

# What is a Will?

**A Will is a legal document which outlines how you would like the property you own at the date of your death (called your “Estate”) distributed following your death. A Will also appoints the person/s who will be responsible for the administration of your Estate.**

The people who receive your Estate are called your beneficiaries.

The people who are appointed in your will to administer your Estate are called your executors.

## Formal Requirements for making a Will

In Queensland, the *Succession Act 1981 (Qld)* governs the requirements for making a valid Will, **including**:

1. A Will must be in writing;
2. A Will must be signed by the person making it in the presence of two independent witnesses; and
3. A Will must be signed by the person making it with the intention that the document constitutes a Will.

## Testamentary Capacity

A Will can only be made by a person who has capacity to make a Will (called ‘testamentary capacity’). Generally, the test for testamentary capacity can be described as whether the person is of “sound mind, memory and understanding”.

**Various cases have elaborated on this issue and have identified that the critical elements of “sound mind” in the context of making a Will include the ability to:**

1. Understand the nature of making a Will and its effects;
2. Understand the extent of the property in the Estate;
3. Comprehend and appreciate the claims to which the Will-maker ought to give effect: for example, a person making his or her Will must have sufficient memory to recall the people who may be appropriate beneficiaries of their Estate and be able to comprehend their relationships to the Will-maker and their claims on the Estate.
4. There should be no disorder of the mind and no insane delusions influencing the disposing of the Estate.

It is possible that a person who generally lacks testamentary capacity may, during lucid intervals, have the requisite capacity to make a Will.

If there is a concern about a person’s capacity to make a Will, sometimes the advice of a medical practitioner will be needed.

## What if I die without a Will?

If you die without a Will, your Estate will be dealt with under the laws of intestacy. In Queensland the laws of intestacy are set out in Part 3 of the *Succession Act (Qld) 1981*.

The legislation sets out the rules for distributing your assets based on whether you have a spouse, child/ren or other family members. The legislation also includes a list of the people who have priority to administer your Estate.

If you die without a Will your Estate may not be distributed to the people you would choose in the way you would choose. Your Estate may pass to someone you actually would not wish to receive it (for example, a spouse from whom you have separated but not yet divorced).

If you die without a Will it may also take more time and money to administer your Estate.

## Who needs a Will?

Everyone who is over 18 and has capacity needs a Will.

Regardless of the size of your Estate, it’s important to have a valid Will. This is to ensure that those dealing with your Estate after your death can do so with minimal stress, complexity and cost.

A Will ensures that your Estate will go to the people you choose (instead of being governed by a set of rules created by legislation which does not account for your own individual and family circumstances).

## When to update a Will

There are certain events in a person’s life which have a significant impact on the operation of their Will. Some of these events even revoke (that is, cancel) a Will.

### It is therefore critically important to review and possibly update your Will following any of the below events:

- ✓ Marriage
- ✓ Civil partnership
- ✓ Entering a de facto relationship – particularly if there are children from previous relationships
- ✓ Separation
- ✓ Divorce
- ✓ Termination of a civil partnership
- ✓ Ending a de facto relationship
- ✓ Birth of children
- ✓ Death of an executor
- ✓ Death of a beneficiary
- ✓ A change in your financial circumstances

A Will is revoked if you get married or enter a civil partnership (except for gifts to your husband, wife or civil partner or appointment of that person as executor), unless it is made in contemplation of marriage or the civil partnership.

Divorce, termination of a civil partnership or the ending of a de facto relationship revokes any gift in the Will to the former spouse or appointment of the former spouse as executor, unless there is a contrary intention in the Will.

### Terms of a Will

In addition to the appointment of an executor and directions about who will receive your property, **a Will also provides you with the ability to:**

- ✓ appoint guardians for your infant children
- ✓ establish a trust to provide for children, or for beneficiaries with a disability or other vulnerability
- ✓ establish a trust for asset protection or taxation advantages
- ✓ bequeath money or property to charity or philanthropic organisations
- ✓ express your preference about being buried or cremated

Historically a Will could also be used to authorise donation of your organs and tissues following death. Some people may have also have ticked a box on their driver's licence.

The Australian Organ Donor Register is now the only valid and reliable place to record your donation decision:

<https://donatelife.gov.au/>

### What documents should I bring to my Will appointment?

- ✓ You must bring some current identification to your Will making appointment.
- ✓ Full names and addresses of your executors and beneficiaries.
- ✓ We recommend you bring a list of your assets and liabilities (including superannuation and life insurance policies).
- ✓ If you have any company or trust structures you should also bring copies of the documents establishing and governing those entities (for example, Self Managed Super Fund or family discretionary Trust Deeds, Deeds of Amendment, Deeds of Retirement and Appointment of Trustees, Company Constitution, current company search).

### Is making a Will expensive?

**We charge a fixed fee of \$550.00 including GST to prepare a new Will.**

**If couples are making Wills at the same time, we charge a fixed fee of \$880.00 including GST for their two Wills.**

This represents approximately two hours of our solicitor's time to consult with you on your wishes, give you specialised advice on issues relevant to your particular circumstances and prepare a Will which achieves your objectives for your Estate.

If your circumstances or assets are unusually complicated, we may charge extra for the additional time, consideration and care involved in preparing your Will.

Bearing in mind that the purpose of a Will is to effectively deal with all of the assets you have acquired over the course of your lifetime, the cost of a Will is a very reasonable investment in planning for the future of those assets.

### Can an informal document be a Will?

The legislation states that to be a valid Will there must be a written document which has been signed by the will-maker in the presence of two independent witnesses with the intention that the document is a Will.

However, the legislation also allows the Court to determine that an informal testamentary document is a Will if the Court is satisfied that the document embodies the testamentary intentions of the deceased (s18 *Succession Act 1981(Qld)*).

**Can an informal document be a Will? (cont)**

**In various cases on this issue the Court has determined that (in the particular circumstances of the case) the following documents were held to constitute a Will:**

1. A document signed by the deceased with only one witness;
2. A document signed by the deceased with no witnesses;
3. A document written by the deceased but not signed;
4. An electronic version of a document found on the deceased's computer; A DVD or phone video recorded message of the deceased expressing their intentions for their property after death;
5. An unsent text message found on a deceased's mobile phone.

We must convey a strong warning that the cases in this field do not create a general principle that any of the above will be considered a Will.

In each case the Court had to carefully consider the particular facts and circumstances in which the document was created and the intention of the person making the document.

And, of course, the biggest problem with any informal document is that a Court determination is needed, which creates unnecessary cost and delay in administering your Estate.

**We invite you to contact a member of our Wills & Estates team to assist you in making a Will which you can rely on to effectively carrying out your intentions for your Estate.**

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