

HAVING NO WILL OR AN INVALID WILL – THIS IS NOT THE WAY TO GO!

Studies show that on average 45% of Australians do not have a Will or if they do, the Will it is not valid. If you were to die without a Will, nobody knows who you would nominate as your beneficiaries or who you would appoint as your executor(s) - the persons usually appointed to administer your estate upon your death.

If you die without a Will you are said to have died "intestate". In this case, the laws of intestacy apply to your estate. Your estate will be distributed according to these laws. This means your assets may not go to the person(s) you wish or pass in the shares you may want. You will have made no clear provision for your loved ones, and you will be placing an extra burden on them at a time of stress, grief and loss. This also creates the potential for a conflict to arise between entitled beneficiaries. If so, this will take more time and money to finalise your estate.

Will

A Will is a legal document that sets out your wishes as to the distribution of your assets after you die. Having a clear, up to date and legally valid Will is the best way to help ensure your assets are protected and distributed according to your wishes. Your Will is probably the most important document you will sign during your lifetime.

Everyone over 18 years of age who has legal capacity to make a Will should make a Will. This is regardless of the size and value of one's estate. A Will is really a living document that accompanies you on your life's journey and requires regular review.

Events (good and bad) happen to us all at some stage during our lifetime. Some of these events should make us consider making, reviewing or even updating your Will. These events include:

- . birth of children or grandchildren;
- . marriage/divorce;
- . buying/selling property;
- . death of an executor and/or beneficiary;
- . civil partnerships or their termination;
- . entering a de facto relationship (particularly, if they involve children from previous relationships);
- . ending of a de facto relationship;
- . change in financial circumstances; and
- . buying/selling a business.

In addition, making a Will also provides you with an opportunity to:

- . consider the appointment of legal guardians for any children under 18 years of age;
- . establish a trust to provide for children;
- . establish a trust to provide for a person with a disability;
- . ensure preservation of assets;
- . make gifts to charities;
- . express wishes and desires about a funeral and/or consider organ donation;
- . consider what to do with assets in overseas jurisdictions or otherwise outside of Queensland; and
- . consider dealing with superannuation.

Homemade Wills - Will Kits/Online Wills

Today, it is more and more common for will makers to prepare or make their own homemade Will using either Will Kits purchased either online or from a newsagent or even using an online system to make the Will. When making a Will using a Will Kit or an online system, no regard is had to the will makers family circumstances which can be a very important consideration when making a Will. For this reason alone, preparing your own Will without proper legal advice is not advisable. A Will must conform to strict legal requirements. A Will must be properly witnessed. If a Will does not meet these strict legal requirements or is not properly witnessed, the Supreme Court may later decide, after significant expense and delay, that your Will is not valid.

Anyone who is not legally qualified risks making a mistake, creating uncertainty or losing opportunities for good estate planning if they make a Will for themselves.

The precise wording of a Will is a specialised and important legal task. The ordinary meaning of words is not necessarily the same as their legal meaning. Ambiguous wording is extremely common in homemade Wills and this usually results in substantial costs and delay in estate administration because the Supreme Court must first resolve any ambiguity.

In some cases that have come before the Supreme Court over recent years, the Court has had to make decisions about homemade Wills where will makers have left, as their purported Will, handwritten notes, text messages or typed notes on the computers outlining how they would like their estate distributed after their death. These types of documents are not legally recognised. The cost to an estate to prove this type of document as a testamentary document in order to establish the will maker's last testamentary intention is significant and completely unnecessary. More often than not, homemade Wills are challenged in Court due to the confusion created in their drafting, meaning and compliance with legal requirements.

A Will is a very important legal document. Bearing in mind the risks of preparing a homemade Will, it is extremely unwise to prepare your Will this way. When considering making a Will, the will maker must balance the cost of having a Will prepared that has been professionally drafted by a legal practitioner against the significant cost the estate will incur in having to remedy an ambiguous or defective Will that is not legally recognised. Think of it this way, an ambiguous or defective Will is just a ticking time bomb. The bomb goes off when you are gone! You will not be around to deal with the problem. It will be up to some unsuspecting and innocent person to deal with the issues, at your cost, which will be very stressful for them.

Estate Plan

Ideally, what most people require is an estate plan. An estate plan need not be complex or expensive. Usually estate plans are relatively straight forward.

An estate plan may involve:

- making a Will;
- making a Power of Attorney (whether it be an Enduring or General document);
- creation of trusts;
- nomination of guardians; and
- a consideration of superannuation and life assurance (including consideration of superannuation death benefit nominations).

In addition to making a Will, an estate plan could include, and can address, areas such as:

- assets held in a joint tenancy (eg joint bank accounts, shares held jointly and real property). These assets are not covered by a Will;
- superannuation matters (including self-managed superannuation funds);
- discretionary/family trusts;
- company structures and company assets; and
- business succession; shareholder agreements; and buy-in/buy-out options and provisions.

As your life changes so should your estate plan. It is recommended that your estate plan be reviewed whenever your circumstances change, or at the very least every three years.

When considering an estate plan, you need to consider obtaining joint advice from your financial planner, accountant/ financial adviser and legal adviser.

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