

A Guide for Wills and Estates and Succession planning



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Introduction

The area of wills and estates is a unique area of law where understanding and sensitivity are important elements. At Harwood Andrews Lawyers we understand the importance of helping you to plan ahead and we make the process as easy as possible for you.

We meet with you and discuss in detail your wishes relating to your assets and how they should best be allocated, taking into consideration your hopes for your future working life, your retirement, your family and loved ones needs, the possibility of your incapacity in years ahead and any other relevant circumstances. We ensure you understand the choices available to you and the future outcomes of the decisions you make. We can advise you in terms of structuring your assets after your death to minimise costs and tax implications for your beneficiaries and to ensure that the potential for a claim to be made against your estate is minimised.

We have prepared this guide as an easy-to-read summary of wills and estates and succession planning law. This guide is not intended to replace the personal legal service provided by your lawyer but to provide basic information and guidance. Specific advice in relation to your personal situation should be sought in all circumstances.

Making A Will

A will is a legal document that names the people you want to administer your estate, that is your executors, and the people you want to receive the property and possessions you own at the date of your death. These assets can include your home, money in bank accounts, investments, household and personal possessions, jewellery and the like.

To make a will you must be over 18 years of age and you must have “testamentary capacity”. This generally means that you must:

- know what assets you own and have some idea of how much they are worth;
- be able to decide who should fairly receive your assets; and
- understand what you are doing in making a will.

Most people leave their assets to their spouse or their children, but this is not always the case. You can leave your assets to whoever you choose, including charities and not for profit organisations. It is important, however, that you leave enough assets to people to whom the law considers you have a responsibility to make provision.

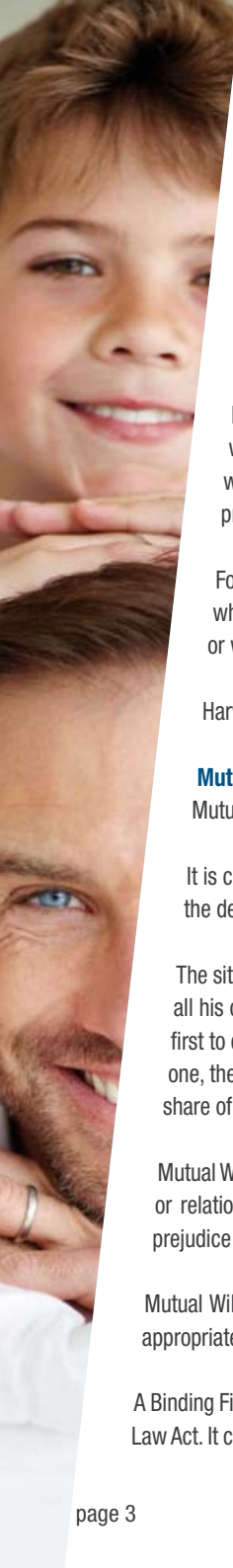
If you do not provide for these people they may be able to take legal action to obtain a share, or larger share, of your estate by contesting your will. (See “Contesting a Will”)

If you make a will before you marry it will be revoked when you marry, unless the will is made in contemplation of the marriage. If you divorce, any gift or appointment as an executor in favour of a former spouse is automatically revoked, but otherwise the will remains valid.

If you separate from your spouse but are not divorced, your existing will continues to apply until a divorce. This might mean you have a very inappropriate will at that time. (See “Separated Couples”)

You can only give what you own. This may sound obvious but it is not always so. If you own your home or a bank account in your name only, then you can gift it in your will. However if you own an asset with another person, such as your spouse, there are two ways in which the asset can be owned, each giving different outcomes on the death of one owner.

If you and your spouse own an asset, such as your home, as joint proprietors, then upon the death of one of you the other will automatically own the property. This is regardless of the terms of the will of the deceased. However if a couple own an asset as tenants in common, in specified proportions, then upon the death of one of them that person’s share in the asset will pass in accordance with his or her will.



