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Wills and Estates

A will is an important legal document. Prepared properly, it will ensure that your assets will be distributed according to your wishes after your die. A will can be used to distribute all of your assets such as real estate, shares, savings and insurance policies. Wills can also be used to establish a trust or make a charitable donation.

Who Can Make A Will?

In general terms, any person 18 years of age or older can make a will if they are of sound mind. This is based on the requirement that persons must have the necessary mental capacity and to understand the nature of the document they are preparing.

Recent changes to Queensland legislation recognise that in some circumstances, minors may have the necessary capacity to make a will. Those under age 18 may make a will if they are considering marriage and the will is intended to take effect when the marriage takes place. In addition, the Supreme Court can authorise a minor to make a will. This may be significant where a minor is suffering a life threatening illness and wishes to determine how their assets will be distributed.

The legislative changes also allow courts, in some circumstances, to make or change wills for people who are incapable of making a will themselves (for example, people with brain injuries or who are in a coma) or people who are already deceased. The court can propose a new statutory will based on the court's belief as to what the incapacitated (or deceased) person would have intended. For example, an old will might no longer be appropriate due to the birth of a child not included in the old will. It might be clear from the circumstances that the incapacitated (or deceased) parent would have wished that child to be recognised in their will. This highlights the importance of reviewing your will on a regular basis. It is preferable to keep your will up to date rather than have a court guess at your intentions.

FOR FURTHER INFORMATION,
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Preparing Your Will

It is a good idea to have a solicitor assist in the preparation of your will. This will ensure that it is properly drafted in order to achieve your objectives, and that it has been properly signed and witnessed.

Solicitors may also provide advice on how to preserve your assets and provide for your family's financial security. For example, a solicitor may provide advice on how you can minimise capital gains tax liability. Depending on your circumstances, you may also have a legal obligation to make adequate provision for certain family members upon your death. A solicitor can review your circumstances and provide advice about the extent of your obligations. This will minimise the possibility of challenges to your will following your death.

Having a will also enables you to choose your executor, which is the person who will be responsible for distributing your assets. Executors have an important role in the administration of an estate. The performance of their duties may require legal and financial knowledge. For example, an executor's duties may include collecting assets, establishing and paying debts and taxes, obtaining court orders, establishing trusts and paying legacies. A solicitor can help you choose the right person for this role.

What Happens If I Don't Have A Will?

If you die without a will, your assets will be distributed according to rules set down by law. These rules may be different from how you would have chosen to distribute your property. In addition, the law may require the sale of property and assets such as the home in order that all beneficiaries receive their share. The resulting distribution of property may fail to provide adequate financial protection for your children or grandchildren, or leave incapacitated family members without adequate support. Ultimately, if you have no living relatives, your property may go to the government.

In addition to not having any control over the distribution of your assets, if you die without a will you will not have an opportunity to determine who will administer your estate or to express your wishes regarding the appointment of a guardian of your children.

Keeping Your Will Up to Date

Once you have prepared a will, it is important to keep it up to date. You can change your will at any time and as often as you wish. You should generally review your will every three to five years to ensure that it still reflects your wishes. It is also important to review your will upon life event such as:

- marriage;
- divorce or separation;
- entering into a de facto relationship;
- the birth or death of children or grandchildren;
- the death of a beneficiary or executor; or
- a change in financial circumstances.

Life events can have a significant impact on the validity of all or part of your will. For instance, marriage revokes an existing will. The will does not have any effect unless it was expressly made in contemplation of the marriage. Divorce, however, does not revoke a will, although it cancels any provision in favour of your former spouse. In addition, once you have children, you may wish to consider additional issues such as guardianship or how to best provide for your children's financial security.



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