Will for Visual Artists

?Artists who make a will can decide how their assets, including their art and their copyright, are dealt with when they pass away. Having a valid will avoids problems with intestacy after you have passed away. This information sheet explains why artists should have a will, and includes a sample will at the end. Artists can use this template to draft their own will, and have it reviewed by Arts Law as part of our Document Review Service.

PLANNING YOUR ESTATE

What is your estate?

All property that you own outright or have an interest in, is property that may be disposed of during your lifetime, or should be considered when making your will.

This includes real estate, personal property such as a car, furniture, shares or other investments, personal documents, letters and artwork – both your own and anyone else's that you have acquired. It also includes the copyright in your artwork and any copyright which you have acquired in other people's artwork or other copyright materials and your rights in other forms of intellectual property, such as designs, patents and trade marks. Your estate comprises all of the property you own together with any debts, taxes and liabilities you may owe at the time of your death.

The importance of copyright

What is copyright?

The term copyright refers to certain legal rights, which allow people to control the use of their original creative work. Perhaps the most important of these rights for visual artists is the right to control the copying (or 'reproduction') of their artwork and to offer copies for sale.

Copyright is a distinct asset that exists independently of the physical artwork. For example, if you sell an artwork to a public gallery, you continue to own the copyright in it unless you transfer it to the gallery in writing; the gallery cannot make reproductions of the artwork without your permission.

Due to the independent existence of copyright, when planning your estate you may choose to dispose of the physical artwork to one person and the copyright to another. If you do not expressly dispose of your copyright in an unpublished manuscript or artwork but do dispose of the physical work (either by specific reference to the artwork or manuscript or more generally by giving your entire estate to someone) then the person entitled to the physical work will also receive the copyright in the work.

It is important to get legal advice about copyright from a lawyer who has expertise in intellectual property. Contact the Arts Law Centre of Australia or the Australian Copyright Council for assistance. See Useful Organisations for their contact details.

Copyright is flexible

You can give a number of people different rights to use your copyright. Using the gallery example, you may give the gallery permission to make copies of your artwork for publication in an exhibition catalogue and give someone else the right to make postcards from your artwork. This flexibility is also available to you in estate planning – you may want to give different people different rights to use your copyright in your will.

Ownership of copyright

The owner of copyright is usually the person who creates the artwork. Of course, this will not be the case if the creator has transferred ('assigned') their copyright to another person in writing. There are some other notable exceptions. If, for example,

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you create artworks as part of your employment, your employer will usually own all the copyright. Where a person commissions you to paint a portrait, or make an engraving, or (in some cases) to take a photograph, that person will own copyright in the resulting artwork, unless you both agree otherwise in writing.

Gaining copyright protection

Copyright protection in Australia is automatic. It does not rely on any system of registration. Your artwork is protected by copyright as soon as it is made or expressed in a 'material form' – that is, in any form of storage, whether visible or not – provided it is not itself merely a copy of an already existing artwork.

Duration of copyright

The lifespan of copyright makes it an important asset to take into account when planning your estate. The duration of copyright protection depends on the kind of copyright material.

Until 1 January 2005, copyright in most artworks lasted for the lifetime of the artist plus 50 years after the artist's death. The Copyright Act 1968 (Cth) was amended on 1 January 2005 and the duration of copyright for most artworks (including photographs) was extended to lifetime of the artist plus 70 years after the artist's death. The extension only applies to works which were still protected by copyright on 1 January 2005. So if the artist died before 1 January 1955 the copyright duration has expired and it was not revived for an extra 20 years.

If an estate comprises other kinds of copyright materials, such as literary or musical works, sound recordings or films, the duration of copyright protection for each of these will need to be considered separately.

Reproduction of artworks and licensing of copyright

Owners of copyright can control the reproduction of their artwork and grant licences to others to reproduce their artwork.

VISCOPY (Visual Arts Copyright Collecting Agency), can administer your rights in the reproduction of your artwork by any means, including publications, posters, slides and CD ROM. Any owner of copyright in visual artwork can be a member. Also, trustees or executors of artists' estates and people who inherit copyright under a will can be members. VISCOPY can license the reproduction of your artwork to others and collect the licence fees on your behalf. See Useful Organisations for VISCOPY's contact details.

Moral rights

In addition to copyright rights granted under the Copyright Act 1968, Australian artists have 'moral rights'- specifically the 'right of integrity' and the 'right of attribution'.

The right of integrity is the right to object to a person treating your artwork in a manner which is derogatory or prejudicial to your honour or reputation. This could include distorting or mutilating the artwork or using the artwork in an inappropriate context.

The right of attribution is the right to be known to the public as the creator of the artwork and to prevent others from claiming authorship of your work or attributing works to you that have been made by someone else.

An author's moral rights generally continue until copyright ceases to exist in the artwork.

Unlike copyright, moral rights do not form part of your estate and cannot be given to a person in your will. However, it is important to ensure that there is someone to manage your moral rights for you after your death and to take action if those rights are infringed. This person may be, but does not have to be, an executor named in your will.

Property separate from your estate

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There are some kinds of property, which may be treated separately from your estate, such as:

- property you own as a ‘joint tenant’;
- the proceeds of a life insurance policy;
- property held in a family trust;
- a business where you have made a ‘buy-sell agreement’ with your business partner; and
- your superannuation.

