

Estate planning

Detailed summary and definitions

What is a will?

A will is a revocable written document which allows you (the testator) to specify your wishes as you want them to be carried out after your death. It designates who will control and receive your assets and belongings after you die, as well as who will supervise the distribution and management of your estate.

As a will only comes into effect upon a person's death, it must be made and written in a certain way to ensure the person's wishes can be carried out fully. Of course, when it comes time to use the will, the testator is unable to clarify any directions under the will. For a will to be effective and withstand any challenges, it must meet certain legal requirements in the way it is written and witnessed.

What is your estate?

Your estate generally refers to all your assets including houses, shares, life insurance, cash and personal items such as paintings and jewellery and in certain circumstances, your superannuation.

What is a beneficiary?

A beneficiary is a person who will receive the benefit of a gift under a will. You may name as many or as few people as you wish. You may also name charities, universities or schools to receive a gift under your will. When you wish to name a charity as a beneficiary, it is essential that you have checked firstly that the charity is able to accept your gift.

It is also important that you have fully considered the effects that the division of your estate might have upon any dependents that you might have. If you fail to consider or provide for dependents, they may bring a family provision application to try to claim part of your estate. Discussing your wishes and estate requirements with your solicitor prior to drafting your will saves a good deal of anguish and wasted resources for family and friends at a later date.

What is an executor?

The executor is the person (or persons) who you appoint in your will to oversee the distribution of your assets after your death. The executor is really the person who is responsible for carrying out the instructions in your will. The choice of the executor is one of the most important decisions that you can make when considering your estate planning. Even though it is not essential, it is a good idea to ask your proposed executor if he/she will accept the appointment.

When selecting an executor you should also consider the following:

- Is the executor able to be independent in his/her actions?
- Is the executor able to act impartially?
- Is the executor familiar with your wishes and your family?
- Is the executor completely trustworthy and able to maintain confidentiality?

It is a sensible idea to appoint more than one executor or at least a substitute executor in case one is unavailable or unable to carry out your wishes under the will. You may appoint a professional person, such as a solicitor or accountant, as your executor if you wish to have the estate managed by an independent party.

Being the executor does not disqualify a beneficiary under your will from receiving a benefit, so you may choose a trusted friend or family member as executor.

What tasks will an executor carry out?

The executor named in your will must carry out the following tasks:

- Settle any outstanding debts
- Collect any money owing to you or other income
- Where required, obtain probate of the will
- Make arrangements to claim any life insurance you may have had
- Arrange for any assets to be sold, if required
- Distribute the assets as per your instructions in your will.

What is probate?

Probate is the official recognition by the Supreme Court that a will is legally valid.

In some circumstances, it may be necessary to make an application for a grant of probate.

For instance, probate may be required if there is a dispute regarding provisions of the will or if an institution such as a bank or insurance company requests that probate be obtained prior to releasing funds to the estate. However, a grant of probate is not usually required in the instance where a home or other real property is held in joint names as the property will be automatically transferred to the surviving joint owner.

The executor will be required to consult with all organisations that hold estate assets to check whether they require a grant of probate. The court will only issue the grant of probate once it is satisfied that the will is the last will of the deceased and meets all the criteria for a valid will.

How does your executor apply for probate?

When an executor needs to apply for probate, there are five basic steps that he/she must undertake:

1. Advertise the intention to apply for a grant of probate in both the Queensland Law Reporter and the Public Notices section of the daily or prominent newspaper in the area in which the deceased person last lived.
2. Provide a copy of that advertisement to the Public Trustee.
3. Wait for a period of two weeks after the advertisements have been placed to give other parties an opportunity to state any objection to the will. Anyone wishing to object may file a caveat in the court which will stop a grant of probate being made until that claim has been resolved.
4. Prepare appropriate documentation to make and support the application for a grant of probate. This step is very important as the court carefully considers each application as it is presented. To make the application, the executor will also need to produce:
 - (i) The original will
 - (ii) The original death certificate
 - (iii) A copy of the advertisements described in 1 above.
5. File the application in the Supreme Court nearest to where the deceased lived.

After considering the application and where satisfied, the court will issue a grant of probate.

What is a trustee?

A "trustee" is the person who takes ownership of property or items in "trust" for another person (known as the "beneficiary"). A "trust" is where one person holds the legal title of property for the benefit of another person.

What is a testamentary trust?

This is simply a trust created in your will which operates in a similar way to a discretionary family trust.

When considering the terms of your will, you should consider the benefits of using a testamentary trust especially if you have young children or significant assets.