It is very common for married couples to own their home jointly. However business partners buying an investment property would usually own the property as tenants in common.

Couples who are in second marriages and who have children from a prior marriage are often advised to own assets which they share as tenants in common rather than as joint proprietors. This ensures that upon death each one will have assets in his or her estate to benefit his or her own children if that is intended.

Testamentary Trust Wills

Testamentary trust wills are wills which establish discretionary trusts in the will for the potential benefit of intended beneficiaries. Rather than leaving your assets directly to beneficiaries your will gives your assets to a trust which is established upon your death. Testamentary trusts are widely used for asset protection, although they have their limits in this regard. They can also provide taxation advantages.

For example anyone with substantial wealth, or who has an intended beneficiary in an occupation which carries a risk of being sued for malpractice, or with a spouse or child in such an occupation, or with a child who might be in an unstable marriage, should consider a testamentary trust will.

Harwood Andrews Lawyers is a leading provider of these types of wills.

Mutual Wills Agreements And Binding Financial Agreements

Mutual wills are wills made by a couple which have agreed terms.

It is common for a couple with children to leave all assets to each other and then to the children on the death of the survivor.

The situation is more complicated when a couple have children from prior relationships. If one leaves all his or her assets to the partner, will the partner then leave a share of assets to the children of the first to die? This may have been intended when the couple made wills together but, after the death of one, the other might change his or her will and exclude the children of the deceased person from any share of the assets.

Mutual Wills Agreements can be essential when making wills in the circumstances of a second marriage or relationship. They compel each party to refrain from altering his or her will in such a way as to prejudice the intended beneficiaries named in the wills made by the couple.

Mutual Wills Agreements are not the only mechanism available in these situations and are not always appropriate, but they need to be considered.

A Binding Financial Agreement is an agreement made between a couple under the provisions of the Family Law Act. It can be used to compel a party to the agreement to include particular provisions in his or her will.

Estate Planning & Succession Planning

Estate planning involves planning for what should happen to your assets upon your death.

Succession planning incorporates estate planning and also planning for the future control or influence over assets which are not directly owned by you and are outside your estate.

Sometimes a will is all that is required to provide an estate plan, however this will not always be the case. If you have superannuation benefits these may need to be separately dealt with in your will or in a separate document. If you control a family trust, the future of the trust should be the subject of a separate document.

Life insurance should also be reviewed as part of your estate plan. The ownership of life insurance policies can be critical.

If you own a business or a share in a business either as a partner or shareholder in a company, the future ownership of the business should be taken into account. An agreement between owners is usually recommended.

When you are preparing an estate plan it is also timely to consider the appointment of substitute decision makers, that is people to make decisions on your behalf if you lose capacity.

Whilst the executor appointed in your will controls your estate after your death, you should consider who should control your assets in the event of your incapacity prior to your death. At the same time you should consider who should make medical decisions on your behalf or lifestyle decisions on your behalf in those circumstances.

You can deal with these issues by appointing a financial power of attorney and a medical power of attorney and an enduring guardian. (See “Substitute Decision Makers”)

If you have infant children you should also consider who should look after them in the event of the death of you and your spouse during their infancy. You may wish to nominate a guardian or guardians who you would like to look after your children. You then need to consider how your childrens expenses should be funded.



Business Succession

If you are the owner of a business, or a part owner, or a shareholder in a company that owns a business, then there will be further considerations required for your estate planning.

If you are the sole owner of the business then you should consider:

- who should be given the business if it is intended that the business continue operating?
- who should have the responsibility of winding up or selling the business if these steps are to be taken?
- should one particular beneficiary be given an option to purchase the business, and if so, on what terms?
- can this be done without being unfair to the other beneficiaries?

