

# Do I Need a Will?

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## ***What is a Will?***

A Will is a legal document which sets out your wishes for the distribution of your assets on your death. This can include everything you own (e.g. your home, car, cash, investments, shares etc.), entitlements which arise on death (e.g. life insurance proceeds) and rights that you presently have (e.g. in an estate or to shares etc).

## ***Should I Make a Will?***

If you wish to:

- (a) ensure that your assets are inherited by the people you want;
  - (b) ensure that they inherit your estate in the proportions or manner you want;
  - (c) protect your assets and beneficiaries from claims by “predators” and “creditors”;
  - (d) distribute your assets in a tax-effective manner;
  - (e) reduce the trauma of your death for your survivors; and
  - (f) reduce the impact of tax and other charges on your beneficiaries,
- then you must make a Will.

Even if you are married with dependents, you still need a Will. If there is no Will then the people who inherit your estate may not be the people you want to benefit or they may inherit your estate in proportions you do not want them to. Administration of your estate also becomes more difficult and expensive if there is no Will.

## ***Valid Wills***

In order for a Will to be valid, certain specific legal formalities must generally be followed. These include:

- (a) the document must be in writing - a verbal agreement or statement is not effective;
- (b) the Will must be signed by you at the end of the document; and
- (c) two witnesses who have both seen you sign the Will, must also sign the document. No-one named in the Will should be a witness otherwise any gift to them would fail.

If the Will is not properly executed, it may be invalid and your property could be disposed of as if you had never made a Will.

## ***Who Should Prepare your Will?***

Your Will is one of the most important documents you will ever sign. It is important that it is prepared by an experienced person. Anyone with testamentary capacity can prepare his or her own Will. However, many court cases arise out of home-made Wills. Often they have not been validly made or are unclear or cause undesirable tax liabilities. A Will which has been properly prepared should avoid these pitfalls. Experienced lawyers are able to prepare effective Wills which also take proper advantage of the estate and tax planning opportunities which Wills provide. Because of the value of your estate and the importance of making proper arrangements about what should happen after your death, it is false economy to try to prepare a Will without skilled professional advice.

### ***How to Ensure your Wishes are Carried Out***

Your Will should appoint an executor to look after your affairs and make all the necessary arrangements after you die. The executor can also be a beneficiary. It is also usually necessary to appoint a trustee of your estate. Often this is the same person as the executor. We generally recommend that at least one additional person be appointed to take on these roles in case the first person dies or is otherwise unable to act. It is also often advisable to appoint an experienced professional such as an accountant, financial advisor or someone familiar with financial matters, as an additional executor and/or trustee.

### ***Is a Will Necessary?***

If you die without a valid Will, your assets will be distributed in accordance with the relevant legislation (*Succession Act 2006 (NSW)*). The legislative formula may not divide your assets in the way you want. Also if there is no Will, the legal procedures are more complicated and time-consuming, and may cause hardship, delays and greater expense.

### ***Can I Change my Will?***

A Will can be changed at any time; more or less as often as you wish. It is generally advisable to review your Will at least, say, every three to five years or if your financial or personal circumstances change, to ensure that the Will suits your current circumstances and wishes.

However, you cannot alter your Will by, for instance, crossing out something in the original Will and writing in your new wishes. This simply makes the original Will invalid and cancels it entirely. Generally, Wills can only be altered by making a new Will or a formal codicil to the old one.

### ***Marriage and Divorce***

Marriage automatically revokes any Will made before marriage unless the Will was made "in contemplation of" the marriage. A divorce does not automatically cancel an existing Will. However, divorce does revoke any gift made to the former spouse under the Will (who is treated as if he or she had died immediately before the testator) as well as the appointment of a former spouse as an executor or trustee. It is therefore advisable to make a new Will if you are divorced or have been separated for an extended period.

### ***Family Provisions Claims***

Generally, you can make provision in your Will for whoever you choose. However, a number of family members and other people may have a right to make a claim on your estate if adequate provision has not been made for them. Your Will should accordingly make proper provision for your spouse or partner and for your children, including ex-nuptial and sometimes step-children in some circumstances, and for a range of other people who would be "eligible persons" to make a family provision claim.

### ***De Facto Relationships***

De facto partners, including same sex partners, are often considered to be legally in the same position as spouses. Accordingly, de facto partners are entitled to a share in your estate. It is therefore also important to make a Will if you are in a de facto relationship, whether it is registered or not.

### ***Storage***

Your Will should be kept in a safe place together with your other important legal documents. This may be with your solicitor, bank or a trustee company. You should also keep a copy of your Will yourself together with details of where the original is located.

**Fees**

Charges for Wills vary depending on the complexity of the arrangements, the nature and history of the relevant family relationships, income tax and CGT considerations and the protection issues involved. For example, we charge on a time-spent basis and provide an estimate after the first interview.

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