

A GUIDE TO

Wills and Estate Planning



Leaving a valid will is the only way to be sure about who will receive your wealth following your death. If you pass away without a will, your assets will be distributed according to a formula set by law. The statutory formula may have unexpected and undesirable outcomes, especially if you are separated from a spouse but not yet divorced. Having a valid and current will provides you with certainty that your wealth will pass to the appropriate people according to your wishes.

If you already have a will but have recently had a change in your family or financial situation, it is imperative that you review your will to take into account your new circumstances.

Estate Planning is more than just having a will because some assets may not be able to be dealt with by your will. You need to ensure that non-estate assets, which may include superannuation, life insurance, jointly owned assets and interests in companies or trusts will flow to your intended beneficiaries.

Estate planning is also more than just dealing with 'who gets what'. It may also involve important issues such as:

- who will be responsible for administering your estate;
- who can make decisions for or manage the inheritance of a minor child;
- managing the special needs of disabled or vulnerable beneficiaries;
- minimising the tax your beneficiaries may face; and
- who can make decisions for you if you become incapacitated at some future point.

We have compiled this guide to help address some of the questions that you or your clients may have about wills and estate planning. You are most welcome to download it and save it for future reference. You may also wish to share it with your clients. We trust you will find it helpful.





Why should I have a Will?

A Will is a legal document that sets out how your assets are to be divided after your death. It also nominates who has authority to act on your behalf following your death.

If you die without a Will, there is a statutory formula (known as the 'rules of intestacy') that sets out how your assets are to be divided between your family members. The rules of intestacy are applied strictly and, depending on your family circumstances, can have unexpected or undesirable results. Leaving a valid Will can save your family a great deal of stress, time and money and it is the best way to ensure that your wishes are carried out.

Why should I consult a lawyer to draft a Will?

It is in your best interests to ask a lawyer to draft your Will. While a homemade or Will kit may seem attractive because of its low cost, in many cases far more is paid in legal fees to address problems with the homemade Will than would have been charged for professionally drafted documents. Homemade Wills are often not legally effective because of basic mistakes made in drafting, or a lack of understanding of the law or poor strategy, which can lead to disputes after death. There are also legal requirements about how a Will needs to be signed and witnessed. Engaging a lawyer experienced in estate planning provides you with the certainty and peace of mind of a legally effective Will.

Related Topics:

[How to write a will](#)

[When should I consider estate planning?](#)

What issues can be dealt with in a Will?

In its most basic form, a Will sets out who is to receive your assets after your death. In addition, you can give specific directions, such as what happens to a gift if a beneficiary dies before you or that a beneficiary must reach a certain age before receiving their inheritance. A Will must nominate an executor, who is the person responsible for carrying out the terms of your Will. You may also wish to nominate a testamentary guardian who can care for and make decisions for your children while they are minors. Depending on the circumstances, you may want to establish trusts in your will, for example, to provide for a vulnerable or disabled beneficiary.

What assets are not dealt with in a Will?

Not all assets are automatically dealt with by your Will. It is important to get professional advice about how non-estate assets will be dealt with upon your death.

Superannuation

The rules relating to superannuation death benefits are complex and vary between different superannuation funds. Whether superannuation is dealt with by your Will may depend on the rules of the superannuation fund and whether you have made a valid death benefit nomination. There may be tax implications depending on who receives your superannuation.

Related Topics:

When superannuation doesn't end up with the people it was intended for:

blended families & government super conditions

Why you need to check your superannuation death benefit nominations

SMSFs and Superannuation death benefit tax option

Continued over page





What assets are not dealt with in a Will? (continued)

Life Insurance

If there is a beneficiary nominated on the policy, life insurance proceeds will be paid directly to that beneficiary rather than being paid to your estate and dealt with by the Will. If a policy over your life is owned by someone else (e.g. your spouse), the proceeds will be paid to the owner of the policy.

Jointly owned assets

Assets that are owned as joint tenants with another person (e.g. a home owned by husband and wife as joint tenants) will pass automatically to the surviving joint owner and will not form part of your estate.

Assets held in a company or trust

A company or trust is a separate ownership structure, and assets held within a company or trust will remain in that entity. Company or trust assets will not form part of your personal assets to be dealt with by your Will, and consideration should be given to how control of those entities is passed upon your death.

Related Topics:

Protecting Clients' Estates with Testamentary Trusts

Why testamentary trusts are not only for the wealthy

What is the effect of separation or divorce on my Will?

Separating from your spouse has no automatic impact on your Will. Therefore, you should update your Will if you no longer want your separated spouse to receive a benefit. A gift to a former spouse or the appointment of the former spouse as an executor is automatically revoked upon divorce or termination of a civil union.

Even if the divorce is complete, it is wise to review your Will as the effect of the automatic revocation can produce unusual results in a Will. A former spouse, whether you are divorced or not, is eligible to make a family provision claim, and it is recommended that you get legal advice in relation to managing this risk.





When should I review my Will?

You should read through the copy of your Will every two to three years, or whenever there is a change in your circumstances, to check that the Will still reflects your wishes. In particular, you should review your Will in any of the following circumstances:

- If you marry or enter into a civil union. Many people are unaware that a Will is automatically revoked upon marriage or registration of a civil union (unless the Will was made in contemplation of the marriage or civil union).
- If you have separated or entered or ended a de facto relationship since you last made your Will.
- If your nominated executor has died, does not wish to act, or is no longer a suitable choice.
- If any of your chosen beneficiaries have died or are no longer your preferred beneficiaries.
- If any of your chosen beneficiaries have special needs or are at risk of bankruptcy or relationship breakdown.
- If you have acquired assets with another person, or you have disposed of assets that were specifically mentioned in your Will.
- If you have changed superannuation funds, established a self-managed superannuation fund; or if more than three years has passed since you nominated a beneficiary for your superannuation.

Related topics:

How can a Power of Attorney be revoked and when can an Attorney be removed?

Choosing your Enduring Power of Attorney in Australia | 9 things you need to know

When the capacity of a will-maker is in doubt

How to avoid disputes about your will

A message from Phil Davey

One of the more challenging parts of our role as wills and estates lawyers is when we need to deliver news that an individual's wishes will not be able to be upheld due to avoidable mistakes. Even the most straightforward estate can be misrepresented in DIY wills or wills that have been poorly drafted and have not taken into account the many elements explored above.

My team specialise in identifying and managing the risks facing our clients in their estate planning. We work closely with financial planners, accountants and any other professional advisors as required to ensure all options are considered and that our mutual clients' objectives are met. We are here to ensure that your clients' interests are protected.

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