If you are a part owner of a business or share in the control of a separate entity owning the business then, as part of your estate planning, you should have an agreement with the other owners or controllers. This could be either a partnership agreement or shareholders agreement or unit holders agreement. It should deal with, amongst other things:

- what happens upon the death of one of the owners, or a person sharing control of the ownership entity?
- how is the value of that person's share in the business, or the entity's share, to be determined?
- how is that value to be paid out to that person's estate or the entity and on what terms?

Your agreement with your co-owners or fellow shareholders or unitholders needs to dovetail with your will. Their wills should also dovetail with the agreement.

Farm Succession

Farms can present a particularly challenging set of circumstances to deal with in terms of estate planning.

Farming estate disputes are very common and careful planning is recommended to avoid them. This can require a detailed will or it may require transferring the farm to an intended beneficiary or to a trust during your lifetime. Of course if you own a farm and decide to part with it during your lifetime you should only do this if you can afford to or you are ensured of receiving sufficient financial support to enable you to live reasonably well and independently in future. You may require funds to provide supported accommodation in the future.

Many estate disputes arise where farmers leave the farm to sons and little or nothing to daughters. Generally the courts will re-write the will to make greater provision for the daughters. This can result in the sale of the farm. Farmers need to plan carefully to avoid this outcome. Their wills need to make proper provision for those to whom they are obligated. Often this can be achieved without need of the sale of the farm with proper planning.

Taxation and stamp duty issues need to be considered if a farm is to be transferred to another family member during the owner's lifetime.

Wills For Separated Couples

A will is revoked by divorce, to the extent that it provides for a spouse. However it is not revoked by separation. Therefore if you and your spouse separate your existing wills remain valid. Usually this is not appropriate.

When a couple separate they are often focused on the difficult emotional issues and the family law aspects at the time of separation. The family law issues are:

- resolution of property matters;
- care arrangements for the children including who the children will live with and the time they spend with each party; and
- divorce.

Separating couples often overlook other legal issues. Their wills, made in happier times, usually leave everything to each other. Their life insurance policies will often be owned by each other. If they have prepared financial or medical powers of attorney these will usually appoint the spouse. All of these arrangements will need to be reviewed.

Taxation And Stamp Duty Issues

Taxation is an issue which is relevant to all aspects of estate and succession planning. Taxation of estates and superannuation benefits and capital gains tax need to be taken into account at all times.

Taxation is relevant in relation to wills, superannuation nominations, life insurance ownership, business succession planning and farm succession planning. Sometimes it is necessary to restructure the ownership of assets at the time of preparing your estate plan to ensure the best and most tax effective outcome.


Stamp duty is also a factor to bear in mind when considering the change in ownership of assets.

Harwood Andrews Lawyers is renowned for its competence in advising in the area of taxation. We have specialists in taxation law available to assist in estate matters.

Superannuation And Your Will

Considerable wealth is now held in superannuation funds. Your superannuation benefits are not necessarily controlled by your will and often require special treatment. Sometimes a person's will is not as important as a separate document called a death benefit nomination. This might control the destination of superannuation benefits upon a person's death depending upon whether the nomination is binding or non-binding.

Remember that your will only applies to personally owned assets. Many people are surprised to find that the payment of superannuation benefits upon death is determined by the trustees of the superannuation fund. Often, but not always, the trustees have discretion to pay to the spouse, (which includes a domestic partner irrespective of gender), a child or children, the estate of the deceased or a person in an interdependency relationship with the deceased. Only if the trustees pay the benefit to the estate does the benefit come under the control of the will.



The trustees could pay your superannuation to a person, or in proportions, that you do not intend.

Can you tell your superannuation fund trustees to pay your benefit to a particular person? This answer is sometimes, but then only within the limited range of people referred to above.

Many superannuation funds offer their members the right to nominate a beneficiary to receive their superannuation benefits upon death. However these nominations are usually not binding on the superannuation fund trustees. Many people don't realise that there is a difference between binding and non-binding death benefit nominations.

Self-Managed Superannuation Funds are increasingly popular. They can give you greater control over your superannuation benefits by allowing nomination of death benefit beneficiaries which bind the trustee. It is very important to consider the nominations and who will be in control of the fund after your death.