The benefits that flow from such a trust include:

- If there is a risk that a beneficiary may become bankrupt, the trust can protect the assets from creditors and trustees in bankruptcy.
- If there is a potential risk that a beneficiary's marriage or de facto relationship may break up assets held within the trust may not be the subject of a Family Court Order in a property settlement.
- If a beneficiary is unable to properly manage his/her own affairs, the trust is useful as some person other than the beneficiary controls it. The trustee can ensure that sufficient funds are available to meet the needs of the beneficiary but the beneficiary does not get control of the assets.
- The trust can actually protect your hard earned assets from the beneficiaries themselves, for example from spendthrift or immature children.
- A testamentary trust can provide taxation advantages where there are minors who are beneficiaries under the trust, as children enjoy the normal tax-free threshold of \$6,000 per annum. Therefore, in a situation of a surviving wife and say three children, rather than the wife alone paying tax on the income generated from the inherited property, she can lessen the "tax hit" by distributing to other family members who are lesser income earners.

The use of the testamentary trust in a will has become widespread due to its extensive asset protection capabilities and should always be considered when you have minor children or if there is any likelihood that the assets might be attacked by a third party.

What is the difference between an executor and a trustee?

In a will, an executor and a trustee are often the same person. The executor ensures your wishes are carried out in accordance with your will. The trustee looks after assets on behalf of a beneficiary (usually children until they reach a certain age) or because the testator has set up other trusts in the will.

What is a guardian?

A guardian is a person who you appoint in your will to take legal responsibility for any dependent children that you may have. The guardian does not necessarily have to care for the children personally but will retain control over important decision about the children's lives including such issues as who will care for the children, their education and residence.

What are guidelines for guardians?

Guidelines for guardians is an in-depth document you can complete to assist the guardians of your minor children when making decisions about their upbringing and welfare.

The guidelines allow you to give your views on a diverse range of topics which may impact upon your child as they grow up.

What is an enduring power of attorney?

An enduring power of attorney is a legal document which allows you to appoint someone (an attorney) to have the legal power to make decisions about matters on your behalf.

"Enduring" simply means that the power continues even after the person giving it loses capacity to make decisions. This means your attorney can continue to act for you if you lose capacity to act for yourself. For this reason, great care needs to be taken when choosing an attorney.

This differs from a "general power of attorney", whereby you may appoint an attorney to sign documents for you in your absence. This is a limited power and will come to an immediate end if for some reason you lose capacity to make decisions.

The enduring power of attorney can cover personal/health matters and financial matters.

What is an advance health directive?

An advance health directive is a legal document which deals with your future health care.

By completing this document you can give directions about your medical treatment for when the time comes when you cannot speak for yourself.

The document itself states your wishes or directions regarding your future health care for various medical conditions. It comes into effect only if you are unable to make your own decisions.

You may wish your directive to apply at any time when you are unable to decide for yourself, or you may want it to apply only if you are terminally ill.

The completion of the advance health directive will involve your general practitioner, who will explain the medical terminology to you and confirm that he or she has done so and that you fully understand the implications of what you are signing and that you have the capacity to do so.

The advance health directive is not for everyone but if you are concerned about your future health care or wish to remove the burden of difficult decisions from family members, you may wish to consider completing one.

Should I make a will?

If you are over the age of 18 years of age you should have a will. Also, if you are concerned about who will receive your assets and belongings after you have died, it is essential that you make a will. It is also especially important to make a will if you have a family, dependents or a business. It is the only way to ensure your dependents are provided for and that your assets are passed on or dealt with in precisely the way that you wish.

If you would like to make your wishes known about whether you wish to be buried or cremated, or about whether you want a civil or church service, you should make a will.

If you have a valid will it is easier for your family and loved ones to follow your wishes in distributing your estate. Leaving no will may create yet another worry for your family at a time of bereavement.

The inheritance laws in Australia are complex and, if you do not have a will, your estate may be distributed other than how you would want or expect it to be distributed.

Your will also gives you the opportunity to leave special gifts or treasured items to friends and family and allows you to make gifts to causes and organisations that you value and in a manner that will render your estate liable to no, or relatively little, capital gains tax. Appropriate provisions in your will may postpone capital gains tax liabilities.

What if I don't have a will?

If you die without making a valid will, you are said to die 'intestate'. This means that you have not validly disposed of some or all of your assets. Many people believe that the Government takes their assets if they die without a will but this is not strictly true. It could only happen if you have no living next of kin.

However, if you die without a will, your assets will be distributed according to a legal formula. This may mean your assets will not end up with the person you would have chosen. It also means you have no control over who distributes your assets.

How often should I review my will?

