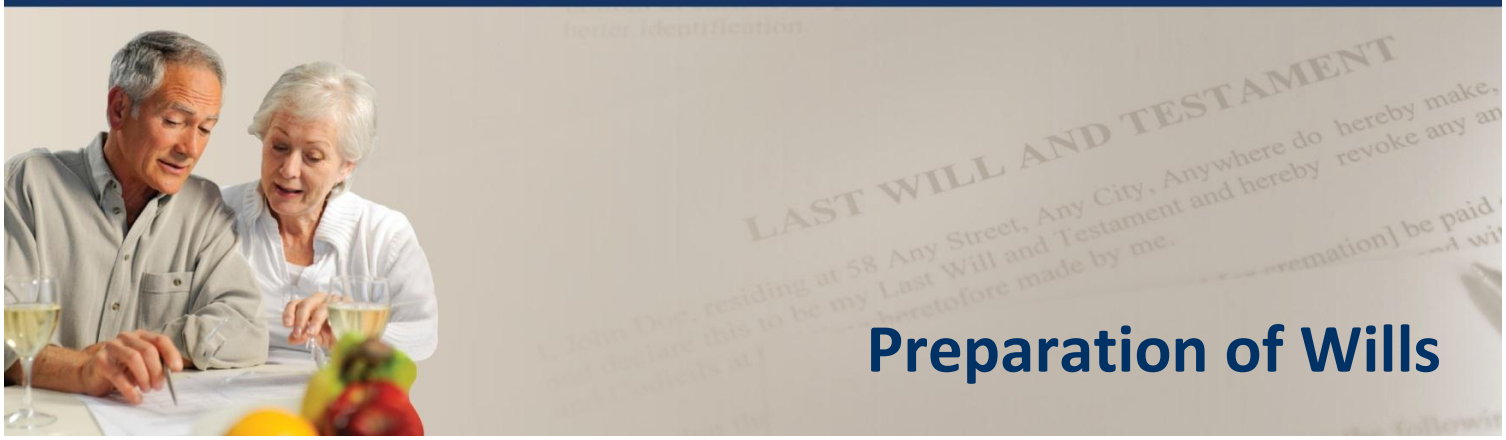

Preparation of Wills

Some of the most commonly asked questions about Preparation of Wills are discussed on this page.

1. Should I make a Will?

Generally everyone over the age of 18 years should make a Will.

If you do not make a Will, your assets will be distributed in accordance with a method set by law. This means that your assets are likely to be distributed in a way that you did not intend.

For example, you may be involved in a de facto relationship and intend to leave your assets to your partner. If you do not leave a Will, your partner must endure the burden of proving the relationship to the Supreme Court, at a time when they are grieving. It would be much easier to have a Will leaving the estate to your partner.

Also, it is usual for your beneficiaries to require access to your assets as soon after your death as possible, to avoid suffering financial hardship. Having a valid Will would ensure that your beneficiaries get access to your assets as early as possible, without having to prove to the Supreme Court that they are entitled to your estate.

2. Is a do-it-yourself Will Kit good enough?

It is not advisable to use a do-it-yourself Will kit as there is greater risk of mistakes being made, and good estate planning opportunities being lost.

Your Will must conform to strict legal requirements for it to be accepted by the Court for Probate, and anyone who is not legally qualified risks making a mistake which could cause your family substantial cost and delay in having the Court resolve any ambiguity or mistakes. A Will is an important legal document, and therefore it is important that you have your Will professionally drafted.

A Will is one of the most important documents you are likely to sign, and it is vital to ensure you seek professional advice about making your Will to ensure it is both valid and reflects your intentions.

3. How does marriage or divorce affect my Will?

If you marry after you make your Will, your Will is no longer valid. This is unless the Will specifically states that it was made in anticipation of the marriage.

If you divorce after you make your Will, any gift to your former spouse will be cancelled. If you appointed your spouse as your executor, trustee or guardian of your children, that appointment will also be cancelled.

Marriage and divorce raise complicated issues when it comes to the validity of Wills. It is very important to seek legal advice if you are getting married or divorced to ensure your Will operates as you intend.

4. What is a Testamentary Trust?

The beauty of a Testamentary Trust is that it is discretionary, which means the timing and amounts of distributions may be controlled and co-ordinated to suit the needs of your beneficiaries for years to come.

A Testamentary Trust is designed to give an array of options when it comes to transferring your estate, so that your beneficiaries attain the maximum benefit from their inheritance.

Examples of the types of benefits that can come from having a Testamentary Trust include;

- After-death continuance of trusts, business assets or property
- Tax minimisation devices
- Protection of vulnerable beneficiaries (such as spendthrifts)
- On-going and controlled provision for disabled beneficiaries

5. Who should my Executor be?

Every Will must appoint at least one executor. An executor is the person who will 'step into your shoes' and carry out your wishes as set out in your Will.

