



Wills & Estate Planning: Information Sheet

It is estimated that over the next 20 years, 3.5 trillion dollars of wealth will transfer from older to younger Australians. As a consequence, it is important that individuals consider having a Will and engage in estate planning with a lawyer to ensure as smooth a transition as is possible.

This information sheet touches on some of the important matters Tasmanian residents should consider when thinking about their Will and estate planning, but it does not replace bespoke advice which considers your personal circumstances. The law varies between different states and this information sheet is limited to the law as it stands in Tasmania as at the date of publication.

If you need initial advice to set you on the right path, you should contact your local Community Legal Centre for advice - that's us for North-West and Western based Tasmanians. However, if you would like to have a Will drafted for you then we can refer you to legal practitioners in your local area.

What is a Will?

A Will is a written document that sets out the intentions of a person as to what occurs with their estate upon their death. It is the legal way in which you can have your say regarding where your assets go after your death and who is responsible for giving effect to your wishes.

To be a valid Will, it does not need to be on any particular form, but it must comply with the *Wills Act 2008* ("the Act") basic requirements, which are:

- That the Will maker is over the age of 18 (subject to limited exceptions); and
- That the Will maker signs their Will in the presence of two independent witnesses (s8 of the Act).

A Will does not need to use specific wording, and your witnesses do not need to be aware of the content of your Will. However, be aware that a witness should not receive a benefit under your Will as it will likely invalidate the gift to them (see section 12 of the Act). If in doubt, use two persons who are not named in your Will and who can give evidence regarding your mental capacity at the date of signing if required.

Why have a Will?

Here are a few reasons:

- A. **It saves stress for you and your family** - In the absence of having a Will, the law of intestacy (contained within the *Intestacy Act 2010*) will apply, meaning Parliament via the

Intestacy Act 2010 decides who receives your assets as there will be no legal direction from you regarding your estate.

- B. **Saves money in the long run** - This is because a properly executed Will where you have received advice as to the relevant issues will ideally protect your estate (as much as is possible) to ensure your assets transfer in line with the directions contained within your Will and that Probate of your Will can be obtained without issue.
- C. **Gives you Control** - Allows you to control (as much as you can) the process and what happens to your estate. It is all the more important if you have a partner and/or children. A protracted, costly, and wasteful estate dispute because you did not get your affairs in order is unlikely to keep your family together once you are gone.

What are some of the things I should think about when it comes to my Will?

1. **Beneficiaries**- who is going to receive my Estate? Is it to be divided equally or am I going to leave specific gifts of certain items? What about the practicalities (i.e., why would I give my furniture to a friend when my wife owns half the couch)? Do you want protections placed into the Will such as the creation of a Trust to manage inheritances of children or disabled parties?
2. **Executors**- who do I trust to do the heavy lifting and give effect to my Will? Should I have a second person to help or a backup executor named? Your Executor does not need to be a lawyer- but if an Executor needs assistance, then they may instruct a lawyer to help administer the Estate, which is very normal.
3. **Guardians of Children under 18**- who will look after my underage children if I die before they are 18? Have you consulted with this person and are they willing to take on such a responsibility?
4. **Fall back gifts**- if your primary beneficiaries do not receive their gift under your Will because they die before you, what happens next? You should think about having back-up beneficiaries just in case.
5. **Funeral Wishes**- while you are not required to have a funeral, your Will is an opportunity to include whether you would like to be cremated or buried as well as how you wish for your remains to be disposed of. However, your wishes are not binding, and you should make your executor(s) aware of your intentions.
6. **Superannuation**- by default, superannuation is separate to your estate and not typically transferred in line with your Will. There are reasons why you may wish to keep your superannuation separate to your Estate and you should receive advice about this. If you wish to control where your superannuation trustee pays your superannuation benefit, you should consider completing a “Binding Death Benefit Nomination Form” (BDBNF) which forces your superannuation trustee to follow your wishes. Always check your Superannuation Fund’s rules as some BDBNFs expire.
7. **Close Relatives**- Are all Children (including adopted and step) and Spouses/Partners catered for? If not, there are options for them to challenge your Estate and so you should obtain legal advice if this is a concern for you.