You may change your will at any time and as often as you wish. It is wise to change or update your will when there are any changes in your circumstances. In any event, you should review your will regularly, but at least every three years.

If you marry, any existing will is automatically revoked except to the extent that you make a gift to or appointment of the person to whom you are married when you die.

If you divorce, your divorced spouse is not entitled to any assets under your will unless you specify otherwise.

We highly recommend changing your will or having it reviewed if any of the following occur:

- Children or grandchildren are born
- A beneficiary or executor under your will dies
- You experience financial changes
- You experience home or property changes
- A beneficiary is experiencing personal difficulties. We have seen situations where the testator's adult child suffers from alcoholism or drug addiction and the testator-parent wishes to provide for the child under the will but not in the same manner as for other beneficiaries. Particular care needs to be given to situations such as these to ensure the beneficiary is provided for in an appropriate manner and to limit the grounds upon which the beneficiary may challenge the will
- You are self-employed
- You have joint assets or joint bank accounts with another person
- You have assets that are overseas or in another State
- You wish to protect your estate in the instance of a family dispute or where a beneficiary divorces or marries
- You have a family company or trust operating
- You have a self-managed superannuation fund
- You are in the armed forces and likely to be involved in active service
- You suffer from a medical condition or potentially debilitating disorder.

How do I make a will?

A will is a complex written legal document that should be prepared by a solicitor. It must contain at least one person as a beneficiary and must stipulate at least one person to act as the executor.

A will does not need to be a long document. However, it must be clear and concise and must not contain any ambiguities in the meaning of the words used.

A will must be witnessed by at least two people over the age of 18 who are not beneficiaries under the will or spouses of beneficiaries. The executor, if not a beneficiary, is able to witness the signing of the will.

The will must be signed in the presence of both witnesses and the person declaring the will (legally called the 'testator').

Failure to follow these requirements may invalidate the will and cause emotional distress and costly legal battles amongst relatives. If the will is invalidated due to failure to comply with any legal requirements, the law may consider that the maker of the original 'faulty' will does not in fact have a will. In this case, the laws of intestacy will apply unless the court rectifies the invalidity, which is also a costly procedure.

Even where a will is considered valid, having met all the formal legal requirements, if the words used in the will could have more than one meaning or do not accurately and precisely express

your wishes, your will may end up being interpreted by the court.

While it is not essential that Duffy Lawyers draft your will for you, if we prepare your will, you will be assured that your assets will be distributed according to your wishes.

Duffy Lawyers will not only ensure your will is properly drawn up and correctly signed and witnessed but is able to provide advice on the following:

- The appointment of an executor, the executor's powers and responsibilities and associated remuneration
- The appointment of a guardian for any children you may have and how best to structure your assets to benefit the children
- Your legal obligations to provide for your family and how to avoid any challenge to your will
- Life insurance
- Minimising capital gains tax liability
- Funeral arrangements
- Estate planning and asset protection
- Testamentary trusts
- Enduring powers of attorney
- Family provision claims
- Business structuring.

Duffy Lawyers can also organise for your will to be kept in safe custody in secure facilities.

We do not charge a fee for this service and you may rest assured that your will is confidentially protected.

What do I include in my will?

There are many issues that you may wish to include in your will. You should discuss your concerns and requirements with Duffy Lawyers. You may also need to deal with related documents such as powers of attorney or directions on medical consents. Duffy Lawyers will also be able to offer advice on related documents.

To make your consultation with Duffy Lawyers easier and so you feel prepared, the list below is a handy checklist of information we will seek from you in drafting your will.

1. Details of your executor(s) (this is the person who will finalise your affairs)
2. Details of the people or organisations to whom you wish to give your property (your beneficiaries)
3. Details of a guardian for any child or children under 18 years of age
4. Details of your major assets, their value and when you acquired them
5. A list of your major debts (if any)
6. Details of any family trusts
7. Details of any business you own and what will happen to them. (It may also be appropriate for you to discuss with our team the powers your executor is to have in making business decisions and what structures you have in place to protect your business)
8. If you are giving specific property to more than one person, who do you want to receive any remaining or left over property or items
9. Disposal of your body - whether you would prefer cremation or burial
10. Whether you have any debts owing to you by individuals, organisations or companies and whether these are to be collected or forgiven

11. Any special requirements for providing for family members or friends who may have social issues (as discussed previously) but for whom you wish to leave a gift under your will.

Alternately, you can complete our **Will and Enduring Power of Attorney Information document**. This document can then be emailed or posted to us and we will contact you to discuss your requirements.

For more information or to discuss any aspect of your estate planning please contact:

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