

Why you must  
**make  
a Will**  
to **protect** your family





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## Who is this book for and what does it include

After 18 years of age everyone should have a Will.

This booklet is designed to help you understand more, make some clear determinations and generally to help you make your Will.

For all of us there is an emotional element to address when making a Will and an understanding of the essential elements is critical in creating this important protection for our loved ones.

This brief book seeks to explain simple facts surrounding Wills and their creation to help you through the maze of legal terms and concepts that mystify this area that most of us experience in our lives.

I hope you find this book useful and I welcome your questions.

My aim is that you hold a Will that provides peace of mind for you and security for your family.



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**Will Author and Lawyer**

A photograph of a smiling couple in autumn attire. A woman with long dark hair is wearing an orange turtleneck, and a man with a beard is wearing a grey scarf and a black leather jacket. A dark grey circular graphic is overlaid on the image, containing the text '1 why do I need a Will?'.

# 1 why do I need a Will?

## Because you care.

Because you care for your loved ones and you want to look after them.

And because you will die. Perhaps soon. Perhaps later this week.

You do not need a Will for yourself. Why not? Because your Will has no legal effect until the moment you have died. Your Will provides for those you love after your death.

Making a Will may be one of the most selfless acts you will ever do.

### **Your Will can**

- Appoint Guardians for your children.
- Provide maintenance for your dependants.
- Leave specific items to specific beneficiaries.
- Leave the residue of your estate to your family.
- Provide for funeral arrangements, burial or cremation.
- Give directions about assets that you control (companies, trusts).
- Nominate who shall administer your estate.



If you die without a Will – and many people do – you do not leave your affairs in the lap of the gods. It is much worse than that. You leave your affairs in the lap of state legislation. Legislation which says who shall inherit your assets and how your estate shall be administered.

If you die without a Will your estate shall be distributed in accordance with the intestacy rules – a “one size fits all” fixed formula. Perhaps the formula does not fit your family’s size. It certainly didn’t fit mine when I was 15 and my father died.

It also didn’t fit my two sisters or my stepmother. In fact it didn’t fit anyone in my family at all.

Don’t leave your loved ones in limbo.

**If you care about anybody you must have a Will.**





## Now. You should make a Will now.

By now, I do not mean pulling out a blank sheet of paper and starting to pen “being of sound mind I hereby make my Last Will and Testament...”

There are things that you need to consider carefully before you make a Will including:

- What assets do I own?
- What assets do I control but not own?
- Who should be in my thoughts when making a Will?
- Who are my family members and who are my dependants?
- Do I want certain items to go to particular people?
- Who will administer my estate and ensure that my wishes are carried out – not merely to the letter but also in spirit?
- What are the consequences of me making a Will in the terms that I would want?
- What do I want done with my body after I die – burial/cremation/funeral service?



These things and more need to be considered by you before preparing a Will.

Additionally there are strict formalities to be followed when preparing a Will if it is to be valid. It is very risky to simply write “all to Mum”, sign your name and expect that this wish shall be carried out.

But what I do mean by “now” is to immediately commence action to put a valid Will in place which reflects your wishes. This starts by thinking about the above items and taking action to prepare a Will.

Once you decide that it is important to have a valid Will – and it is – then you can achieve that within a short space of time – weeks at the most.

In Queensland you must be 18 years of age to make a valid Will unless you are married or intending to get married.

Additionally, the Court may authorise a person less than 18 years of age to make a Will in terms stated by the Court if the Court is satisfied that the person understands the nature and effect of the proposed Will and that it is reasonable for the Will to be made.

A Court may also make a Will or alter an existing Will of a person who does not have testamentary capacity in limited circumstances. Application must be made to the Court for such an Order.

You would be amazed at the number of people who I speak to who are loving and considerate partners, spouses or parents and who have been intending to make a Will for a long period of time but have not. Often for years.

**Face it. It is an unavoidable fact. We are mortal. Make a Will NOW. Then move on with your life.**





How you go about making a Will need not be complicated. However there are formal requirements for making a valid Will.

For hundreds of years under English law, Wills have been considered as one of the most important documents a person can create. It is important because it deals with giving away your property and it will be interpreted at a time when you cannot be present to say what you actually meant to do.

For these and other reasons strict rules were established under law for a Will to be valid.

These historic rules have resulted in the provisions of the Queensland Succession Act. However we live in an age of enlightenment when strict rules – particularly those which may create hardship in certain cases – are sought to be softened and made more flexible, in a manner which would have been unthinkable in previous times.

Queensland law states that the basic formalities of a Will are:

- That it is in writing.
- Signed by the Testator.
- In the presence of two or more witnesses present at the same time.
- The signature of the Testator must be made with the intention of executing the Will.



Although our modern more flexible approach has resulted in text on mobile phones to be held valid it is much safer to ensure that your Will incorporates the above basic formalities.

It is an essential pre-requisite that the Will maker has testamentary capacity. This is a technical legal definition which exceeds the simple medical specifications for “capacity”.

In order to make your Will you must also be aware of your existing legal obligations otherwise your Will may be subject to a contest after your death. Many estates have been financially decimated by such claims.

Experience in drafting and a knowledge of the rules of interpretation of documents is a valuable if not essential prerequisite to draft a Will.

Whilst there are alternatives (Will kits, Public Trustee, etc) the best value for the preparation of a sound and enforceable Will is to have it prepared by your own Lawyer. The cost of that service is modest. When you consider the importance of the issues and the security afforded to your loved ones, the value can be priceless.

Your Lawyer will be able to provide you with suggestions and advice from their experience as well as to inform you on all of the essential elements for you to create a valid Will.

Additionally they will be able to provide you with the essential advice required for complimentary issues relating to your estate planning – business succession, enduring powers of attorney, superannuation succession issues, advance health directives and the like.