8. **Reasons**- If I leave out a person intentionally, do you say why in the Will? While you are not obliged to explain the rationale behind your Will, if there are persons missing out that are legally eligible to apply to challenge your Estate, it is advisable to prepare a statutory declaration outlining your reasons for their exclusion which can accompany your Will.
9. **Trusts**- depending on your circumstances, you may wish to set up certain trusts within your Will. This may be done for a variety of reasons, including: tax minimisation, to protect assets (for example, if the gift is likely to be subject to litigation or you have concerns the beneficiary may not be able to manage the gift all at once), to protect vulnerable beneficiaries (such as those with severe disabilities) or to allow flexibility in its distribution in complex family arrangements.

Who can view my Will?

A Will may only be seen by others if you are alive and permit them to. You are not required to advise anyone (other than the lawyer drafting your Will) of the content of it. However, it is advantageous to let your proposed Executor know where your Will is, in addition to any funeral wishes.

Depending on your relationship with your beneficiaries, in some circumstances it can assist in reducing the chances of litigation of your estate upon your death if you discuss with those persons how you are gifting your estate. This is because you can explain to those persons why you have made certain decisions within your Will such that it will not come as surprise to them upon your death.

Once you have died, section 63 of the *Wills Act 2008* permits the following persons to view and copy your Will:

- Any person named or referred to in your Will (even if they are not a beneficiary);
- Any surviving spouse, parent/guardian, or child of yours;
- Any person who would be entitled to a share of your estate if you had died intestate (without a valid Will);
- Creditors or other persons who may have a claim against your estate;
- Beneficiaries under a prior Will; and
- A parent/guardian of a child referred to in the Will or who would have been entitled to a share of your Estate if you had died intestate.

What are some of the Common Issues that arise with Wills?

1. **Not having one** - In which case the law of intestacy applies (see *Intestacy Act 2010*). You should receive tailored advice to know what will likely happen in the event you die without a Will (intestate) as it can become complex.
2. **Not talking about your Will with family** - Sometimes there are good reasons not to, but at other times this can be problematic particularly when your family do not know where

your Will is kept and have to search to find it after you have died. If you are leaving unequal distributions to children or are leaving certain persons out of your Will who may have thought they would be included, discussing your decision could assist in reducing the chance of your estate being litigated upon your death.

3. **Not keeping your Will updated** - Marriage and divorce both significantly impact your Will. You should also revisit your Will when your Executors and Beneficiaries predecease you. It is also important your Will is reviewed in case there are significant changes to the law that impact/alter the effect of your Will.
4. **Testators Family Maintenance Act 1912 claims** - This is a type of claim that can arise in circumstances where a person entitled under the above-mentioned Act to make a claim is left without adequate provision and there are sufficient assets within the estate to make provision for them. This becomes particularly problematic for those with blended families and advice regarding this issue ought to be sought. Remember, it is normal for all costs of litigation to be paid from the estate before distribution is made to beneficiaries. This means any such claims will reduce the asset pool for distribution to your desired beneficiaries.
5. **Will kits!** - A Will kit may seem a cheap option, but they do not come with tailored legal advice and mistakes are often made when completing them. They are also easier to lose than a Will held by a lawyer. Often a modest upfront saving causes significant grief when a family engage in a protracted dispute over your estate due to the Will maker not receiving advice or the deficiencies inherent in a “one size fits all” type of document.
6. **Losing your Will** - Most lawyers that draft a Will hold the original for you and do so in a safe or strongroom as a part of their service. This avoids prying eyes and minimises the risk of losing your Will. There is no national or state-based registry for Wills, so it is important both you and your Executor(s) know where the original Will can be located.
7. **Capacity** - if your mental capacity is in doubt, you should ideally instruct a lawyer to draft your Will so that protective steps can be taken to attempt to safeguard (as much as is possible) your Will based on expert evidence. If you are ultimately found not to have had capacity at the time you gave instructions for your Will, your Will may be invalidated.

Advice

Wills are a relatively low-cost item and often private firms will have fixed fees for drafting and storing your Will. While we cannot draft your Will for you, if you require initial advice in relation to Wills and estate planning as well as referral to local practitioners, you may contact the *North West Community Legal Centre* on (03) 6424 8720 or email office@nwclc.org.au to seek our assistance.

We have also produced an Information Sheet on Estate Administration covering some of the basics once a person has died and their Will is to be acted upon. It is available free of charge on our website.

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North West Community Legal Centre Inc.

56 Formby Road

DEVONPORT, TAS, 7310

Ph: (03) 6424 8720

Email: office@nwclc.org.au

Website: www.nwclc.org.au

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