These kinds of property and the ways in which you can deal with them raise specific legal and tax issues on which you should get advice. However, with these kinds of property you can be more certain as to who shall receive them, as it is less likely that their ownership can be legally challenged after your death. This is an important consideration if you want to provide for someone after your death who may be neither a relative nor a dependent, such as a friend or same-sex partner.

HOW TO PLAN YOUR ESTATE

When planning your estate you will need to consider:

- all the property you own in Australia and overseas;
- whether any of your property is to be treated separately from your estate;
- the people you wish to benefit from your estate and their likely future financial requirements;
- the people who may have claims on your estate;
- the assets which are available to pay debts and liabilities;
- the tax implications; and
- the laws that apply to the different ways of dealing with your estate.

You will need to compile a list of your current assets, including bank accounts, insurance policies, superannuation, investments, title deeds and an inventory of your artwork including your ownership of copyright.

Once you have made arrangements for the disposal of your property, it is a good idea to review those arrangements every few years to ensure that they are still appropriate.

Some of the ways you can plan your estate include one, or a combination, of the following:

- making a will;
- disposing of property during your lifetime;
- acquiring assets as a joint owner;
- owning a life insurance policy;
- entering a ‘buy/sell’ agreement with a business partner;
- establishing a superannuation fund; or
- establishing a trust.

Each of these options has its advantages and disadvantages. These are summarised and explained below.

Making a will

Advantages	Disadvantages

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Choice: you can choose who will benefit from your estate	Disputes: if your will is successfully challenged by relatives or dependents, your estate may not go to the beneficiaries of your trust
Flexibility: there are different ways to provide for beneficiaries	Legalistic: it is advisable to have a lawyer draft your will, especially where it is complex; a will may be invalid if legal formalities and prescribed form are not followed
Certainty: a carefully drafted will gives you peace of mind that your estate will be distributed according to your wishes, with minimal risk of a successful legal challenger	Tax: in some circumstances, your estate or beneficiaries may have to pay capital gains tax on disposal of estate property
Revocability: a will may always be revoked during the lifetime of it's maker. This applies even where the will claims it cannot be revoked	

Background

What is a will?

A will is a document in which you set out your intentions for the disposal of your property after your death. It becomes effective when you die but can be cancelled or changed at any time before then.

Preparing your will

If your estate and what you wish to do with it is simple and straightforward you can make your own will, but be careful. It is always wise to let a lawyer translate your intentions into words, so that your plans for the disposition or use of your property including your artwork are realised.

You can contact any community legal centre for more information about how to draft a will including the Arts Law Centre of Australia, which can refer you to a lawyer who is experienced in drafting wills.

The Office of the Public Trustee in each State and Territory also prepare wills. There is generally no direct charge for this service, but a percentage based on the value of your estate is taken as a fee when or after your estate is distributed. See Useful Organisations for the Office of Public Trustee's contact details in your State or Territory.

How can you dispose of property in a will?

There are different ways you can dispose of your property in your will. For example:

- you may make an outright gift of certain artworks (or the proceeds from the sale of those artworks) to one beneficiary and give the copyright in those artworks to another;
- you may specify that a gift is not to be received until a particular condition is satisfied (eg. 'to my nephew if he survives me and attains the age of eighteen');
- you may provide for an annual sum of money (an 'annuity') to be paid to a beneficiary;
- you may set up a trust for your young grandchildren so that artworks can be held for them and divided between them at a later date. You may want to provide in your will for the sale of other assets to pay for the cost of storage, maintenance and insurance for the artworks during the interim period; or
- you may give one beneficiary the right to enjoy your property during their lifetime (perhaps your spouse or partner) with ownership passing to another beneficiary (perhaps your children) after their death.

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You should seek legal advice on the options available to you. Some may have tax implications or may prove burdensome to your estate.

Disposing of property during your lifetime

Advantages	Disadvantages
in most cases, gifts won't be challenges	in some circumstances, a gift may be challenged after your death
you can earn income through sales	you will be taxed on the proceeds of any sale
your will may be simpler	the disposal of a gift may attract capital gains tax
there may be tax benefits if you give artworks to public institutions	

Background

There are several advantages to disposing of property during your lifetime such as being able to decide who gets what and having the pleasure of seeing the recipient enjoying it. Selling or giving away some of your artwork during your lifetime also means you can make a simpler will, because it will deal only with the property you retain. Selling your artwork means you earn income.

There are tax incentives available to people who give artwork to certain public institutions as gifts during their lifetime. Gifts of artwork to a public institution such as a museum, gallery, library or hospital may also enhance your reputation and ensure that your artwork is collected by the institutions you choose.

It is important to be aware that in some circumstances, a gift made during your lifetime will be 'clawed back' into your estate after you die. For example, in New South Wales, if you die within a certain time after making a gift, it may be considered part of your estate if there is any challenge to your will. For this reason you should get legal advice if you want to part with assets during your lifetime for less than their market value.

Joint ownership of assets

It is possible for assets to be owned jointly by one or more people. There are 2 forms of joint ownership known as "joint tenancy" and "tenancy in common".