Some examples of an executor's responsibilities include:

- Locating the Will
- Arranging the funeral
- Making an application to the Supreme Court for Probate of the Will
- Collecting assets of the estate
- Insuring any insurable assets
- Paying outstanding bills/debts
- Identifying any tax liabilities
- Distributing the estate to the beneficiaries
- Defending any claims brought against the estate

As you can see, the responsibilities of an executor are important and sometimes burdensome. It is vital that you choose someone you can trust will carry out your wishes in the best interests of your beneficiaries. It is a good idea to speak to the person you have in mind before making your Will, to make sure they would be happy to act as your executor.

6. Where Should I keep my Will?

As part of our service to you, you may choose to leave your Will with us for safekeeping in our fire proof safe custody facility. We can hold your Will until it is needed, free of charge.

You will need to advise your executor of the location of the Will, or better still give them a copy (which we can provide you with). A Will is not of any use if it cannot be located when it is needed.

7. How can I obtain access to a deceased's Will?

Getting to see the will of a deceased can sometimes be a problem.

Certain classes of people who can apply to inspect or obtain copies of the will are:

(a) Any person named or referred to in the will, whether as a beneficiary or not;

(b) Any person name or referred to in an earlier will as a beneficiary of the deceased;

(c) The surviving spouse, de facto spouse (whether of the same of the opposite sex) or issue of the deceased'

(d) A parent or guardian of the deceased;

(e) Any person who would be entitled to a share of the estate of the deceased if the deceased had died intestate (without making a will);

(f) Any parent or guardian or a minor referred to in the will or who would be entitled to a share of the estate if the deceased had died intestate;

(g) Any person (including a creditor) who has or may have a claim at law or in equity against the estate of the deceased

(h) Any person committed with the management of the deceased's estate under NSW Trustee and Guardianship Act immediately before the death of the deceased;

(i) Any attorney under an Enduring Power of Attorney made by the deceased; and

A person, such as a solicitor or a trustee, who has possession or control of the will of a deceased must allow any of those persons entitled inspect or obtain copies of the will, which includes the final unrevoked will, any previous wills or any document purporting to be the will.

The right to access a will applies before Probate is granted.

A person may apply for access if there is a potential dispute about who should apply for Probate or Letters of Administration.

A person eligible to make a family provision claim can promptly now find out whether the deceased has made adequate provisions for them so that they can consider whether they should make a claim. A family provision claim must be made within 12 months of the date of death unless the Court gives leave for proceedings to be commenced after 12 months.

8. Who will look after your pets?

One of the most common ways of providing for a faithful companion is through the use of a legacy programme with an charitable organisation.

Funds are usually gifted to the organisation as part of the division of the estate and in return the organisation is charged with the wellbeing of the valued companion – placing them in a special boarding facility or organising for them to find a new home.

In cases where you would prefer a more personal touch to the care provided to your favourite pet, a legacy bequest could be made to a close friend of family member.

It is important to talk this decision over with the parties concerned before the will is drafted to help make sure that the conditions are understood – as well as to ensure that the funds made available are sufficient for the ongoing requirements. It is of particular importance that the will is drafted properly, because there can be issues about the enforceability of a trust for the care and maintenance of an animal.

Practical factors to consider here include the expected lifespan of the animal in question as well as the capacity for care that a family member or friend has at their disposal.

9. What Testamentary Capacity is required to make a Will?

Any person can make or change their will provided they understand in general terms:

- what a will is, i.e. a document setting out what is to happen to their property when they die
- the amount and type of property they have
- their moral obligation to provide for persons such as their surviving spouse and children' and
- they are not delusional or suffering from a mental illness at the time they sign their will.

Age, even great age, does not prevent a person having testamentary capacity to make or change their will.

It is not even necessary that the willmaker be able to read or write, as long as appropriate steps are taken to make sure they understand the will.

If there is a question about a willmaker's mental capacity to make a will, then an opinion, preferably in writing, should be obtained from that person's treating doctor, that the willmaker has the required testamentary capacity to make a will. Ideally the doctor could be present when the willmaker signs the will and the doctor should be one of the two witnesses to the will.

10. How can I provide for financial reckless beneficiaries?

A common solution is to set up a trust arrangement whereby the benefit you bequeath to them is held in trust under conditions you have outlined. It may wait until the beneficiary reaches a certain age or meets a certain condition before the beneficiary's share is made available. Alternatively, it may dispense a limited amount of money at certain intervals specified by you. However, there are also certain arrangements that will not stand up if challenged.

To make the right arrangements or to investigate other possible solutions, you should discuss your concerns with a solicitor who can advise you on the best course of action.

If you would like further information, or require assistance, please contact us on (02) 4731 5899 or send us an email by clicking on the 'Contact Us' page on our website.