The first step to making a valid Will is to make an appointment with your Lawyer.



## 4 who do I name in my Will?

There are a number of people who you will name in your Will for a variety of reasons.

### **Executors**

You need someone to administer your estate, typically called an Executor or Trustee. This person should have the principle characteristics of being a sound and prudent decision maker. If they are a family member or friend who knows you and your family, then that is even better.

You must name more than one Executor otherwise it is only a 50/50 statistical probability that they will be there to do the job you want them to do after you die. You can therefore name two or three possible Executors of your Will and they can act either jointly or successively – as you would prefer. Just remember that if you appoint more than one person as Executor at any time then they must make unanimous decisions and not majority decisions.

### **Beneficiaries**

Clearly you will also want to name beneficiaries in your Will. These are the persons who will receive the benefit of inheritance from your estate.

I have seen Wills where the Australian Taxation Office was a beneficiary. An unstated and unintended beneficiary but a beneficiary never the less. Always get experienced advice on the consequences of your proposed Will bequests – the effect may shock you.



You are likely to have persons in your life to whom you owe a legal obligation to look after when you die. You must know these legal obligations and also the consequences that may occur if you fail to fulfil those legal obligations. It is essential that you obtain advice from your Lawyer to ensure that your Will is not subject to a contest after you die. This could defeat all of your wishes.

You will be surprised at the number of options and variations which you can employ to ensure that your wishes are carried out. Good experienced advice will be invaluable to you in making these decisions.

### **Testamentary Guardians**

For parents with children it is essential for you to consider and to appoint in your Will Testamentary Guardians to look after those children. This power of appointment by a parent in their Will is a very powerful and beneficial tool and you can insert provisions into your Will which ensure that the Guardians who you name are not financially disadvantaged in fulfilling that vital role for your family.

Before signing your Will it is essential that you personally check with your proposed Executors/Trustees and Testamentary Guardians to ensure that they are willing to accept that role. The reality is that when you die those persons have an election to make – will they accept the appointment which you have made in your Will or shall they decline? There is no legal obligation on them to accept that appointment and obviously you do not want your wishes to be frustrated because you have made an inappropriate appointment in your Will.

We have great experience in guiding clients through the difficult decision making process of naming the persons who will appear in your Will.





Essentially your Will deals with assets which you own personally – that is assets in your own name. Many of these are easy to identify – car, home, boat, bank account, personal effects, chattels, etc. But be aware some assets will only be realised when you die – life insurance, superannuation death benefits, etc.

Other assets which you have during your life may extinguish upon your death and not form part of your estate. For example most husbands and wives own their home in joint names as joint tenants. The effect of this legal joint tenancy is that when one spouse dies the survivor becomes the automatic sole owner of that house and it is not included in the assets of the deceased spouse.

Additionally there may be assets which you consider as your own assets – because you control them and created them – but which in the law are not your assets. Typical examples of these are assets held in Companies or Trusts and digital assets such as social media accounts – Facebook, Twitter, Instagram, Snapchat, etc.

Your Will should have provisions that deal with all of your assets whether they are assets in your own name or assets in another entity over which you have control. If you do not include these into your Will your family may suffer disappointment or frustration in the administration of your estate.



Assets owned by you personally can be dealt with by mandatory provisions in your Will. However assets that are owned in other legal entities may require sophisticated treatment to achieve your desires. This may be achieved:

- In the case of Companies through the wording of the Constitution and/or Shareholder Agreements.
- In Unit Trusts through specific transfer rules in the Trust Deed.
- In Discretionary Trusts through the provisions of the Deed relating to Appointors and amendment of the Deed.
- In the superannuation regime by the use of Binding Death Benefit Nominations.

An experienced Estate Planning Lawyer will be able to draft provisions that achieve your wishes. We are one of those.





## 6 where should I keep my Will?

I am feeling good. I survived. Despite those fears that making a Will would invoke a curse on my health it hasn't happened! And I now have a Will so what do I do with it?

A Will is a document that lies dormant and without legal effect during your lifetime. However if you can't locate your original signed Will then you do not have a Will. It is therefore essential that your original Will is securely stored.

What are my options for this? Alternatives include:

### **Lawyer safe custody**

Most Lawyers offer a free safe custody storage facility for their clients. A vast number of Wills are retained in this manner which provides long term security and protection at zero or minimal cost. You can keep a copy at home for your reference. Speak with your Lawyer on this.

### **At home**

What is important is that your document is held in a secure and fire proof location known to your important family or friends. Do not keep your Will in your bedside table or desk drawer. You may both be destroyed in the same event.

If you have a home safe where you keep your documents then it may be appropriate to keep your Will in that safe. If you do this it is important that you ensure family members are not only aware of its location and also have access codes/keys if the document is required.



## **Cloud**

A copy of your Will may be stored electronically and this may include Cloud storage. Knowledge of location and access codes referred to above are equally important here. Further, for the reasons stated in earlier chapters it is critical to be able to locate your original paper based signed Will until such time as our laws change. Your e-Will is therefore a reference document.

## **Will Registers**

There are no official Government Will Registers in Australia such as exist for Land Title Registries. Private Will Registers do exist however these are often created more for the benefit of the Will Register owner rather than for the altruistic benefit of the Will maker. The effectiveness of such Registers, particularly long term, is dubious. Caution is required here.



No matter where you choose to keep your original Will the following factors will always be critical:

- Keep it somewhere fireproof, safe and secure.
- Keep a copy of your Will (or instructions as to where it can be found) with your important paperwork.
- Tell your Executors and/or family members where they can locate your Will.

Remember, if you cannot locate your original Will then you do not have a Will. Find it and read it now.



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Life is not about  
the destination but  
about the journey