There are advantages and disadvantages to each, partly depending on the relationship of the parties.

Joint tenancy

When you purchase an asset, such as a house, with another person you may do so on the basis that you share ownership with the other owner(s) as a 'joint tenant'. This means that each joint tenant (co-owner) has rights over the entire asset. No joint tenant has a specific share in the asset. In other words, you cannot sell or dispose of your interest in the asset independently of the other joint tenant/s.

Importantly, when a joint tenant dies, the deceased's share **does not** form part of the deceased's estate. Instead it passes automatically to the surviving joint tenant/s.

It is not possible to transfer by will an asset held as a joint tenant. If you wish to transfer an asset held as a joint tenant, this can only be done while you are alive.

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Joint tenancy is generally more suitable for relationships of mutual trust such as those between long term partners, such as husband and wife or de facto relationships. It is generally not recommended for business relationships.

Joint tenancy may simplify the administration of your estate, as certain property will not form part of your estate. For instance, superannuation may be an asset that is owned as a joint tenant.

You should also be conscious of possible tax implications. Stamp duty and capital gains tax may be payable if you transfer your property to a joint tenancy structure. You should consult an accountant for advice on transferring property into a joint tenancy.

Tenants in common

A tenancy in common is another way to jointly own an asset. Under this arrangement each tenant in common has a particular share in the asset. The shares may be of unequal proportions such as one- third/two thirds.

In a tenancy in common each tenant's share will form part of their estate at the time of their death. In other words the property can be left to a beneficiary under a will. The surviving tenant/s in common will not automatically receive the deceased tenants share.

A tenancy in common may be more appropriate between friends or in a business situation such as where two artists share ownership in a studio space. It may also be appropriate in a long-term relationship where the partners have made unequal contributions to purchasing the asset or where there are children from a previous marriage. The tenancy in common can be structured to reflect the level of each partner's contribution and the partners are able to leave their share to their respective children in their wills.

Life insurance policies

Advantages	Disadvantages
certainty: the proceeds of the policy will go to the person of your choice	cost of contributions
tax: the proceeds of the policy aren't taxed (except in pension and annuity form)	

Background

The proceeds of a life insurance policy must be distributed to the beneficiaries you have nominated. This means that others will be unable to challenge the distribution of the proceeds of the policy after your death.

Buy/sell agreements

'Buy/sell agreements', which give a business partner the right to buy the business once the other business partner has died, can have the effect of allowing your share in the business to be treated separately from your estate. However, there may be capital gains tax implications to consider.

Superannuation

Superannuation funds generally require that you nominate a beneficiary. This person will obtain the benefit of your superannuation at your death.

It is a legislative requirement that the trustees of your superannuation fund allocate your superannuation assets to one or more people who are your 'financial dependents'. This means that your nominated beneficiary may not receive the assets if

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the trustee believes they do not satisfy this requirement.

The rules of your fund will set out who will be considered as a financial dependent. The rules of every fund differ. You should contact the trustees of your fund to obtain a copy of the rules.

If you have no financial dependents, the superannuation assets will usually form part of your estate.

Your nominated beneficiary(ies), or any person who may be entitled to a death benefit may be able to appeal to the Superannuation Complaints Tribunal about the trustee'' decisions or conduct, and to have the matter considered by the Tribunal. See Useful Organisations for the contact details of the Superannuation Complaints Tribunal.

To avoid future disputes over your superannuation assets it is advisable to review your nominated beneficiary(ies) regularly to ensure it remains appropriate.

Establishing a trust

Advantages	Disadvantages
beneficiaries: long term benefits for the beneficiaries	costs: setup costs and ongoing administration costs
tax: tax advantages for family trusts and trusts set up for cultural or charitable purposes	control: you may lose control of the trust's assets
protection of assets: in the case of family trusts, assets are protected if a beneficiary becomes bankrupt or divorces	

Background

What is a trust?

A trust is a legal entity by which one person ('the trustee') holds property owned by the trust for the benefit of a person or people or class of people (beneficiaries), or for some purpose permitted by law, such as a charitable purpose. The property may be real estate, personal property (including money and shares) or intellectual property, including copyright.

A trust enables you to benefit a person or institution over a long period of time. Trust funds are invested to produce income which is used to achieve the purpose of the trust.

For example, you may set up a trust which holds your artwork on behalf of your young children until they reach a certain age and then distributes the artworks between them. Alternatively, you might direct your trustee to sell your artworks over a period of time, invest the proceeds and use the interest (and capital if necessary) for the maintenance and education of your children.

Like disposing of your property by gift, in New South Wales trust assets may be 'clawed back' into your estate if a family member or a dependent makes a claim.

Setting up a trust

You can set up a trust by specifying this as your intention in your will, or alternatively you can set up a trust during your lifetime. If you set up a trust during your lifetime, you will need to prepare a trust deed.

A trust deed is a document which:

- sets out the objects of the trust;

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- names the beneficiaries;
- names the trustees and their powers; and
- specifies how the income and assets of the trust can be distributed.

The objects of the trust should be clear, but flexible enough to allow for changing circumstances. It is important that the trust deed is drafted carefully and professionally.

