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Wills & Estates

What You Need to Know About Your Will?

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A Will is a legal document which outlines how you would like the property you own at the date of your death (called your "Estate") distributed following your death. A Will also appoints the person/s who will be responsible for the administration of your Estate.

The people who receive your Estate are called your beneficiaries.

The people who are appointed in your will to administer your Estate are called your executors.

Formal Requirements for making a Will

In Queensland, the *Succession Act 1981 (Qld)* governs the requirements for making a valid Will, **including:**

1. A Will must be in writing;
2. A Will must be signed by the person making it in the presence of two independent witnesses; and
3. A Will must be signed by the person making it with the intention that the document constitutes a Will.

Testamentary Capacity

A Will can only be made by a person who has capacity to make a Will (called 'testamentary capacity'). Generally, the test for testamentary capacity can be described as whether the person is of "sound mind, memory and understanding".

Various cases have elaborated on this issue and have identified that the critical elements of "sound mind" in the context of making a Will include the ability to:

1. Understand the nature of making a Will and its effects;
2. Understand the extent of the property in the Estate;
3. Comprehend and appreciate the claims to which the Will-maker ought to give effect: for example, a person making his or her Will must have sufficient memory to recall the people who may be appropriate beneficiaries of their Estate and be able to comprehend their relationships to the Will-maker and their claims on the Estate.
4. There should be no disorder of the mind and no insane delusions influencing the disposing of the Estate.

It is possible that a person who generally lacks testamentary capacity may, during lucid intervals, have the requisite capacity to make a Will.

If there is a concern about a person's capacity to make a Will, sometimes the advice of a medical practitioner will be needed.

What if I die without a Will?

If you die without a Will, your Estate will be dealt with under the laws of intestacy. In Queensland the laws of intestacy are set out in Part 3 of the *Succession Act (Qld) 1981*.

The legislation sets out the rules for distributing your assets based on whether you have a spouse, child/ren or other family members. The legislation also includes a list of the people who have priority to administer your Estate.

If you die without a Will your Estate may not be distributed to the people you would choose in the way you would choose. Your Estate may pass to someone you actually would not wish to receive it (for example, a spouse from whom you have separated but not yet divorced).

If you die without a Will it may also take more time and money to administer your Estate.

Who needs a Will?

Everyone who is over 18 and has capacity needs a Will.

Regardless of the size of your Estate, it's important to have a valid Will. This is to ensure that those dealing with your Estate after your death can do so with minimal stress, complexity and cost.

A Will ensures that your Estate will go to the people you choose (instead of being governed by a set of rules created by legislation which does not account for your own individual and family circumstances).

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Wills & Estates

What You Need to Know About Your Will?

When to update a Will

There are certain events in a person's life which have a significant impact on the operation of their Will. Some of these events even revoke (that is, cancel) a Will. **It is therefore critically important to review and possibly update your Will following any of the below events:**

- ✔ Marriage
- ✔ Civil partnership
- ✔ Entering a de facto relationship – particularly if there are children from previous relationships
- ✔ Separation
- ✔ Divorce
- ✔ Termination of a civil partnership
- ✔ Ending a de facto relationship
- ✔ Birth of children
- ✔ Death of an executor
- ✔ Death of a beneficiary
- ✔ A change in your financial circumstances

A Will is revoked if you get married or enter a civil partnership (except for gifts to your husband, wife or civil partner or appointment of that person as executor), unless it is made in contemplation of marriage or the civil partnership.

Divorce, termination of a civil partnership or the ending of a de facto relationship revokes any gift in the Will to the former spouse or appointment of the former spouse as executor, unless there is a contrary intention in the Will.

Terms of a Will

In addition to the appointment of an executor and directions about who will receive your property, **a Will also provides you with the ability to:**

- ✔ appoint guardians for your infant children
- ✔ establish a trust to provide for children, or for beneficiaries with a disability or other vulnerability
- ✔ establish a trust for asset protection or taxation advantages
- ✔ bequeath money or property to charity or philanthropic organisations
- ✔ express your preference about being buried or cremated

Historically a Will could also be used to authorise donation of your organs and tissues following death. Some people may have also have ticked a box on their driver's licence.

The Australian Organ Donor Register is now the only valid and reliable place to record your donation decision: https://donatelife.gov.au/.

What documents should I bring to my Will appointment?

- ✔ You must bring some current identification to your Will making appointment.
- ✔ Full names and addresses of your executors and beneficiaries.
- ✔ We recommend you bring a list of your assets and liabilities (including superannuation and life insurance policies).
- ✔ If you have any company or trust structures you should also bring copies of the documents establishing and governing those entities (for example, Self Managed Super Fund or family discretionary Trust Deeds, Deeds of Amendment, Deeds of Retirement and Appointment of Trustees, Company Constitution, current company search).

Is making a Will expensive?

We charge a fixed fee of $550.00 including GST to prepare a new Will.

If couples are making Wills at the same time, we charge a fixed fee of $880.00 including GST for their two Wills.

