



Richmond and Bennison

WILLS AND PROBATE – A GUIDE TO MAKING WILLS AND OBTAINING PROBATE

This guide includes the following:

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- Why do I need a will?
- What happens if die without a legal will?
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The most difficult time in any person’s life is when they lose a loved one. The emotional pain suffered by family members and special people when we die cannot be avoided. You can make this difficult time easier for your family members and special people if you properly consider and legally communicate your wishes prior to dieing. No one likes to think that something will happen to them, for example, sudden illness, and accidents and as a result important decisions are sometimes not made before a person’s death. Planning for your death is about being fair to your loved ones.

What is a will?

A will is a legal document which states who you want to receive your assets and possessions after your death. Assets include your house, land, cars and boats, shares, insurance policies, money, clothes and jewellery and other goods. It can also detail where, and how you wish to be buried so that your loved ones have certainty that your wishes are being carried out after your death.

Why do I need a will?

A will specifies how you wish your assets and possessions distributed and to which people and organisations. A will is particularly important if you have children under the age of 18 years and/or still dependant upon you, or other people dependant upon you (for example, elderly parents).

A will is also very important if you wish to provide for a de facto or same sex partner as in some circumstances a de facto or same sex partner will not be allowed to inherit (see below). A will is important if you have separated from your spouse and wish to alter your bequests to cater for a new partner or a new partner's children. It is also important if you wish to specifically exclude someone from the rewards of your hard work (for example a family relative with a serious drug problem or a wealthy relative where others need your assistance more). You may wish to establish a trust to achieve a specific purpose after your death.

What happens if I die without a legal will?

If you die without a legally valid will you are said to have died intestate. Your assets are then sold and distributed in accordance with a specific formula which is set out in the *Administration and Probate Act 1958*.

Generally, this means that if you are married and have children, your assets are sold and the money distributed to your spouse and children. This may not be in the proportions that you chose.

If you are not married and you do not have children, your assets will be sold and the money distributed to your next of kin. This is your parents if they are alive. If your parents are not alive it is distributed among your brothers and sisters and if you do not have any brothers and sisters it would go to any nieces or nephews that you have.

If no relatives can be located the state government inherits your assets.

If you are said to have a "domestic partner" some of your assets may be distributed to that person. A "domestic partner is a person who, although not married:

- (a) was living with the you at the time of the your death as a couple on a genuine domestic basis (irrespective of gender); **and**
- (b) either -
 - (i) had lived with you in that manner continuously for a period of at least 2 years immediately before your; or
 - (ii) is the other parent of your child who was under 18 years of age at the time of your death.

Who can make a will?

If you are over the age of 18 years and have the mental capacity to understand what you are doing you can make a legally valid will. If you are under 18 years of age but you are married you can make a legally valid will. Otherwise you will require a Court Order to be allowed to make a will.

Things to consider

Things to consider before making a will can include the following:

1. *Who should you appoint as your Executor or Trustee?*

(See below for an explanation of an executor and trustee's duties.) You may wish to appoint your spouse or partner, however you may wish to also nominate a second person, in case one of your nominated executors dies before you, becomes incapable due to illness or loss of mental capacity to fulfil the role or refuses the role due to circumstances in that persons life at the time of your death. You need to be able to trust your executor carry out your wishes.

2. *If you leave your assets to your spouse and your spouse dies at the same time that you do, what should happen with your assets?*

3. *Do you wish to leave any specific item to a friend or relative?*

4. *Have you been married previously? Do you wish to make provision for the children of your first marriage?*

It more common than not, that when property is bought with a partner the property is bought jointly in both your name and your partner's name. When this occurs your property does not form part of your estate, as it is transferred into the name of your partner. It will not, therefore, be included in the assets available for distribution in accordance with your wishes. Not unnaturally your partner's will may name his or her children, or at a future time, a subsequent partner as beneficiaries of his or her will. This would mean that little or no assets would ever be left to your children.

5. *Do you wish to leave anyone out of your will?*

If you do wish to leave someone out of your will it is best to outline your reasons if you do not wish your will be challenged and your wishes ignored.

6. *What do you wish your funeral arrangements to be?*

7. *What are your assets? How do you wish to divide them?*

8. *If you have children who are dependant upon you, do you wish to name a guardian or guardians?*

What is a legally valid Will?

A will should be in writing, signed by you in the presence of two witnesses, who are both present at the same time. It must be dated at the time of signing and must be made by you of your own free will, without pressure being placed upon you by anyone. A beneficiary can witness your signing of your will however it is best if this does not occur in case there is later a dispute.

What if I use a do it yourself will kit?

Do it yourself will kits are available however we do not recommend their use. Some wills can be quite standard however others may be quite individual. Your individual circumstances may not be taken into account by a will kit and therefore the intended effect may not be the actual effect. It may be that you have, in determining the distribution of your assets not taken into account some aspect of the law that may affect your assets.