It should also provide for the sale of assets or the winding up of the trust (in the event that it can no longer achieve its purpose) and specify to whom proceeds should be distributed.

A trust may be set up through a lawyer, a trustee company or both. The Trustee Corporations Association of Australia maintains a list of trustee companies. See Useful Organisations for the Trustee Corporations Association of Australia's contact details.

Choosing a trustee

This person may be the same person as the executor. A trustee can also be a beneficiary of the trust as long as they are not the sole beneficiary. The trustee may be a relative or friend or a trustee company. Ideally, the trustee should have financial know-how and experience in administering the type of trust you want to set up.

Your trust deed should provide for the appointment of an alternate trustee with similar qualities in the event that your nominated trustee dies or wishes to retire.

The greater the faith you have in your trustee(s), the more discretion or power you may want to give them in your will. If you have nominated trustees in your will, you may want to grant them certain powers in relation to your artwork, to assist them with their ongoing duties, such as the support of young children.

You might provide your trustees with the discretion:

(a) to obtain valuations of your artwork;

(b) to enter into agreements with galleries and dealers for the sale of your artworks; and

(c) to decide whether to sell outright to dealers or galleries or to consign your artwork for sale subject to the dealer's commission.

Family trusts

Family trusts come in several forms. Whatever the form, their main advantages are that they allow a family to reduce its overall tax burden, they protect the assets placed in the trust from such events as the bankruptcy or divorce of an individual family member, and they enable assets to be held for present beneficiaries and for future generations.

If you set up a family trust during your lifetime, you can retain control of the assets in the trust by setting up a family company, in which you are the main or sole shareholder, to act as the trustee. After your death, trust income will continue to be distributed according to the terms of the trust deed so that, in effect, you still control the flow of income to your family members until the trust comes to an end.

Family trusts will not be appropriate for every family. They are most likely to be used where the main income earner of the family is exposed to work-related business risks (for example, a company director or the proprietors of a family business,), where a family member requires ongoing care and financial assistance and where the family owns assets which are suitable to move in to a family trust structure.

There are significant costs associated with setting up and administering a trust. For further information on family trusts, you should contact a lawyer or a trustee company. Contact the Law Society in your State or Territory for referral to a lawyer with

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experience in establishing family trusts. See Useful Organisations for the Trustee Corporations Association of Australia's contact details, who can give you information on trustee companies.

Trusts to benefit the arts

You may want to provide funds to an arts organisation or institution, or to a particular class of beneficiaries, such as Australian practising sculptors or painters. The trust may, for example, provide an annual award for a portrait by a female artist or maintain your house as a low rent residence for young artists. Philanthropy Australia Inc has a range of information available that may assist in the establishment of community foundations and trusts. See Useful Organisations for their contact details.

Costs of a charitable trust

Once the trust is established, it should be able to generate enough income to achieve its purpose as well as cover ongoing administrative fees and adverse fluctuations in interest rates and inflation. There could however be other costs to consider, such as advertising for donations or to inform potential beneficiaries about the trust.

You may want to provide the trustees with the power to join the trust to another with similar objects in the event that it is no longer able to generate sufficient income by itself.

YOUR WILL

Preparation

Before you prepare your will or see a lawyer you should:

- make an inventory of your property, including artwork;
- choose executors
- choose guardians for your children under the age of eighteen;
- choose beneficiaries;
- choose trustees and beneficiaries of any trusts you intend to establish; and
- consider how you wish your body to be disposed of.

Making an inventory

An essential step in planning ahead is to get your records in order. Making an inventory of your property (including your bank accounts, insurance policies, superannuation, investments, title deeds, artworks and copyright) will make it easier for you to decide what you want to do with your will, and should simplify the task of those who look after your estate when you die. You should update the inventory of your property regularly and give a copy to your executor.

Why an inventory of artwork?

An inventory allows the executor of your estate to establish which of your artworks you are referring to if you have decided to leave certain works to particular beneficiaries. Your executor will also have to place a dollar value on your estate and to do this may need to call in an artwork valuer whose job will be easier if they also can readily locate and identify each artwork and determine recent sale prices.

A detailed inventory will also assist your artworks to be readily acknowledged as your work in future years. This may impact on the potential curatorial and sale values of your work. An inventory will be a useful source for authentication of your artwork, allowing any forgeries to be identified in the future. The sample inventory included here outlines the information that is ideally collected by museum curators when they accession artworks to collections. Many artists are not able or willing to

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keep records of this detail but you should at least satisfy yourself that the documents you leave will enable the executor of your estate to ensure that your beneficiaries receive the artwork you have chosen for them and that this will be settled with as little cost and trouble as possible.

Your inventory of artworks should list:

- all artworks which you have given away or sold;
- all artworks which you own and are in your possession;
- all artworks which you own and are on loan, including the names and addresses of the borrowers and the terms of the loans;
- all artworks which are held on consignment for sale by galleries, dealers or retail outlets and the terms of the consignments;
- copyright owners and licensees in all artworks which you have created; and
- details on each artwork which allow a person to identify the artwork.

If you have not already kept records you should begin to do so now.

Executors

The executor's role

Your executor is the person whom you appoint to carry out your wishes as expressed in your will. He or she completes the necessary legal documentation, finds and collects the estate property and distributes it to the beneficiaries named in the will. The executor's duties end once the estate property has been distributed to the beneficiaries.