We can provide detailed advice about the inter relationship between your will and the possible distribution of your superannuation benefits.

Taxation Of Superannuation Benefits

Superannuation benefits can be subject to tax depending on who receives the payment. You need to take this into account if you are making a death benefit nomination.

Superannuation benefits paid to a spouse or child under 18 years or a financial dependent or a person in an interdependency relationship with the deceased will be tax free. Superannuation benefits paid to children over 18 who are financially independent will be taxed.

Loved Ones With Disabilities - Disability Trusts

The provision of care and financial support for family members or loved ones with disabilities is an important issue to many people making an estate plan.

Harwood Andrews Lawyers has a keen interest in this area. Lawyers within the Wills and Estates department often act as trustees for trusts established for intellectually disabled persons and regularly advise clients who wish to provide for family members with disabilities.

The introduction of Special Disability Trusts under the Social Security laws in recent years has been a very important development for people wishing to provide for severely disabled beneficiaries. The use of these trusts and protective trusts can be an important part of an estate plan.

If a will does not provide adequately for a disabled child the will is likely to be challenged on the death of the willmaker by a representative of the child. Some parents avoid leaving assets to a disabled child in the hope that this will ensure the disabled child continues to receive a pension. This is a risky approach and may be unnecessary, given the options now available with Special Disability Trusts.

Family Trusts

Many assets are held in family discretionary trusts. Sometimes people who control trusts forget that they do not own the assets held in the trust. These assets are not controlled by the person's will but a will might include provisions concerning the future control of the trust. Alternatively those provisions can be in a separate document.

If you are an appointor or trustee of a discretionary trust, or if you are a shareholder in a company which is the trustee of a trust, you need to either include special provisions in your will dealing with the trust or sign a separate document to deal with the trust.

Depending on what the trust deed allows you may be able to appoint future trustees and appointors in the will or the separate document. The shares owned in a corporate trustee will pass in accordance with your will, so you need to check that the will deals with this. You may wish to consider expressing wishes in your will about how you would like the trust to be administered after your death, bearing in mind that at that time the trust will be controlled by its then trustee subject to the power of any appointor of the trust to remove the trustee and appoint a new trustee.

Life Insurance

Estate planning should include consideration of life insurance. Is life insurance required? If so, who should own the policy? It is often assumed that if you are the insured person then upon your death the proceeds of the policy will be paid to your estate. However the proceeds are paid to the owner of the policy and the owner does not need to be the person whose life is insured. Sometimes it is desirable to have life insurance proceeds paid to the estate of the deceased but this is not always the case.

If you own or control a business with other people life insurance arrangements can be critical and maybe required to cover obligations under a business owners agreement.

Often life insurance is taken out by the superannuation fund of which the insured is a member. Remember that if your life insurance premium is paid by your superannuation fund then the proceeds of the policy on your death will be paid to the superannuation fund. The proceeds will then be distributed as part of the superannuation benefit. This is not necessarily governed by your will.

The taxation of life insurance proceeds also needs to be taken into account. If the proceeds are paid to a superannuation fund then they might be subject to substantial tax upon payment from the fund, depending upon to whom they are paid.



Powers of Attorney - Substitute Decision Makers

Have you ever considered who you would want to make financial and medical decisions for you if you were incapacitated due to illness or injury?

Powers of attorney and guardianship are legal documents that allow you to appoint a person or persons to make financial, medical or lifestyle decisions on your behalf. Appointing attorneys and a guardian ensures that decisions about your assets and finances, medical treatment, and lifestyle are made by a person or persons of your choice in the event of you being unable to make those decisions yourself.

There are four main legal documents of this type. Each allows you to appoint someone to manage different areas of your life.

General Power Of Attorney

A general power of attorney enables you to appoint one or more persons to make financial or legal decisions on your behalf. The general power of attorney ceases if you lose capacity to make decisions for yourself. Therefore it is rarely used.

