

Frequently asked questions

Contained in this fact sheet are some of the frequently asked questions which arise in the preparation of Wills and in estate planning generally.

Q: Who should have a Will?

A: Anyone who is married or over the age of 18 should have a Will prepared. If you are under 18 years of age, then you cannot prepare a Will unless you are married or the Will is made in contemplation of your intended marriage.

Q: How often should I review my Will?

A: You should review your Will at least every 3 to 5 years as well as any time there is a significant event in your life. For example, this may include marriage, divorce, separation from a de facto partner, the birth of children, the sale or acquisition of significant assets.

Marriage and divorce and relationship breakdowns are particularly significant. In some jurisdictions (e.g. Queensland) marriage revokes your Will unless the Will was made in contemplation of the marriage.

Q: What happens if I die without a Will?

A: Your estate will be divided up in accordance with a statutory formula. The law allows for certain family members to receive a defined percentage of your assets. If there are no surviving family members entitled to share in your estate, then your entire estate will be transferred to the government.

Q: I prepared a Will myself after having purchased a “Will kit”. Is this OK?

A: Your Will is valid (assuming you followed the instructions properly). However, it is unlikely your Will contains the asset protection and taxation benefits of a Will which has been prepared specifically for your personal circumstances. You should consider having it reviewed to see if it can be improved upon.

Q: I want my assets to be left to my children but am concerned about their choice of life partner. I don't want my assets going to someone outside the family.

A: It is possible to draft your Will so your assets benefit your children and their families but to also prevent those assets being lost in any relationship breakdown.

Q: I have prepared a Will but I also have a holiday home and investments which are owned in a family trust. How do I deal with these assets?

A: Your Will is only effective to dispose of assets you own personally. It does not deal with assets you hold in discretionary (family) trusts. As part of your estate plan you should consider what will happen to the assets in any trust you control. There are a variety of strategies we can implement to prevent family disputes which may arise, especially if the assets in the trust are significant.

Q: What happens to my children if both parents pass away?

A: Who becomes guardian of your children is one of the most important matters you need to consider in making your Will. If you have children under 18 years of age, then you should nominate a guardian(s) in your Will to reduce the likelihood of the courts or a statutory tribunal having a say in who raises your children.

We also recommend you leave detailed instructions with your Will regarding the guardianship of your children. These instructions should deal with issues such as education, religion, discipline and other important matters which will give your chosen guardians comfort that they are raising your children the way you would have wanted.

Q: One of my sons is a bad gambler. I want him to benefit under my Will but I don't want him to waste the money. What should I do?

A: It is possible to establish a trust within your Will and pay your son's inheritance into the trust. The terms of the trust can then be drafted in a way which allows the assets within the trust to be distributed to your son in a manner you determine. For example, there may be limits on the amount of money which he can access and control of the trust can be given to a trusted advisor or relative.

Q: Can I exclude a close family member from my Will?

A: Yes you can but if you do then you need to understand they may challenge your Will when you die on the basis it was unfair. There are strategies you can adopt to reduce this risk but it is a risk nonetheless.

Q: I have been left out of a Will of someone I was very close to. What can I do?

A: If you think you have been unfairly treated, then you may have grounds to contest the Will.

Q: I am a part owner in a business. Does my Will need to deal with this also?

A: This will depend on how your business is structured, but regardless, the succession of your business assets is certainly something for which you should plan. Many business owners are too busy trying to run their business to consider what would happen to the business if one of them were to pass away or suffer a serious illness. Some careful planning early on can save a lot of anguish, and in some cases save the business itself.

Q: Why do some people offer to prepare my Will for no fee?

A: It is not uncommon for some trustee companies and law firms to offer to prepare Wills for no fee on the condition they are appointed the executors of the Will. When you die, it is likely they will charge a fee calculated as a percentage of your estate assets. Sometimes as high as 5%. Assuming your only asset was your family home worth \$500,000 their fee may be in the order of \$25,000.

Q: Can I change my Will?

A: Yes. You can change or amend your Will at any time. However, if the changes are substantial, then it is often advisable to prepare a new Will to avoid any possible confusion or dispute about your intentions.

Q: Who should I appoint as executor of my Will?

A: The only formal requirement is that the executor be a natural person or a registered trustee company. You should select someone you trust who is likely to survive you. Often the beneficiaries under your Will are possible candidates. You can have more than one executor.

Q: What does the executor named in my Will have to do?

A: Your executor's first job is to organise your funeral. They must then collect the assets of your estate, pay any debts you owe and then distribute the balance in accordance with the instructions in your Will.

This is an important and sometimes difficult job and in all but the simplest of cases the executor will usually engage a lawyer on behalf of the estate to assist them in the administration process.

Q: I am a young person. How do I prepare my Will now when I don't know what my circumstances will be in the future?

A: At the very least you should have a Will which distributes your estate to your loved ones. In some cases this might be your parents or other family members. If you are young or have a young family, then it is also important to make your Will flexible enough to deal with whatever circumstances your beneficiaries might find themselves in when you pass away. Remember, you can change your Will at any time.

Q: How long does it take to prepare a Will?

A: The answer to this really depends on the complexity of the matter, but generally speaking you should expect to have a Will finalised within two weeks of providing instructions to your lawyer.

McMahon Clarke Legal specialises in estate planning and wealth management for private clients. We work with you to develop an estate plan that takes into account your personal circumstances.

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