An executor is entitled to be paid for performing their duties, which include:

- locating the will;
- applying for the death certificate from the Registrar of Births, Deaths and Marriages in your State or Territory:
- locating your assets and liabilities;
- applying for a grant of probate;
- assessing the value of your assets;
- paying any debts, income tax and funeral expenses; and
- finally, distributing the balance of the assets according to the terms of the will.

One guide to dealing with these duties is 'Rest Assured', 4th Edition, 2005 published by Redfern Legal Centre Publishing. See Useful Organisations for Redfern Legal Centre Publishing's contact details.

Choosing an executor

Before you nominate a person to be the executor, you should discuss the matter with that person to ensure they will be happy to accept the appointment.

You may want to appoint more than one executor, each with different skills. For example, you may appoint one executor to deal with all the matters relating to your artworks and another to deal with the remaining aspects of your estate. It is also a good idea to appoint more than one executor where your estate is large or where your wishes are complex.

Appointing more than one executor is also a precaution against any mishap should your executor die before you, become ill or decline to act in their appointed role. If any of these events occur, or if you die without a will, someone will have to apply to the Court to be appointed to administer the estate. It is better that this important matter be in your control.

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In appointing your executor (who can also be a beneficiary under the will), choose someone who you trust, is likely to outlive you, knows and understands your artwork, and who will discharge their duty of care to your estate by carrying out your intentions, particularly your intentions regarding your artwork. You may also want to authorise the executor to manage your moral rights for you and take action if these rights are infringed.

Appointing an executor to be a trustee

An executor may also be appointed to act as a trustee in a will. A trustee is responsible for any ongoing duties that need to be performed on behalf of a trust (see Establishing a trust for information about trusts).

Guardians

A guardian is the person you nominate in your will to look after the interests of your children under the age of eighteen if they are left without a living parent.

Choosing a guardian(s)

Before you nominate the guardian(s) of your children under the age of eighteen years, you should ensure that the person(s) you have in mind is happy to take on that responsibility. The guardian(s) also should be someone who is likely to outlive you. In the event that your child is left without a living parent, the Court will choose the guardian(s) you have named in your will to care for your children if this is in the children's best interests. You should ensure that there are sufficient funds from your estate to enable the guardian(s) to pay for your children's expenses.

Beneficiaries

You can leave your estate or part of it to any person or organisation you choose, but this must be written in your will unambiguously and you should be aware of the tax implications of your choice.

Family provision

While you have freedom to choose who will benefit from your estate, certain relatives and dependents can challenge the terms of your will after you die. Whether you leave a will or die intestate (without a will), if there is inadequate provision for the proper maintenance and support of certain family members and dependents, courts have power under State and Territory legislation to make provision for them out of your estate.

In most States and Territories, potential claimants include spouses, former spouses and children of any age whether legitimate, ex-nuptial or adopted. You should certainly seek legal advice when making your will if you are not planning to nominate your spouse, children or other dependents as the main beneficiaries. The legislation in some States and Territories includes a wider category of relatives and dependants as potential claimants. De facto spouses and stepchildren may also be included.

De facto spouses and same sex partners

If you die without a will, your estate will be distributed among your closest relatives according to the rules of intestacy. Whilst the rules of most States and Territories recognise a de facto spouse as a beneficiary, this is not always the case for same sex partners.

In some States and Territories same sex partners may be eligible to make an application as a dependent for maintenance and support under testator's family provision legislation. In New South Wales, a claimant can include a person who was wholly or partially dependent on the deceased and was at some time a member of the deceased's household. This can include same sex partners.

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To avoid difficulties, if you wish all or any part of your estate to go to a de facto spouse or same sex partner (whether to provide for their maintenance and support after your death or simply for their enjoyment) you must make this intention clear in your will.

Institutions as beneficiaries

Collecting and educational institutions

Most national, state and regional art galleries, museums, libraries and universities have policies for accepting bequests of artwork. It is a good idea to do some research before you choose an institution for your bequest, to ensure it is able to accept your artwork and will deal with it in a manner which is appropriate to your wishes. Some institutions collect only certain categories of artwork.

Most institutions are more likely to accept your bequest if they have already established a relationship with you. This enables the institution to become familiar with your artwork and enables you to get to know more about its facilities and its acquisition, collection and exhibiting policies.

Institutions' selection criteria

Almost all institutions reserve the right to select from donated artwork rather than accept all of it. Selection criteria vary but may include:

- relevance of the artwork to their collection;
- quality and condition of the artwork;
- significance of the artwork and the artist;
- whether the artist is already represented in the collection;
- capacity of the institution to store and care for, and to display or screen, the artwork;
- historical or cultural significance of the artwork; and
- (for State or Territory institutions) close association of the artwork or artist with the State or Territory.

Most institutions refuse to accept bequests that impose conditions, as these might be incompatible with the institution's collecting, storage or exhibition policies.

Deaccessioning policies

Collecting institutions have policies which detail the conditions under which they can remove artworks from their collections ('deaccessioning policies'). Most institutions review their collections from time to time to determine whether or not an artwork should remain in the collection. You should check each institution's policy before making a bequest.

