



Browne Linkenbach

WILLS

**THE BLUE
MOUNTAINS'
LEADING WILLS &
ESTATES LAW FIRM**

PROTECTING WHAT MATTERS MOST





WILLS

WHY MAKE A WILL?

1. WHAT IS A WILL?

A Will is a document made by a person (called a "Testator") with legal and mental capacity (ie testamentary capacity) to make a Will, which states how the Testator will dispose of his/her assets on death.





2. WHO MAY MAKE A WILL?

Usually a person must be at least 18 years of age and have testamentary capacity to make a Will. However a minor (ie someone under the age of 18 years) or any person without testamentary capacity can make a Will if the Supreme Court allows.

3. WHAT ARE THE ADVANTAGES OF A WILL?

A will:

- gives certainty about the persons performing the important positions of Executor and Trustee
- controls the disposal of assets on death
- allows for the appointment of a guardian to care for children under the age of 18
- reduces the delay, complexity and expense involved in finalising the deceased's legal and financial affairs compared to the position where there is no will. For the process of administering an estate where there is no will, see 'Estates InfoSheet Q8'
- means that allowance can be made for contingencies
- enables a comprehensive estate plan to be made. This may involve superannuation death benefits which are not usually dealt with by a will.

4. WHAT HAPPENS IF ***THERE IS NO WILL***

Where there is no valid will, the beneficiaries of a deceased are determined by State legislation. The list is wide, and sometimes distant relatives can inherit. The list of relatives are called intestate beneficiaries, and are listed in paragraph 12. If there is no one who comes within any of the designated categories of relatives, or their issue, the deceased's assets form part of State Revenue.

The beneficiary(ies) with the largest claim fills the Executor's role (and is given the name of the Administrator). As a general rule, there is greater delay in finalising an estate where there is no Will, there is greater complexity and there are larger costs involved.



WHAT PERSONS ARE INVOLVED IN A WILL?

In some ways, Will making is like a team sport. This is because there are lots of different participants involved in the process, performing different roles but with the same goal.





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5. THE PARTICIPANTS

Each of the possible participants should be considered when making a Will.

Executor

Beneficiaries

Possible claimants

Trustee

Testamentary guardian



5.1. EXECUTOR

The Executor is the 'captain' of the will. This is because the executor has many responsibilities. The main one is to ensure that the Willmaker's directions, which are set out in the Will, are implemented.

WHO CAN BE APPOINTED AS AN EXECUTOR?

Commonly a family member or friend is appointed as the Executor. A professional person such as a solicitor or accountant may also be appointed. Sometimes a trustee company is appointed as the Executor. The Executor may be, but does not need to be, a beneficiary under the Will.

IS AN EXECUTOR ENTITLED TO BE PAID?

No, but the executor is entitled to apply for payment. If there is no provision in the Will allowing the executor to be paid the Executor may apply to the Supreme Court for compensation for his/her "pains and trouble" in acting as the Executor (or reach an agreement with the beneficiaries for payment of the executor's work and worry). Commonly family members and friends do not seek commission for being the executor. Professionals and trustee companies charge to act as the Executor. However, consideration should be given to paying the Executor for his/her time and effort, even when the Executor is a family member or friend.

WHO SHOULD BE APPOINTED AS EXECUTOR?

The ideal attributes for an Executor are:

- conscientious
- organised
- able to deal with tedious work
- able to withstand unreasonable demands
- willingness to keep beneficiaries informed
- able to delegate
- able to work with others
- able to take advice.

Other factors may be relevant in particular circumstances, such as:

- where the Will creates a life estate: age and health
- if litigation is likely: independence
- assets or domicile outside Australia: familiarity with issues
- property requiring specialist knowledge, such as copyright or digital records: familiarity with property
- disputes as to ownership of assets or validity of Will: independence.



WHAT DECISIONS MUST AN EXECUTOR MAKE?

Deciding how the deceased's remains are dealt with (being burial or cremation).

Organising the funeral arrangements

Ascertaining if the deceased had a will (or other testamentary document) and, if so, taking possession of the last will

Ascertaining the nature and extent of the deceased's assets and liabilities of beneficiaries

Locating and obtaining details of beneficiaries

Considering if there is any doubt about the effectiveness of the will (eg if the deceased married after making the will, or divorced)

Obtaining Probate or Letters of Administration. For more information see Q2 and Q7 in the 'Estates InfoSheet'

Selling or otherwise dealing with the deceased's assets so that debts and expenses may be paid, including funeral expenses

Defending and resolving legal proceedings involving the deceased's estate (such as family provision claims or claims by creditors)

Preserving (which may include insuring) and investing the assets pending a distribution

Paying him or herself remuneration (if the Will allows this), seeking commission from the court or making payment with the agreement of beneficiaries, and

Accounting to either the Court or beneficiaries for the executor's financial transactions.