This represents approximately two hours of our solicitor's time to consult with you on your wishes, give you specialised advice on issues relevant to your particular circumstances and prepare a Will which achieves your objectives for your Estate.

If your circumstances or assets are unusually complicated, we may charge extra for the additional time, consideration and care involved in preparing your Will.

Bearing in mind that the purpose of a Will is to effectively deal with all of the assets you have acquired over the course of your lifetime, the cost of a Will is a very reasonable investment in planning for the future of those assets.

Can an informal document be a Will?

The legislation states that to be a valid Will there must be a written document which has been signed by the will-maker in the presence of two independent witnesses with the intention that the document is a Will.

However, the legislation also allows the Court to determine that an informal testamentary document is a Will if the Court is satisfied that the document embodies the testamentary intentions of the deceased (s18 *Succession Act 1981(Qld)*).

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Wills & Estates

What You Need to Know About Your Will?

In various cases on this issue the Court has determined that (in the particular circumstances of the case) the following documents were held to constitute a Will:

1. A document signed by the deceased with only one witness;
2. A document signed by the deceased with no witnesses;
3. A document written by the deceased but not signed;
4. An electronic version of a document found on the deceased's computer;
5. A DVD or phone video recorded message of the deceased expressing their intentions for their property after death;
6. An unsent text message found on a deceased's mobile phone.

We must convey a strong warning that the cases in this field do not create a general principle that any of the above will be considered a Will.

In each case the Court had to carefully consider the particular facts and circumstances in which the document was created and the intention of the person making the document.

And, of course, the biggest problem with any informal document is that a Court determination is needed, which creates unnecessary cost and delay in administering your Estate.

We invite you to contact a member of our Wills & Estates team to assist you in making a Will which you can rely on to effectively carrying our your intentions for your Estate

Common Myths about Wills

Wills & Estate Lawyers come across many common myths and incorrect assumptions about Wills. Relying on these mistaken beliefs can have serious financial and emotional consequences for your Estate and your family members following your death.

Myth #1 – "If I die everything will automatically pass to my husband/wife or partner".

This is not always the case.

If you die without a Will, you are considered to be intestate. The Queensland intestacy laws contain a set of rules for the distribution of assets where people have died without a valid Will. Under those rules, your spouse will receive a portion of your Estate. However, they may not receive all of your Estate depending on the size of your Estate and the other family members you leave behind. Further a partner may not be considered a spouse for legal purposes such as distribution of your Estate on intestacy.

Although the intestacy rules recognise the importance of providing for your spouse, the provision your spouse actually receives may not be adequate for his or her needs. In those circumstances your spouse may be forced to bring a claim on your Estate resulting in costly litigation and an enormous emotional burden for your spouse and your family.

By making a Will now, you can ensure your spouse or partner is adequately provided for and prevent your assets passing to those you do not intend to benefit from your Estate.

Myth # 2 – "If I don't make a Will, my Estate will go to the State or the Public Trustee."

This is a common misconception and although it is not completely untrue, the chance of this occurring is extremely low.

If you die without leaving a valid Will your Estate will be distributed in accordance with the Queensland intestacy rules. Generally your spouse and your children will inherit, but it can get quite complicated especially when there are current and former spouses and blended families involved.

In the event you that you are not survived by any spouse, child, parent or next of kin, the Estate is deemed to be bona vacantia and the State is entitled to it. This will only occur after a thorough search has been carried out to determine there are no living relatives who may be entitled to your Estate.

Myth #3 – "I don't have any assets so I don't need to make a Will".

The Estate of a deceased person needs to be dealt with, regardless of whether there are many assets or not, and regardless of whether there is a Will or not.

Even if you think your Estate is not worth a lot, it is still important to make a Will. The administration of your Estate will be simpler, quicker and less expensive if you have made a Will.

Further, your Estate might be worth more than you think. Many people have personal possessions and superannuation. Superannuation may form part of your Estate and by law will require distribution.

Additionally, if a person dies accidentally there may be substantial compensation that falls into the Estate for distribution.

Small Estates can be unnecessarily complicated if you have not made a Will.

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Wills & Estates

What You Need to Know About Your Will?

Myth #4 – "I can write my own Will using a Will-kit an online template".

See our comments above regarding Can an informal document be a Will? ***insert hyperlink***

Making a homemade Will can be disastrous for your Estate and your family.

It is our experience that homemade Wills, do-it-yourself Will Kits, and online template Wills cause more problems than they are worth. It is very common for people to complete the Will Kit forms or online templates incorrectly or fail to have it signed and witnessed correctly.

This can result in a purported Will being challenged in court if the drafting is not clear or if there is any uncertainty about the meaning or interpretation of your words.

While leaving behind a note or homemade will might outline what you would like to happen, this type of document may not be legally effective.

The costs to have the Court determine if an informal document is your last Will and/or to interpret what the document means will be substantially greater than the up-front cost of seeing an experienced solicitor to prepare your Will.