Your body

In most cases, directions in your will about what happens to your body and any funeral arrangements do not carry the force of law and will not bind your executor. However, such directions, if stated explicitly, do make your wishes clear and should influence the exercise of your executor's discretion. If the disposal of your body is disputed, your directions may also influence a Court's decision.

It is advisable not to rely solely on your will to make your wishes known as your executor may not read the will until after your family have made arrangements for your body. For this reason, you should make your wishes known (preferably in writing) to your executors and close family members prior to your death.

FORMALITIES OF A WILL

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Legal requirements

Legislation in each State and Territory sets out what is required when making a legally enforceable will. It is very important that this legislation is complied with, as failure to do so may result in the will having no effect when you die.

Generally, a will complies with the formal requirements if:

- it is in writing and dated;
- it is signed at the end of the document by the testator in the presence of two adult witnesses. Neither the witnesses nor their spouses should be beneficiaries under the will;
- (where the will is longer than one page) the testator and witnesses sign the bottom of each page; and
- there is a clause in the will, signed by both witnesses, which states that the will was signed by the testator in the presence of the witnesses and that they signed in the presence of the testator and each other. This is known as an 'attestation clause'. This clause should include the name, address and occupation of the witnesses.

If the will is longer than one page, it is advisable to join all the pages together but no other documents should be attached to the will. The testator and both witnesses should sign and date the will with the same pen to avoid arousing suspicion that the will was not signed by the testator in the witnesses' presence.

The terms of your will should reflect your own wishes and not the influence or pressure exerted by another person.

If you own assets held overseas, you will have to check that your will also complies with the legal formalities of that country. It may be easier to have a separate will which deals with that property and which appoints an executor who resides there.

By consulting your local community legal centre, the Arts Law Centre of Australia or a private lawyer, you can ensure that you comply with the formal requirements for a will, that your intentions are effectively expressed, and that you avoid common errors such as making a gift in your will for one of your witnesses, or making inadequate provision for your dependents.

Legal capacity to make a will

In order to make a will you must be over the age of 18 and have the necessary mental capacity – that is, you must be 'of sound mind, memory and understanding'. This means that you understood you were signing a will disposing of property after your death, had a general idea of the extent and character of the property, and that you were aware of the claims to your estate by the natural claimants to it, such as your spouse and children. Even if it is established that you were insane or suffered from insane delusions, if you executed your will during a lucid period, this will suffice.

If your will has been validly executed and there is nothing suspicious in its terms, a court will presume that you knew and approved of its contents and had the capacity and intention to make it and that the will reflected your own wishes.

Changing or cancelling a will

Sometimes changes in yours or other people's circumstances will impact on whether your will reflects your intentions. And, of course, you may also change your mind about how you want your estate to be distributed.

You can change or cancel your will at any time if you decide to distribute your estate in a different way.

Changing a will

There are strict legal rules about making valid changes to your will. You should not attempt to change your will simply by crossing out the parts which no longer reflect your intentions or by adding in new clauses.

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You can change your will by signing a separate document which then forms part of the will. This document is called a ‘codicil’. The codicil has to meet the same formal requirements of a will. Due to the complexities of the law about this, in most cases it is easier to make an entirely new will.

Cancelling a will

You can cancel (‘revoke’) your will entirely by:

making a new will which contains a clause expressly revoking any previous will;

- by destroying the will (with the intention of revoking it);
- by getting married; and
- in some States and Territories, by getting divorced.

Marriage

Your will is automatically revoked when you marry or re-marry unless you clearly contemplate the marriage at the time you make your will. In some States and Territories you will actually have to state that the will is made in contemplation of the forthcoming marriage. If you have not made this type of will, it is important to make a new will after your marriage to avoid dying intestate.

Divorce

In some States, a divorce will also cancel part or all of your will. You should consider making a new will if you divorce.

If you have made a will naming a former de facto partner as a beneficiary, you should make a new will if you no longer want that person to receive any part of your estate.

Death of a beneficiary, executor or guardian

Beneficiary

If a beneficiary named in your will dies before you, you may want to change your will. Otherwise, that part of your estate may pass to other beneficiaries named in your will or may be disposed of according to the ‘intestacy rules’.

If you have more children after making your will, you may want to amend it to include them as beneficiaries.

Guardian or Executor

You may also want to change your will to choose a new executor or guardian if the people named in your will to take these roles die before you.

Storage of the will

Ensure that your will is kept in a safe place.

The original should be stored in a safety deposit box at your bank, with your lawyer if you have one, or a trustee company or the Public Trustee.

A copy should be kept with your business papers and another, in a sealed envelope, with the executors, who should be told where the original is kept. If there is a codicil, store it with the original will and keep a copy of the codicil with all copies of the will.

Locating your will

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In New South Wales it is now possible to register, for free, the location of your will with the NSW Wales Registry of Births, Deaths and Marriages. This will assist your family, friends, or executor to locate your will if this is not known to them at the time of your death. See Useful Organisations for the New South Wales Registry of Births, Death and Marriages contact details.

Granting of probate

A grant of probate is an order from the court to confirm that a will is valid and that the executor can distribute the deceased's estate. Once a grant of probate is made, members of the public can obtain a copy of the will from the Probate Division of the relevant State or Territory Supreme Court. See Useful Organisations for contact details of your State and Territory Supreme Court.

