

The importance of a will and getting it right

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What is a will?

A will is a legal document that allows you to determine who receives an inheritance from your estate after your death and what that inheritance will be. Without a will, your estate will be distributed in accordance with intestacy laws. Having a will is important for peace of mind in ensuring that your loved ones are looked after once you have died and you have control over who inherits your assets.

What do you include in a will?

There are three key aspects to a will. These are the executor, the beneficiaries and how your assets will be distributed.

Executor

The first consideration is who you will appoint to administer your estate after your death. This person (although there can be more than one) is called the executor. An executor has the responsibility of distributing the assets in your estate in accordance with the instructions you leave in your will.

Beneficiaries

The second consideration is who you want to inherit from your estate. A person you include in your will to inherit from your estate is called a beneficiary. We recommend providing substitute beneficiaries to ensure that in the event that your first choice of beneficiaries pre-decease you there are others to inherit your estate. For example, in your will you may leave your estate to your children, but in the event that a child dies before you their inheritance will pass to their children.

Distribution of assets

The third consideration is identifying what the beneficiaries of your estate will receive. You can give a specific gift (also known as a legacy) to a beneficiary. For example, you may specifically give your car or principal home to a particular beneficiary. Careful drafting may be required if you intend for that gift to relate to a substituted car or property.

You can also make a gift from the residue of the estate. The residue means the money and items remaining in

your estate after the payment of all debts, legacies, taxes and funeral expenses. The purpose of the residue is to ensure that no item or money of the estate are left ungifted. For example, you may give a number of specific gifts and then provide that the remainder of your estate is to be distributed equally among your children.

We recommend you think carefully about the above considerations prior to making a will. There may also be more complicated factors you need to consider that an estates lawyer can assist you to identify and work through (we discuss some of these below).

We also recommend seeking advice on updating your will if there has been a significant change in your personal circumstances (such as a relationship breakdown or other changes to your family) or a significant change to your assets that impacts on what your beneficiaries will receive. For example, selling a property that was a specific gift to a beneficiary which now leaves that beneficiary with little or no inheritance under your will.

Why is it prudent to engage a lawyer?

Although making a will may appear to only involve listing the beneficiaries and what gifts they receive, it can be considerably more complicated. In the remainder of this article we set out what can go wrong in drafting wills and why it is prudent to engage an experienced estates lawyer rather than preparing your own will.

Issue of capacity

A critical issue when seeking to make a will is whether you have testamentary capacity. This is an important issue if, for example, your memory or other mental processes are beginning to deteriorate. An experienced estates lawyer will consider whether you have sufficient capacity and may recommend steps to take to protect your will from being successfully challenged after your death.

Issue of duress

In some circumstances, especially where there is conflict between family members, there may be accusations of duress or pressure being applied by a beneficiary to the person making the will. For example, child A may argue that child B pressured a parent into giving child B a larger inheritance than child A.

The involvement of a lawyer in preparing a will assists to protect against claims of duress or pressure as a lawyer will take steps to ensure that the person making the will is expressing their own free wishes and not those of another. If the person making the will does, for example, exclude a child or provide for unequal inheritances the lawyer will be able to provide evidence that this was the free and informed intention of the person making the will and not a result of duress or pressure from another beneficiary.

Avoiding inheritance claims

A lawyer can assist with estate planning generally, as well as advise on how to reduce the risk of inheritance claims being brought or succeeding. For example, a lawyer can advise on the option of gifting assets prior to your death to remove those assets from your estate and prevent a person challenging your will to inherit those assets.

Another example is structuring your will in a certain manner to provide a person with the benefit of an asset during their lifetime such as allowing a partner, who is the step-parent to your children, to live in your property after your death but ensuring that your own children inherit that property upon the death of your partner and not your partner's family.

Obtaining legal advice for estate planning is particularly important in blended families, where there may be conflict among family members or where a person seeks to distribute their estate in unequal shares among their beneficiaries or exclude from the will a person who may be able to make an inheritance claim (see our article [Making an Inheritance Claim](#) for further information on who can make an inheritance claim).

Establishing trusts for minor children and others

If you wish for a beneficiary to receive some or all of their inheritance not immediately upon your death but at a later time a lawyer can draft a will to this effect and establish a trust in the will. Trusts within your will can be used to delay a beneficiary's inheritance while ensuring that the beneficiary (often a child under the age of 18) still has access to the inheritance for expenses such as their education, care and further advancement in life.

The inheritance of the child is managed by a trustee, often the executor, until the child attains the age specified in your will, at which point, the beneficiary can receive the

inheritance directly. Creating a trust within a will requires the knowledge of an experienced estates lawyer both for the legal drafting of the will and for providing advice on the effect of the trust.

Accounting for debts of the estate

Prior to your estate being distributed to the beneficiaries in accordance with your will, your outstanding debts need to be paid from the estate. This can impact the amount of inheritance the beneficiaries receive and may result in some beneficiaries receiving a reduced inheritance while others not. It is important to carefully consider the impact of your debts on your estate and what effect that will have on the inheritance of each beneficiary.

If the debts of your estate result in an unequal impact on the inheritance of beneficiaries it may cause a beneficiary, disadvantaged by the debt, to make an inheritance claim in an effort to increase their inheritance and offset amounts lost to the repayment of debts. It is beneficial to engage a lawyer to provide advice on how to manage the repayment of your debts after your death to ensure your beneficiaries are not unintentionally and disproportionately impacted.

Testamentary Discretionary Trusts

An experienced estates lawyer can help work out if you should create testamentary discretionary trusts in your will. If appropriate, these trusts have considerable taxation and asset protection benefits for your beneficiaries.

Summary

While making a will might seem simple, it can be far from it, as demonstrated by the examples above. Due to these complexities (and others), which may not initially be evident, we recommend having a lawyer draft your will and provide legal advice about the effect of the document and any potential issues that may arise upon your death.

We note that the issues that can arise with wills are not limited to those we have discussed or could cover in an overview article.

If you require a will, or have concerns about your current will, our Estates team would be happy to assist you. Our Estates team can also assist executors (or administrators) to administer an estate or if you require assistance in relation to an inheritance claim.

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Disclaimer

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