It will also cause additional uncertainty, stress and delay for your family members following your death.

Myth #5 – "If I leave my child a nominal gift (eg $1) in my Will, they won't be able to bring a claim on my Estate."

This is not true. Leaving an estranged child a small or nominal gift will not protect your Estate from a claim. In fact, it might have the effect of upsetting the person you wish to disinherit and actually cause them to bring a claim on your Estate.

One of the significant factors in considering whether adequate provision has been made for a child or spouse is the needs and financial position of that person. A nominal sum obviously does not take into account those issues at all.

Related Myth #5A - "I can make a Will that no one can challenge or change"

In Queensland the spouse, child or dependents of a deceased person have a statutory right to make a claim on the Estate if adequately provision has not been made for their proper maintenance and support. For more information on this topic please see our guide "Have you been eft out of a Will". ***insert hyperlink***

It is not possible to make a Will that no one can challenge or change. There is no certain way to guarantee that a claim will not be made.

Our experienced solicitors can give you advice on some of the steps you can take to reduce the risk that a person will make a claim on your Estate. These steps may include keeping assets out of the Estate and therefore beyond the reach of a claim (for example, through joint ownership, binding nominations on superannuation or trust structures). Such steps may have undesirable asset protection, tax and stamp duty risks so need to be carefully considered.

Myth #6 – "I cannot make a gift to the person I nominate as executor"

This is not true. It is very common to appoint your spouse as your executor and to leave your whole Estate to your spouse.

On a separate but related note, your executor is entitled to claim a commission from your Estate for performing the role of executor. To claim commission the executor must obtain the Court's permission. It is common for the Court to allow commission in the range of 1.5% - 3% of the Estate, depending on the size and complexity of the Estate and the time and skill involved in its administration.

To avoid the cost of obtaining the Court's permission, an executor will sometimes obtain the consent of each of the beneficiary's to the commission to be paid.

If you do choose to leave a gift to your executor, it is important that your Will is clearly drafted to express if that gift is conditional upon that person performing the role of executor and if that gift is in substitution for any rights the person would have to claim executor's commission.

It is best to appoint an adult family member whom you trust and consider reasonable and sensible as your executor. If you do not have a trusted family member or friend to perform the role of executor, you can consider appointing the Public Trustee or a solicitor from our firm to be your executor in their professional capacity. If you appoint a professional executor your Estate will have to pay for the professional services of that person to administer your Estate. Given that an executor who is a family member will generally not be paid nor claim commission it is far preferable to appoint a family member where possible.

Myth #8 – "I can use my will to make a gift of my superannuation benefits".

Your Will disposes of all assets you own at the date of your death. If you have funds held in a superannuation account, technically those funds are held by the Trustee of the Superannuation Fund, for your benefit. You do not yet own them and they will not automatically form part of your Estate.

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Wills & Estates

What You Need to Know About Your Will?

Given that superannuation often represents a significant part of your net wealth, and that you may have substantial sums in death benefits connected to your superannuation, it is critically important to understand how your superannuation will be dealt with on your death.

For more information on how your superannuation will be dealt with following your death please see our guide "Superannuation: Your Biggest Asset"

Myth #9 – "I can make a gift in my will of assets held by a family trust because I am the trustee of that Trust".

If you are a trustee of a family trust or a unit trust or a self-managed superannuation fund, you should obtain specialised Estate planning advice about what will happen to the trust and the assets owned by the trust following your death.

In your Will it may be possible to appoint a person who will take on the role of trustee from you on your death. This allows you to pass the day to day control of the trust to another person. However, since you do not personally own any of the assets of the trust, you cannot use your Will to give away or deal with any of the assets owned by the Trust. Only the Trustee can make distributions from the Trust in accordance with the Trust Deed.

At the time of making your Will, the terms of the original Trust Deed (and any amendments to that Deed) will need to be consulted to consider the beneficiaries, the clauses regarding death of a trustee, and any powers of appointment of trustees, appointors or principals, to ensure that you have an effective plan regarding the control and beneficial interests of the assets of the trust following your death.

Myth #10 – "I can keep my will confidential after my death and tell my executor not to show it to anyone else".

Following your death your Executor is entitled to all of your property, including all of your documents. This includes your original Will, which will not be provided to any person other than the Executor you have nominated in your Will, following proof of their identity and proof of your death.

Section 33Z of the *Succession Act 1981 (Qld)* provides that a number of other people are entitled to obtain a copy of your Will, including:

1. A person mentioned in the will;
2. A person mentioned in any earlier will of the deceased;
3. A spouse, parent or child of the deceased;
4. A person entitled to a share of the Estate if the person had died intEstate;
5. A creditor of the Estate;
6. A person entitled to bring a family provisions application against the Estate.

Even if you have instructed your Executor not to show your Will to anyone else, or not to your Will to a specific person or persons, if one of the people listed in s33Z requests a copy, they are entitled to it and your Executor will have to provide them with a copy.

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