Enduring Power Of Attorney (Financial)

An enduring financial power of attorney gives the person(s) you appoint power to manage your assets and finances. However, unlike the general power of attorney which ceases if you lose your capacity, the enduring power of attorney (financial) continues to operate in that situation.

The power given can be used because of necessity, that is if you are no longer able to manage your own assets. It can also be used for convenience, for example, if you are travelling overseas or if you and your spouse own assets separately and want to give each other the authority to deal with those assets.

You can appoint one or more persons to be your attorney. If you appoint more than one person you can specify whether you want the appointment to be joint (where all attorneys must act together) or several (where any one of the attorneys can act on your behalf).

The document gives you the flexibility to decide how and when your attorney can exercise the power. You can specify limitations or conditions. You can choose whether you want your attorney's power to commence immediately or on a specific date or occasion.

Your attorney must always act in your best interests.

If you do not have an enduring power of attorney (financial) and you lose your capacity then a family member, friend or carer will need to make an application to the Victorian Civil and Administrative Tribunal (VCAT) to be appointed as your administrator. A person whom you may not have appointed yourself could

be appointed or VCAT could appoint a trustee company to manage your affairs. This process can be very stressful for your family and can lead to a dispute.

Enduring Power Of Attorney (Medical Treatment)

An enduring medical power of attorney enables you to appoint a person to make decisions about health care and medical treatment on your behalf. The person you appoint under an enduring power of attorney (medical treatment) is called your agent. The power only commences if you lose your capacity, that is, if you can no longer make medical decisions on your own.

You can only appoint one person to be your agent and one alternate agent who can only act if your first nominated person is deceased, incapacitated or cannot be located.

Your agent can:

- consent to medical treatment on your behalf;
- choose between different treatment options;
- refuse consent to medical treatment on your behalf if:
 - the treatment would cause you unreasonable distress; or
 - your agent has reasonable grounds to believe you would not want the treatment to continue; and
- withdraw treatment, including turning off life support systems.

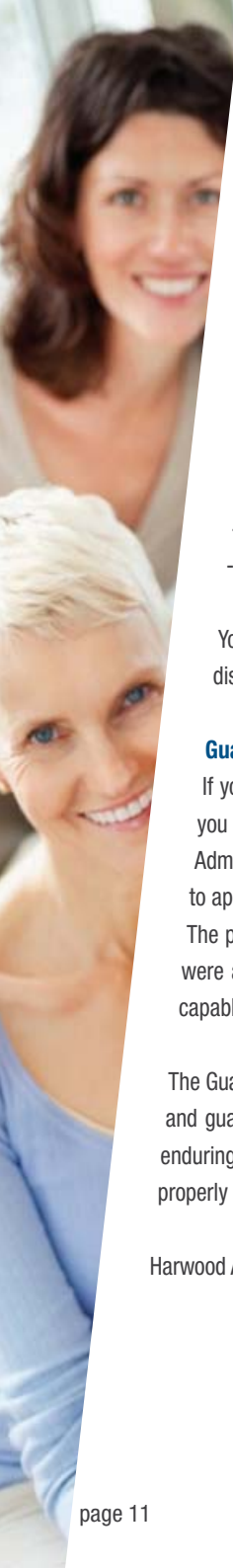
Your agent cannot refuse palliative care, which includes pain relief and the reasonable provision of food and water.

Enduring Power Of Guardianship

An enduring power of guardianship allows you to appoint a person to make health care and lifestyle decisions on your behalf, such as where you will live and with whom, who can visit you, what medical treatment you should receive and what leisure activities may be suitable. Your guardian can consent to medical treatment on your behalf but, unlike a medical power of attorney, cannot refuse consent to treatment.

You can only appoint one person to be your guardian and one alternate guardian who can only act if your first nominated person is deceased, incapacitated or cannot be located. You cannot appoint a person who provides you with professional care, treatment or accommodation. Therefore if you are living with a son or daughter in their home, that child cannot be your guardian.

