

Wills

SPECIAL NEEDS CHILDREN

Wills, Executors, Beneficiaries, Trusts. What does all this mean and more importantly, what does it mean for YOU?

The world of Wills can be overwhelming and confusing. You may feel that it's easier to do nothing, rather than try to understand it all!

In legal terms, a Will is the legal instrument that permits a person to make decisions on how their estate will be managed and distributed after their death.

In many instances, although not all, even identifying whom you want to manage your Will and whom you want to benefit from your estate are the easy parts.

The harder parts may come with identifying how a particular beneficiary's provision should be applied and managed in their best interests and long term welfare. Also identifying how your assets are currently held. Great care must be taken when drafting a Will to ensure that the wishes of the Will maker are legal and able to be carried out and that the Will is worded and signed correctly.

Bequests for Special Needs Children

Most provisions to children allow them to take control of the provision at the age of 18 or 21. At the age of 18, some special needs children may have the legal capacity to manage their own financial affairs, but not possess enough responsibility to make informed decisions that are in their own best interests. Others may not have legal capacity at all and from the outset require someone to manage their affairs. If you have a special needs child, the nature and severity of the special need should be carefully considered and discussed, (perhaps even with a Health Professional), prior to making any final decisions regarding your Will.

Parents/Legal Guardians of Special Needs Children

S91 of the *Administration and Probate Act 1958* provides the details that a Court must take into account when an applicant makes a claim on an Estate. The list is quite large, however it does include "*the financial resources (including earning capacity) and the financial needs of the applicant, of any other applicant and of any beneficiary of the [estate](#) at the time of the hearing and for the foreseeable future;*" and "*any physical, mental or intellectual disability of any applicant or any beneficiary of the [estate](#);*".

Who will care for your child in your absence?

For you, this is probably the single most important question and no doubt you will take great care in ensuring that in your absence, your child will continue to receive the care, love and support required long after you are gone. You can make your wishes known in your Will. However it is a WISH, for infant children, in the event of a dispute, the matter will be decided by the *Family Law Act 1975* and for special needs Adults, by the Victorian and Administrative Tribunal (VCAT).

If you would like to make provision for a child or person with special needs and you do not believe they would be able to control the provision on their own behalf, you should consider leaving their bequest in the form of a Testamentary Trust.

In creating a Testamentary Trust, you will firstly need to give consideration to whom you will appoint as the Trustee (Administrator of the Trust). This could be family members, a friend, State Trustees, the Office of the Public Advocate, a young professional, a group etc. This role is purely to administer [financial resources](#), not personally care for your child.

You have the ability to predetermine the rules of the Trust and how the Trust funds can be applied during the lifetime of the beneficiary (in this case, the special needs child) and also how the assets of the Trust are to be distributed upon the death of the beneficiary.

Many factors must be considered, however **NEEDS** are paramount. If the financial and other needs (eg; medical, education and housing) of your special needs child are, or will be, mainly met by Government assistance, then the special needs child may not have a greater need than any other child (in some circumstances they may even have a lesser need) however if this is not the case, then careful consideration should be given how you divide your estate.

Other considerations include healthcare, what is being received and what should be received, housing, government financial assistance and taxation implications. Will the special needs child require capital for medical reasons, the purchase of a house, education, motor vehicle etc? If not, then their need will only ever be income, however what income are they entitled to elsewhere?

In answering some of these questions, you may start to form a picture of what should be created in your Will and why.

Would you like your Special Needs Child to remain living in the family home after you are gone?

It is possible to set up a life interest clause in a Will that allows for someone to remain living in real estate for as long as they want to (or for a specific time or set of circumstances) but during that time the person with the occupancy right will never own the real estate. It will remain owned by the Estate and once the person passes or relocates (or as specified in the Will), the ownership of the real estate will be passed in accordance with the Will. Of course thought needs to be given to whether this type of life interest is applicable in your particular set of circumstances. Is the child able to live independently? Is a carer required? The clause needs to be carefully drafted in order to ensure that your wishes are accurately reflected and able to be carried out.

Be careful with Real Estate...

If you own Real Estate, what does the Title actually say? Who owns the real estate and in what manner?

If you own Real Estate as a Sole Proprietor or as Tenants in common with other parties, yes you are able to bequest your share of that real estate in your Will. In this instance, Probate of your Will, will be required at the time of your death to allow your Executor/s to deal with the Real Estate.

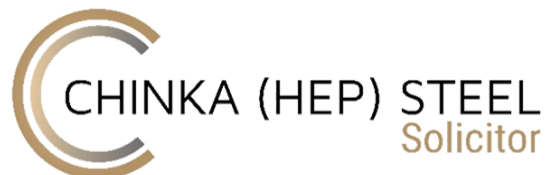
However, if you own real estate with other parties as Joint Proprietors, upon the death of one of the joint Proprietors, the remaining proprietors will automatically be entitled to own the deceased proprietor's share in the real estate and it cannot be dealt with in a Will. In this instance the transfer instrument is an "Application by Surviving Proprietor" form and Probate is not required to deal with the real estate.

It is possible to change the manner of holding of a Title to Tenants in Common or Joint Proprietors, depending on your requirements and individual set of circumstances. This type of change to the Title does not attract a Stamp Duty fee.

Special consideration needs to be given when dealing with real estate, but particularly in a Will!

We Can Help!

If you do not have a Will, or have not reviewed your Will recently please do so. A little bit of time, effort and cost now, can save a lot of time, effort and additional cost in the future. We can help with all your Will requirements – ask us how! Call our friendly team on 5427 2477.



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