HOW MANY PEOPLE SHOULD I APPOINT AS EXECUTOR?

Any number of people may be appointed to concurrently act as the Executor but, for practical reasons, usually one is appointed and an alternative person is specified (in case the first person cannot act when required).

WHEN WILL THE ALTERNATE EXECUTOR ACT?

The alternate Executor acts when the first named Executor cannot – such as when that person is dead, mentally incapable or divorced from the Testator – or does not want to act as executor – by renouncing.



5.2 BENEFICIARIES

The beneficiaries are the 'players'. They are the people (or entities, such as charities) who obtain the benefit of the deceased's assets. Usually, it is important to not only select your preferred beneficiaries. It is important to choose the second choice of beneficiaries, or 'bench'. The 'bench' or contingent beneficiaries benefit if the gift to the preferred beneficiaries fails.



5.3 POSSIBLE CLAIMANTS

Certain people can claim a part of a deceased's estate when nothing is left to them in a Will (or upon intestacy) or the part of the estate that is left is alleged to be insufficient. The sporting analogy is a player that's 'Left Right Out'.



**THE PERSONS WHO CAN MAKE A CLAIM ARE REASONABLY WIDE.
THEY INCLUDE:**

- a spouse, whether married, unmarried or a same sex partner
- a grandchild who was dependent on the deceased, and
- a child of the deceased or someone for whom the deceased had parental responsibility
- an adult who lived with the deceased in a close personal relationship and who provided domestic support and personal care to the deceased at the time of his/her death.
- a former married wife or husband
- a person who was dependent on the deceased and a member of his/her household,

For more information see 'Contesting a deceased's estate' InfoSheet.



5.4 TRUSTEE

The trustee is the 'player manager' in the team sport scenario. This is because, if there are young or disabled beneficiaries, or beneficiaries who need protection, the gift to the beneficiary is held by the trustee on behalf of the beneficiary. The trustee is the person who "manages" the gift for the beneficiary.

The trustee's job usually commences when the Executor's role has been completed.

Accordingly, the person who is the Executor could also be the trustee, but it is equally open for different people to do the different jobs.



WHO CAN BE APPOINTED TRUSTEE?

Like the Executor, the trustee must be at least 18 years of age and must have the capacity to understand the responsibilities involved in the position.

Commonly a trustee is a person who is able to make sound decisions about prudent investments and make appropriate payments, for instance, for the maintenance or education of a young beneficiary.



5.5 TESTAMENTARY GUARDIAN

The testamentary guardian is the 'Under 18's coach'. This is the person who is appointed to care for and make decisions concerning the welfare of a deceased's child until the child turns 18 years of age. These powers include making decisions about education, religion and discipline, consenting to marriage, a passport and medical treatment, deciding the child's name, representing them in legal proceedings, appointing a further guardian, agreeing to adoption and issues about remains.

WHAT IS A TESTAMENTARY PLAN?

Sometimes a Willmaker will set out a plan to guide the testamentary guardian's care for the Willmaker's minor children. This is called a testamentary plan. It may contain the policies that the Willmaker wants the guardian to adopt on issues like health, education, religious instruction, residence and the child's general activities.



6. WHAT ASSETS CAN AND CAN'T BE DISPOSED OF IN A WILL?

A Willmaker may give away something that the Willmaker owns at the moment of his or her death. "Assets" that the person doesn't own, like superannuation benefits and the proceeds of life insurance policies, even though they may have significant value and be controlled by the deceased, can't be given away in a Will. This is because neither a superannuation benefit nor a life insurance payout is owned by the deceased immediately before death; rather an entitlement to payment arises because of the death.

Interests in a discretionary trust or property owned as a joint tenant are other examples of 'assets' that a person may control but doesn't own. Comprehensive estate planning involves dealing with these 'assets', and therefore requires more than just a Will.

7. WHAT ARE THE FORMALITIES WITH A WILL?

The standard requirements are that:

- the Will be written,
- it is signed by or on behalf of the Willmaker,
- the Willmaker knows and approves the contents and effect of the Will,
- the Willmaker has capacity to make a Will, and
- the signing by the Willmaker is witnessed by two competent persons who each sign the Will

but the Court has power to allow a document to be a Will, even if all these requirements are not strictly met.

8. WHAT DO YOU DO WITH THE WILL ONCE IT IS MADE?

8.1 The Will should be stored in a safe place. If you wish, BROWNE · Linkenbagh will place your Will in our safe, where it may remain indefinitely free of charge.

8.2 You should tell your Executor of the existence of your Will and the place it is stored. The Executor should be asked to advise BROWNE · Linkenbagh if he/she changes his/her address.