Your guardian cannot make decisions about your assets or your finances.



If you appoint a guardian and an agent under an enduring power of attorney (medical treatment) there is some overlap in the powers given to both. In relation to medical treatment, your agent can override your guardian.

The enduring power of guardianship only commences if you lose your capacity.

If you do not appoint a guardian and you lose your capacity it may become necessary for the Victorian Civil and Administrative Tribunal to appoint someone to make lifestyle decisions for you. This process can be very stressful for your family and can lead to a dispute.

Harwood Andrews Lawyers can assist you by:

- advising whether or not powers of attorney and guardianship are suitable for you;
- drafting documents that meet your particular needs;
- advising you on the implications of the documents.

You can appoint the same person or persons to act in all three roles. We recommend that you discuss this with your lawyer.

Guardianship & Administration Applications - Victorian Civil And Administrative Tribunal

If you have not appointed a financial enduring power of attorney and an enduring guardian and you become incapable then it will be necessary for someone to apply to the Guardianship and Administration Board at the Victorian Civil and Administrative Tribunal. Applications can be made to appoint an administrator to make financial decisions, or a guardian to make lifestyle decisions. The person who applies to be appointed may not be the person you would have appointed if you were appointing a financial enduring power of attorney or an enduring guardian whilst you were capable.

The Guardianship and Administrative Board has jurisdiction over the operation of powers of attorney and guardianship. Sometimes it is necessary to apply to the Board to cancel an existing financial enduring power of attorney or power of guardianship where the attorney or guardian has not acted properly or has become incapable or wants to be released from their position.

Harwood Andrews Lawyers regularly represents parties in matters before the Board.

Deceased Estates

The Wills and Estates team at Harwood Andrews Lawyers regularly assists executors to administer deceased estates.

An executor appointed in a will is responsible for making funeral arrangements, identifying the deceased's assets and liabilities, obtaining possession and control of those assets, paying all taxes and liabilities, obtaining possession and control of those assets, paying all taxes and liabilities of the estate and distributing the balance in accordance with the will.

Where a deceased person owned a house or land, or had money or investments of significant value, the executor needs to obtain a grant of probate of the will before he or she is entitled to deal with the assets of the estate.

Probate

A grant of probate is a document that is issued by the Probate Office of the Supreme Court of Victoria which states that the executor has proven that the will is valid. In order to obtain a grant of probate the executor must prove that the will is the last will of the deceased and that the executor is entitled to administer the estate.

Applying for a grant of probate is a process that has several steps including:

- gathering documents and information about the assets and liabilities of the estate;
- preparing the probate application including an affidavit by the executor and other documents in accordance with the Supreme Court rules; and
- placing an advertisement of the executor's intention to apply for probate on the Supreme Court Website.

Harwood Andrews Lawyers can assist you by collating all the necessary information required to obtain a grant of probate, preparing the documents and submitting the application to the Probate Office.

Letters Of Administration

A grant of letters of administration is a document that is issued by the Probate Office of the Supreme Court which states that an administrator has been appointed to administer the estate. The administrator then has authority to deal with the deceased's assets.

A grant of letters of administration will be required if the deceased person owned a house or land, or had money or investments of significant value but did not leave a will, or left a will appointing someone as executor who has died or has become incapable or refuses to act. The grant gives the administrator the same powers as an executor. The administrator has the power to take possession of the deceased's assets and distribute those assets amongst the beneficiaries in accordance with the will if there was one, or the intestacy laws if there wasn't a will.

Joint Assets

If the deceased held any assets jointly with another person (usually a spouse or partner) then probate will not be required to deal with those assets. This includes jointly held property, bank accounts, shares and investments. The surviving owner is entitled to have these assets transmitted into his or her name. The assets do not form part of the estate of the deceased owner.



