

Wills

Having a valid Will in place gives you peace of mind knowing that your wishes will be followed in relation to your financial and personal matters in the event of your death.

Benefits

- Your estate can be administered faster and with fewer complications because your intentions will be known.
- Your assets are more likely to pass to your intended beneficiaries.
- There is reduced potential for family disputes.
- You have opportunity to manage tax implications and reduce costs for beneficiaries.
- You will have opportunity to nominate a suitable guardian for your young children.

How it works

A Will is a legal document that sets out how you want your assets to be distributed when you die. You must be over 18 and have mental capacity to be able to make a Will.

Some important items that you need to consider when drafting your Will include:

- who should benefit from the estate
- whether special bequests of assets are to be made to specific beneficiaries
- who the executor of your estate should be – this can be more than one person and they should be willing and able to accept the role
- instructions for your burial or cremation.

You may also wish to consider whether to leave assets to your beneficiaries directly or through a testamentary trust or life interest, or if a Guardianship clause needs to be included.

- **Testamentary Trust** – this trust is particularly useful if you have beneficiaries who are young, or who have a disability, or face the potential for a divorce or other litigation, or have problems with the control of money. Your assets will pass into the trust where they can be protected if necessary and may also receive favourable tax treatment in some cases.
- **Life Interest** – a Life Interest can be used if you want to give someone the right to use an asset during their lifetime but have another beneficiary take ownership of the asset. A life interest is commonly used to enable a surviving spouse to continue living in a home with the ownership of the home passing to the children.

- **Guardianship** – if you have young or disabled children, your Will can include the nomination of your preferred guardian for those children. Your guardianship nomination is a declaration of your intentions only and can be overruled by a court if the person you nominate is not in the best interest of the child.

Estate and non-estate assets

Assets that are dealt with through your Will are called ‘estate’ assets. Examples of assets that are estate assets and which can therefore be covered by your Will include:

- assets held in your own name
- your share of assets that you hold tenants-in-common with another person
- superannuation and life insurance policies in some situations.

Assets that are not dealt with under your Will are called ‘non-estate’ assets. These assets pass directly to your beneficiary. Any provision in your Will relating to a non-estate asset will be invalid. Your non-estate assets include:

- assets that you own as joint-tenants with another person
- superannuation accounts if the trustee of the fund pays the balance directly to a beneficiary (under a binding nomination or trustee discretion)
- life insurance policies where there is a valid beneficiary.

Challenging a Will

Your Will may be challenged after your death in certain situations. Examples of these situations include:

- the Will was not your last Will, or it is not completed correctly
- you did not have mental capacity at the time you signed the Will
- you were forced or pressured into making the Will
- a person you had a responsibility to provide for believes you didn’t leave them a fair share of your assets.

Family provision legislation exists to ensure that certain people are provided for after a person’s death. The list of people who can challenge a Will on these grounds can vary across the States but will usually include your spouse, former spouse, children and step-children. It can also extend to other family members or individuals.

Having your Will drafted by a solicitor can reduce the chances of your Will being challenged.

Consequences

- Once in place, you should review your Will every few years or when your circumstances change.
- If you die without a valid Will, you will have died 'intestate' and the distribution of your assets is determined by State/Territory legislation.
- The tax and Centrelink implications of leaving assets to certain beneficiaries should be considered.
- Even though superannuation and life insurance is often not an estate asset it is important to include provisions for the distribution of these amounts in case they do end up in your estate.
- It is important to ensure that your executor and/or family know where to find a copy of your latest Will and other important documents.

Date: 1 April 2018