8.3 If you have a previous Will you should collect the previous Will and destroy it or store it with your new Will.

9. WHEN SHOULD THE WILL BE REVIEWED?

The Will (and, more generally, the comprehensive estate plan) should be reviewed if any of these questions are answered 'yes':

- have you, or any one named in the Will, changed your (their) name?
- have you married, partnered, divorced, separated or changed your domicile since the last Will?
- has your financial position changed significantly?
- have you sold, encumbered or disposed of an asset that was given in the Will?
- have you given assets to a beneficiary since your last Will?
- is it more than five years since you made your last Will?
- have you had children since your last Will?
- has an Executor died, become incapacitated, left Australia or become unsuitable to act as Executor?
- has another person become more suitable to be the Executor?
- has a beneficiary died, changed their domicile, become bankrupt or become vulnerable since the last Will?
- are there persons who should be added or removed as beneficiaries?
- does a beneficiary now receive a means tested pension which needs to be preserved?
- has a beneficiary become a high income earner, had children, developed a need for care or developed a need for protection of inherited assets?
- has a person ceased to be a dependant? For more information see 'Maximising Superannuation Death Benefits InfoSheet'
- is there an increased or reduced risk of a family provision claim? For more information see 'Contesting a deceased's estate' InfoSheet'
- has the guardianship, education or maintenance needs of a child changed since your last Will?
- has there been a change in the law covering Wills and inheritance (or related aspects such as superannuation) since your last Will?



10. HOW IS A WILL REVOKED?

A Will is usually revoked if, after it is made, the Willmaker marries (unless the circumstances suggest otherwise).

A provision in a Will in favour of an ex-spouse (eg. a gift or appointment as Executor) is usually revoked (or severed) upon termination of the marriage (ie divorce or annulment).

A Will is almost always revoked by a later Will.

A Will is revoked if it is intentionally destroyed (eg. by tearing or burning it) or ended (eg. by writing the word "revoked" on it).

11. HOW IS A WILL CHANGED?

A significant change to a will is usually made by making a new Will. A minor or less significant change to a Will is often made by a Codicil. A Codicil is a document that amends a part of a Will but leaves the balance of the Will binding and effective.

A court may alter a Will as a result of a successful family provision claim. A court may make a will for a person who lacks testamentary capacity.

12. ARE THERE RISKS WITH WILL MAKING?

Will making is technical work.

As a High Court judge said in a case arising from insufficient attention to the technical requirements of a will:

"Because wills are legal documents involving technicalities, attention to the preparation and execution requires the exercise of professional skill and care."





GLOSSARY

13. WHAT DO THE WORDS MEAN?

Estate

"Estate" means the Willmaker's affairs and interests. It includes assets that the Willmaker owns at the date of his or her death. (It doesn't include things that the deceased controls but doesn't own.) It includes the Willmaker's liabilities (i.e. debts).



Intestate beneficiaries

"Intestate beneficiaries" are, in this order:

- spouse (including de facto and same sex partners)
- children
- parents
- siblings
- grandparents
- aunts and uncles
- or later issue of the second or last 3 relationships.

Testamentary capacity

"Testamentary capacity" means the capacity to make a Will.

Generally this requires a Willmaker to understand:

- that a Will is being made
- the effect of the Will, that is the gifting of assets on death
- the extent of the person's assets
- the persons who the Willmaker ought to benefit by the Will.

THE BASIC INFORMATION NEEDED BY BROWNE • LINKENBAGH TO PREPARE A WILL?

1. Personal details

Name (including former names or alias), address, contact details, date of birth, marital status, state of health, domicile.

2. Family tree

with the full names, address and age of any spouse, children, grandchildren, or beneficiary

3. Details of assets and financial resources

and their approximate value
(Note: some assets or financial resources (eg. jointly owned property or interests in a trust or super fund) do not form part of an estate but may require other arrangements to be made separately from a will. Other assets (eg. businesses, partnerships, private companies) may require special provisions in the Will.)

4. Details of liabilities

with approximate amount and details of security.

5. Details of the Executor

Full name, address, age and relationship of the Executor, the alternative Executor and the Trustee

6. Intended Gifts

A rough plan of the way you would like your beneficiaries to benefit from your assets on death, including "Plan B" options: it is important to consider changes that are reasonably foreseeable

7. Any special circumstances

(eg. bankruptcy, disability, vulnerability, addictions, family law issues, means, tested, pensions, impairments...) of a beneficiary

8. Details of the testamentary guardian

Full names, age and address of the testamentary guardian, if applicable

9. Remains

Details of wishes, if any, concerning remains (eg. buried, cremated, research, organ donation, ashes)

10. Superannuation

Name and membership/policy number of any superannuation fund or life insurance. The death benefit payment amount. If a self managed fund: a copy of the trust deed

11. Dependents

Name, address and details of any dependents (and the nature and extent of the dependency)

12. Risks

Identification of any risk issues, such as potential family provision claims

GET IN TOUCH

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