WHAT IF YOU DON'T LEAVE A WILL?

If you don't leave a will you will die intestate and your entire estate will be distributed by the Court according to the 'rules of intestacy'. Even if the intestacy rules, as set out below, would distribute your estate to the beneficiaries of your choice, it is still better to have a will to avoid unnecessary delays and cost to your estate. Having a will also means that you are able to choose your own executor and the guardian of your children under the age of eighteen years.

Rules of intestacy

The rules of intestacy vary in each State and Territory, but in general the following procedure is followed:

1. An application is made to the Court to administer your estate. Generally, your relatives who are most likely to be beneficiaries under the rules of intestacy will make the application to act as administrator. They will have to prepare a number of legal documents to make the application and to show that proper attempts have been made to locate a will. The legal documents must be filed at the Registry of the Probate Division of the Supreme Court of the relevant State or Territory.
2. The administrator may have to lodge a sum of money to guarantee that their duties will be carried out properly (a 'bond'). The amount of the bond required is usually equivalent to the value of the intestate estate. However, the Court can waive this requirement.
3. After debts, liabilities and taxes are paid and the Court's costs are met, your estate will be distributed to designated next of kin, identified in the relevant State or Territory legislation. If there are no surviving next of kin, the intestacy rules do not allow your estate to pass to a close friend or favourite charity. Instead, your estate passes to the Government. The rules of intestacy usually exclude stepchildren, cousins and relatives by marriage such as a brother-in-law. The rules always give priority to your surviving spouse, and if there is no surviving spouse, to your children. For example, in New South Wales distribution occurs in the following order:

- to your surviving spouse if you have one.[1] Depending on the value of your estate, part of it may also go to your surviving children;
- if you do not have a surviving spouse but your children survive you, they will share your estate equally. 'Children' includes legitimate, ex-nuptial, adopted and artificially conceived children but does not include stepchildren. If any of your children have died before you, leaving children of their own, then those children (your grandchildren) take their parent's share of the estate;
- if you leave neither a spouse or children, your parents will receive equal shares of your estate, or, in the case of one parent surviving you, your entire estate;
- if neither spouse, children nor parents survive you, your estate will go to your brothers and sisters or their children; failing them, to your grandparents; failing them, to your aunts and uncles;[2]

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- if none of these relatives survive you, your estate will go to the Government.

4. Once your estate has been allocated according to the rules of intestacy, certain relatives and dependents who believe that they would not, upon distribution, receive proper maintenance and support from your estate may apply under family provision legislation to have the allocation varied.

More information

For information on the rules of intestacy in your State or Territory contact the Office of the Public Trustee in your State or Territory or the Probate Office in your State or Territory Supreme Court. See Useful Organisations for their contact details.

[1] In some States and Territories this can include a de facto spouse, but in no State or Territory does it mean your divorced spouse.

[2] In some States and Territories, other than New South Wales, your cousins may receive your estate if your aunts and uncles have died before you.

TAX IMPLICATIONS

This section outlines the potential tax implications in planning your estate. It is based on the law at the time of writing and is intended as a general guide only. As tax laws change frequently it is best to seek guidance from a suitably qualified lawyer or accountant with respect to your particular circumstances. Contact the Arts Law Centre of Australia, CPA Australia (CPA stands for certified practising accountant), or The Institute of Chartered Accountants for referral to an accountant or lawyer. See Useful Organisations.

As previously discussed, there are various ways to transfer the ownership of property, such as by sale or gift during your lifetime, or by will after your death. See How to Plan Your Estate. The tax consequences of each method of disposal of artworks are different and are briefly described below.

There is also a difference in the tax treatment of artworks created for sale as part of a professional artist's business and artworks created or acquired to be kept as part of an artist's personal collection. Artworks created for sale as part of a business are treated as part of the trading stock of the business.

To understand the section below you may wish to refer to What is Capital Gains Tax? first.

Sale of artwork in your lifetime

A professional artist may produce or acquire artwork either for sale as part of their business, or to keep, as part of their personal collection. When the artwork is sold the tax consequences are different as explained below. Click to go to a summary diagram of this section.

Artwork forming part of a business

Where an artwork forms part of a business and it is sold, it will be treated as trading stock and proceeds of the sale will be treated as income received in the course of carrying on the business. Capital gains tax (CGT) will not apply to income received from the sale of the artwork. See also What is Capital Gains Tax?

Artwork forming part of a personal collection

Where an artwork forms part of a personal collection and it is sold, income received from the sale will be subject to capital gains tax, unless the $500 threshold, explained below, applies. See also What is Capital Gains Tax?

Calculating capital gains tax

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The amount of any capital gains tax payable will depend on the following 3 factors:

(a) Sale price less cost base

The capital gain on which tax will be payable will generally be equal to the income received from the disposal of the artwork less the cost base of the artwork. The cost base includes the amount paid to acquire the artwork or the cost of materials used in order to make the artwork.

(b) Date of acquisition and disposal

The amount of any capital gains tax payable also depends on how much time has passed between acquisition and disposal of an artwork.

