to hold the property equally and want the principle of survivorship to apply. It is not common in other situations. It would be somewhat unusual for a partner to a domestic partnership or personal relationship or even a marriage who buys a house using only her or his own money or who has contributed much more to the purchase price than the other partner to want to register the house in joint names where the interests must be equal and the purchaser cannot deal with the property by will.

(f) It is possible for a joint tenant to sever a joint tenancy.

5. Tenancy in common: Tenancy in common is a form of co-ownership in which property is held in common with others but where, in contrast with joint tenants, the share of a deceased tenant in common passes to her or his beneficiaries under her or his will or intestacy and does not automatically pass to the surviving tenant or tenants in common.

(a) Tenants in common have fixed, undivided shares in the property. Tenants in common can have unequal shares (for example, two-thirds to one and one- third to the other).

(b) The share belonging to a tenant in common becomes part of the estate of that tenant in common when he or she dies; that is, a testator who is a tenant in common can leave her or his share by will or, if there is no will, the intestacy rules apply to the share that belonged to the tenant in common (There is no principle of survivorship for tenants in common.).

(c) Tenancy in common is usual where two people purchase a property together, especially where they have contributed unequally to the purchase price: the parties can own equal or unequal shares to reflect their respective contributions, and each can deal with her or his share by will. A husband and wife who purchase a property together out of what they see as the assets of the marriage often purchase as joint tenants, but if they are in a blended family it may be more appropriate to purchase the property as tenants in common.

In wills, the standard form of gift, for example of residue or the estate, to the testator's children is to the children as tenants in common.

After signing the will

6. If you have signed the will elsewhere than in our office, make two copies of the signed will. Write "Copy" on both the photocopies. Please send one photocopy of the signed will to us so we can check that it has been correctly signed. The second photocopy is yours. It should be placed in an envelope, and dealt with in accordance with paragraphs 4 and 5 below.

7. Do not attach anything to the original will, not even by paperclips.

8. The original will should be kept safe, either by the solicitor who drafted it, in your bank safe deposit, with the Registrar of the Supreme Court or with the Public Trustee [in Victoria, the State Trust Trustees]. Follow the advice of your solicitor. If it is lodged with us we cannot and do not take the responsibility of informing executors or beneficiaries of its existence or its provisions after your death. Therefore, make sure you follow paragraphs 9, 10 and 11.

9. Note on the envelope in which the photocopy of the will is contained:

   (a) where the original of the will is lodged. If the original is lodged with a bank, the bank's receipt for the packet should be placed in the envelope with the copy of the will, and the safety deposit box number should be noted on the envelope. It is important that the original will be easily found when needed;

   (b) the date you signed the original will; and

   (c) the names and addresses of the executors.

10. Keep the copy in your filing cabinet with your important papers.

11. You should now tell your executor and your family where the original will is kept, and when it was deposited there.

12. It is best to keep copies of your will to a minimum, but if you do make further copies write "Copy" on each page of any copy of the will.

13. Once we have told you your will has been correctly signed, but not before, please rule a line through each page of your old, revoked will, and write on it "Revoked by will [*date*], presently held at [*new will location*]", and file the old will with the copy of the new will or return the old will to us for filing.

14. You may wish to make a list of your assets to assist your executor(s). It is not necessary to make this list if you have completed an "estate information manual", although you may wish to make a supplementary list from time to time. If you do make a list of assets it may be kept with the original will or with the copy or both, but it must not be attached to the will. No document should ever be attached to a will. It is important that any such document be headed "this [*letter / list / document*] is a source of information for the assistance of my executors. It is not intended to be testamentary and it does not represent my testamentary intentions. It does not form part of my will. It is not binding on any person and creates no legal or equitable obligation." A heading of this kind will ensure that there is no argument or litigation later about whether the court should treat the document as an informal will. Any actual changes to your will should be made in consultation with a solicitor.

Reconsidering your will

1. If you marry, your marriage revokes your will unless the will is expressed to be made in contemplation of that marriage. Consult a solicitor about your will if you decide to marry.

   Entering a domestic partnership or personal relationship can affect your will. Consult a solicitor.

2. Divorce is likely to affect your will. The matter is complex and the law is not uniform throughout Australia. Proposals for change are being considered in some states.

   If you are contemplating divorce, or have been divorced since making your will, consult a solicitor.

   Ending a domestic partnership or personal relationship can affect your will and your legal obligations. Consult a solicitor.

3. Review the copy of your will every two or three years or whenever a major event occurs in your family, your assets or the taxation laws (to make sure the will is still what you want). In particular, consult a solicitor:

    (a) if you change your name, or anybody named in the will changes theirs;

    (b) if an executor dies or becomes unwilling to act as executor or becomes unsuitable due to age, ill health or for any other reason;

    (c) if a beneficiary (someone who has been left something in the will) dies;

    (d) if you have specifically left any property which you subsequently sell or give away, or put in trust or into a partnership, or which changes its character or name. This applies particularly to specifically bequeathed shares in a company which restructures its share capital;

    (e) if you marry or divorce;

    (f) if you enter or end a domestic partnership or personal relationship;

    (g) if you have matrimonial difficulties; or

    (h) if a child of yours is born or dies, a child is adopted or fostered, an adopted or fostered child dies or a fostering terminates.

4. If you wish to change your will or revoke it or make a new will without informing your husband or wife or partner, you may do so, but you should consult a solicitor. Each of you is free at any time to revoke your will and make a new will in completely different terms without consulting or informing the other. We emphasise that if one of you does decide to make a new will without informing the other, and consults us about it, our ethical duty will prevent us from drafting the new will for you and, further, will require us to tell the other of you about your intentions.

5. In very unusual cases a person may enter a legally binding contract to make a will in particular terms, or not to change or revoke her or his will. If you are bound by contract in this way you will certainly know about it: you will have entered the contract intentionally and the fact that you did so will have been brought home to you in strong and clear terms.

6. Do not add to or delete from the will after execution. Consult a solicitor if you want to change or revoke your will because even the simplest changes must be correctly done or they may have disastrous results.

7. If you later wish to make a list, letter or other document which relates to your affairs after your death, you should consult a solicitor. The danger is that it may not be clear whether the document is intended to be testamentary in nature (that is, a will or codicil), and litigation about the status of the document may result.