

Wills and Estates

A will is a written document that sets out how the will maker (testator) wants his or her assets to be divided after death. A will is important for everyone, as without it, there is no way of ensuring your assets will be distributed as you desire after your death.

To be legally enforceable, a will must meet all the requirements of the *Wills, Probate and Administration Act*. The requirements are as follows:

- The will must be in writing.
- The will must be signed by the will maker and two witnesses who are not beneficiaries under the will.
- If the will is more than one page long, the testator must sign the bottom of each page.
- The two witnesses are present to attest the signature of the testator.

Although the signature of the testator must be made in the presence of two witnesses, the two witnesses who attest and sign the will in the presence of the testator may not necessarily be in the presence of each other.

There is no need for “legal jargon” in a will. The document must simply state the intentions of the testator in regards to the distribution of his or her property. If you chose to draw up your own will, great care must be taken. If the formal requirements are not met, a legal will has not been created and you will be deemed as having died “intestate”, (ie. without a will).

Executors

An executor is nominated by you in your will to administer your estate. The executor shall be responsible for seeing that the terms of the will are carried out as you desired. If you have not named an executor, an administrator will be appointed by the Probate Court. This is generally the person to whom you have nominated the largest portion of your estate.

Who shall I leave my assets to?

You are entitled to distribute your assets to anyone you wish, however it is important to consider that if you do not make proper provisions for your spouse and children, they may contest the will after your death, which is a most unpleasant situation.

Storing your Will Safely

Your will should be kept securely. A copy should also be kept amongst your personal papers with a note explaining where the original is kept. This will ensure that your beneficiaries are aware of the existence of the will and may divide your property accordingly.

It may also be helpful to your executor to store with your will a copy of a list of people to be informed of your death, such as the Department of Social Security, your Bank, your insurance fund, friends, relatives and so on.

Changing your Will

There are many reasons that you may wish to alter the terms of your will. Such may include the death of a beneficiary, the birth of a new beneficiary, the acquisition of new assets and so on.

If no formal changes have been made before your death and a beneficiary is no longer alive, his (or her) share will be distributed according to the intestacy rules, which are addressed below.

Note also that marriage automatically revokes the wills of both partners, unless it is provided for in the original wills.

If a will needs to be updated and the required alterations are minor, this may be done by adding a *codicil* to the will. This is a separate document that is added to the will, containing the new provisions and changes, revocations of old terms and so on. This document must also meet the aforementioned legal requirements, and in many cases, it is easier to draft a new will entirely.

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If there is no Will

If the deceased has not created a legal will, the estate passes to the next of kin, from the spouse and children, to parents, other relatives and non-relatives.

There are specific statutory rules in the *Wills, Probate and Administration Act* regarding the division of intestate assets. These rules list a hierarchy of people who may make a claim to your assets. The list may be summarized as follows:

- if there are surviving children and a spouse or defacto, the first \$200,000 is given to the spouse or defacto, with any remaining assets divided equally, half to the spouse or defacto and the other half to be divided between the children.
- if there are children but no surviving spouse or defacto, the children are entitled to equal shares in the estate. If any of the children have already died, the share may be left to their children (ie. the grandchildren of the intestate deceased)
- the next in the hierarchy is any other living next of kin (not spouse, defacto, children or grandchildren of the deceased)
- finally, if no such persons can be identified, the estate will pass to the government.

The importance of a legal will cannot therefore be underestimated, as certain loved ones may have no call on your assets without specific provision in your will.

How can we help you draft your will?

Although a will can be executed without professional advice, there are several areas where professional advice is in your best interests.

- A lawyer will ensure that your will is *valid*, that is, it conforms to the statutory requirements in regards to content, witnessing and signatures.
- A lawyer will ensure that the final document reflects your precise intentions as to the division of your property.

Comasters is able to help clients in preparing and executing a new will.

Important: This is not advice. Clients should not act solely on the basis of the material contained in this paper. Our formal advice should be sought before acting on any aspect of the above information.

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