Capital gains tax will generally only be assessed on 50% of any capital gain made on the sale of the artwork if, for the purposes of the capital gains tax provisions, the artwork was acquired at least 12 months before the disposal of the artwork.

However, if an artwork is disposed of within 12 months of its acquisition, capital gains tax will be assessed at 100% of the capital gain.

(c) Capital gains tax $500 threshold

A capital gain or a capital loss is ignored if the amount paid to acquire or create the artwork, which is part of your personal collection is less than $500.

The amount paid to acquire the artwork is calculated on the market value of the whole artwork. Therefore if you pay less that $500 for a share or interest in an artwork capital gains tax will still be applied if the market value of the artwork is more than $500. This rule does not apply to interests acquired before 16 December 1995.

Example

Bill is a professional artist. Bill made an artwork for part of his private collection that cost $600 to make. He later sells it for $9,000 within 12 months of making the artwork.

Bill will have to include $8,400 as a capital gain in his personal assessable income being the sale price less the cost of making the artwork.

If the work had cost $300 to make, Bill would not be required to declare any capital gains in his assessable income when he sold it for $9,000.

Example

Bill and Jane purchased a painting for $800 by contributing $400 each for the purchase. They sell the painting 3 years later for $5000.

The sale of the painting will be subject to the capital gains tax provisions as the market value of the painting at the time of purchase was more than $500, even though the cost base of their respective interests in the painting was less than $500. However, as the painting has been held for more than 1 year, the amount that has to be included in Bill's and Jane's income will be reduced by 50%.

Gift of artwork in your lifetime

Click to go to a summary diagram of this section.

Gift of artwork forming part of business

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If an artwork that forms part of a business and its trading stock is given away during your lifetime, the assessable income of that business will include the market value of the artwork. Capital gains tax (CGT) will not apply to the gift of the artwork. See further What is Capital Gains Tax?

Gift of artwork forming part of personal collection

If an artwork is given away from a private collection capital gains tax will apply, unless the $500 threshold, explained above, applies.

Calculating capital gains tax

The amount of any capital gains tax payable will depend on the following 3 factors:

(a) Market value less cost base

The capital gain, on which tax will be payable, will generally be equal to the market value of the artwork less the cost base of the artwork.

The market value of the artwork will need to be ascertained by a valuer or a gallery.

The cost base includes the amount paid to acquire the artwork or the cost of materials used in order to make the artwork

(b) Date of acquisition and disposal

The amount of any capital gains tax payable also depends on how much time has passed between acquisition and disposal of an artwork.

If, for the purposes of the capital gains tax provisions, the artwork was acquired at least 12 months before the gift of the artwork, capital gains tax will generally only be assessed on 50% of the difference between the market value of the artwork and the cost base.

If the artwork has not been held for 12 months, capital gains tax will be assessed on 100% of the difference between the market value of the artwork and the cost base.

It will not be possible to index the cost base of the artworks for inflation. See also What is Indexation?.

(c) Capital gains tax $500 threshold

See Above.

Gifts eligible for tax deduction

If you make a gift of artwork during your lifetime to certain funds, authorities or institutions, you may be eligible for a tax deduction. In addition, capital gains tax may not apply.

You might consider making a gift of artwork from your personal collection to:

- a public art gallery, library or museum under the Cultural Gifts Program (formerly known as the Taxation Incentives for the Arts (TIA) Scheme); or
- the Commonwealth as part of its Artbank collection; or
- a philanthropic or public benevolent fund, set up to provide emergency assistance to professional visual artists in crisis caused by illness, disability or other major misfortune.

Cultural Gifts Program

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The Cultural Gifts Program encourages gifts of significant cultural items to public art galleries, museums and libraries by offering donors a tax deduction for the market value of their gifts, under subdivision 30-A of the Income Tax Assessment Act 1997. The Cultural Gifts Program is administered by the Department of Communications, Information Technology and the Arts. Comprehensive information about this program is available from the Department. See Useful Organisations or click here .

To make a donation under this program there are certain requirements to be met, including obtaining current market valuations of any artwork at the time of its donation. Further advice about this and other requirements are available from the Department for both donors and institutions accepting gifts.

Donations made under the program are exempt from capital gains tax. As well, the average of the GST inclusive written valuations of the artwork (of which two are required) can be a tax deduction, but not in all cases. The Department can advise you of the limitations on tax deductibility. Finally, any tax deduction that applies may be spread over a period of up to five years. . .

The tax implications of making a gift to a cultural organisation or institution are complex and it is advisable to seek further advice when considering a donation.

Artworks left by your will

For the purposes of the *Income Tax Assessment Act 1997* and the calculation of capital gains tax and assessable income, an executor of your estate or a beneficiary under your will is treated as having acquired any assets you leave or bequeath to them as at the date of your death.

The consequences for executors and beneficiaries are briefly described below.

Executor

Capital gains tax

Any capital gain arising from the transfer of artwork to your executor by operation of your will, will not be subject to capital gains tax, except where the

Disclaimer

The information in this information sheet is general. It does not constitute, and should be not relied on as, legal advice. The Arts Law Centre of Australia (Arts Law) recommends seeking advice from a qualified lawyer on the legal issues affecting you before acting on any legal matter.

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