Estate Administration

Once probate (or letters of administration) has been granted, the executor (or administrator) can deal with the estate assets. The executor must attend to payment of all estate liabilities, settle any disputes and pay any income tax liability. The executor can then transfer the deceased's assets, or distribute money received from the sale of assets and redemption of any investments or bank accounts, to the beneficiaries

Intestacy

When a person dies without a will, or without a valid will, he or she is said to have died intestate. The Administration and Probate Act sets out who, among the deceased's next of kin, is to receive the estate's assets. Normally the deceased's partner or the person with the greatest claim to the estate may apply for a grant of letters of administration to represent the estate.

Contesting A Will

Estate disputes arise when a person believes that a deceased person's will fails to make proper provision for his or her maintenance and support.

The Administration and Probate Act allows any person for whom the deceased had a responsibility to make provision to contest the will, that is, to ask the Court to re-write the will. The claim is made in the Supreme Court or County Court and must be made within six months from the date of grant of probate or letters of administration, although the Court can allow an extension of time in some circumstances.

The person claiming must establish that he or she is a person for whom the deceased had a responsibility to make provision. The person must also establish that the will fails to make adequate provision for his or her maintenance and support. It is not necessary for the claimant to be an immediate family member.

If a claim is made, the Court will take into consideration the relationship between the deceased person and the claimant, the size of the estate, the financial resources of the claimant and the beneficiaries under the will, the age and health of the claimant, whether that person was being maintained by the deceased, and several other factors.

Unless the claim is frivolous or vexatious, the claimant's legal costs will usually be paid out of the estate. A frivolous or vexation claim is one without any merit.

Estate disputes can be very stressful for families and all parties involved. The Wills and Estates department at Harwood Andrews Lawyers has considerable experience in dealing with estate disputes.

Other Estate Litigation

Estate disputes can arise in many other situations apart from the challenge to a will described above.

Sometimes it is alleged that a person has made a will under the undue influence of another. This can invalidate a will if the allegation is proved. Undue influence might be a factor in a different circumstance such as when it is alleged that a will maker has disposed of assets during his lifetime by making gifts as a result of the undue influence of another.

Legal proceedings are sometimes taken against an executor of an estate where the executor has failed to properly administer an estate. An executor can be removed in that situation.

Executors do not always agree on a course of action and may need to apply to the Supreme Court for directions as to the proper administration of the estate.

These are just some examples of the many areas of disputation in relation to estates where Harwood Andrews Lawyers has been involved and assisted in finding a resolution.

Further Information

If there are any aspects of the issues addressed in this guide which require further or more detailed explanation, please make an appointment with the wills and estates department at Harwood Andrews Lawyers. We will be able to provide the advice you need.

Important Disclaimer

The material contained in this booklet is of the nature of general comment only, and neither purports, nor is intended to be advice on any particular matter. No reader should act on the basis of any matter contained in this booklet without considering and, if necessary, seeking appropriate professional advice from their lawyer upon their own particular circumstances. This firm expressly disclaims all and any liability to any person, in respect of anything and of the consequences of anything done or omitted to be done by any such person in reliance, whether whole or partial, upon the whole or any part of the contents of this booklet. All rights reserved. No part of this work, which is covered by copyright, may be reproduced or copied in any form or by any means (graphic, electronic or mechanical, including photocopying, recording, taping, or information retrieval system) without the written permission of Harwood Andrews Lawyers or its approved nominee or licensee.



Melbourne

Level 13, 15 William Street

Melbourne VIC 3000

PO Box 633, Collins St West VIC 8007

Tel. +61 3 9620 9399

Fax. +61 3 9620 9288

Geelong

70 Gheringhap Street

Geelong VIC 3220

PO Box 101, Geelong VIC 3220

Tel. +61 3 5225 5225

Fax. +61 3 5225 5222

Werribee

Suite 3, 10 Watton Street

Werribee VIC 3030

PO Box 208, Werribee VIC 3030

Tel. +61 3 9741 0077

Fax. +61 3 9742 5483