For example, a common mistake made concerns superannuation. When you joined your superannuation fund you will have been asked to nominate the people you wish to be paid your accumulated benefit. Having, you believe, appropriately provided for certain persons by your nomination, you may leave these people out of your will.

Unfortunately your wishes will not always be complied with by the superannuation fund. Trustees of superannuation funds are required to pay your superannuation in accordance with the trust deed of the fund. Usually, the trust deed will say that your funds are to be paid to your dependants in proportions which are at the trustee's discretion. It may be that your stated nominees were not dependant upon you. If this is the case, your stated nominees will not be paid any part of your superannuation entitlements. Usually the trust deed will state that if you do not have any dependants, it is only then, that your superannuation entitlements form part of your estate. If this occurs, those people you had intended to leave money to via your superannuation entitlement will get nothing and others, who you believed were adequately provided for in your will, will receive more than was your intention.

When should I change my will?

You need to update your will if your circumstances change. For example, when you have children for whom you wish to provide or if your relationship fails. If you separate, your will remains valid although you may no longer wish you partner to benefit from your will. If you are divorced, any gifts to your divorced spouse as well as his or her appointment as your executor will be automatically revoked. If you made a will prior to a marriage it is not valid after your marriage.

Therefore you should make a new will after marriage, separation or divorce.

You should also regularly review and update your will to see if any circumstances have occurred which may affect your will. For example, additional circumstances which can affect your will may include the death or the executor or a beneficiary under your will, the birth or death of any of your children and the acquisition or sale of any assets, specifically specific assets named in your will.

How do I change my will?

You can either make a new will or make a codicil to your existing will. If you make a new will this automatically withdraws your previous wills.

A codicil is an amendment or addition to your existing will. A codicil should only be used for minor changes, usually only one page long. It must also comply with the usual requirements listed above about the making of your will.

If you rip up your existing will this shows an intention to revoke your will. Make sure you make a new will if you do this.

Where should I keep my will?

You must keep your will in a safe place. It is an important document and if it is lost or your executor does not know where to find it, this may place additional stress upon your loved ones. Safe places to keep your will can include leaving your will in a bank, a private safe or with your solicitor. Richmond and Bennison store many wills of our clients.

You should ensure that you tell the executor of your will where it is stored. We also recommend that you give your executor a copy of your will in a sealed envelope.

When can my will be contested or challenged?

Your will can be contested or challenged in a number of circumstances. One way your will could be contested is if it is said that your will was incorrectly executed, or tampered with. Another way is if it is said that your will was executed under pressure from others or that you were incapable of making a will. Your will can also be challenged if you do not make sufficient provision for a spouse, children or other persons to whom you had an obligation to provide for. It may be that what you intended is not reflected in your will and this may be a cause of challenge. It may be that the provisions of your will are not clear and could lead to different interpretations. This could also lead to a person contesting your will. Your will could also be contested if it is incorrectly administered.

Contesting the validity of a will or interpretation of a will can be costly and complex. This underscores the importance of obtaining legal advice and assistance in the drawing of your will.

Time Limits

Where family members have not been adequately provided for in your will an application must be made within 6 months of the grant of probate or from when letters of administration are granted (see below). People who can challenge your will (having died after 20 July 1998) includes de facto spouses, same sex partners, children and step children.

Adequate provision for family members

Generally a Court will be reluctant to interfere with your wishes unless there is clear evidence indicating that it would be unfair and unreasonable if they did not do so. When determining if you have adequately provided for a person in your will a Court will look at a number of issues. The issues that will be considered include the following:

- (a) The size of your estate (ie. How much you owned);
- (b) The age, sex and health of the person applying to the court;
- (c) Whether the person received any provision from you during your lifetime, or from another source;
- (d) The character and conduct of the person applying.

Role and duties of executors

An executor is the person who is appointed in your will to carry out the terms of your will, pay any debts that are outstanding, determine the assets of the estate and then distribute the assets to the people you have named in your will.

It is the executor's role to arrange your funeral. Most banks will release funds from your bank account to pay for funeral expenses even before the grant of probate has been made. The executor should also check your will to see if you have placed any specific instructions in the your will about the funeral arrangements or the disposal of your body.

Your executor will then consolidate all your assets and pay all your debts. He or she will then distribute the balance of your estate according to the directions you have left in your will.

Your executor is required to keep a record of money received and paid out. He or she is required to give a copy of your will and any other relevant document to the people to whom the balance of your estate is distributed.

Sometimes the duty to distribute the estate will not be over quickly. There may be continuing obligations upon the executor. For example, if you leave your estate to young children then the executor is obliged to invest the balance of your estate until the child/ren are old enough to receive their share. This is an age specified by you and usually 18, 21 or 25 years of age.

Is an executor paid?

An executor is entitled to claim all costs and expenses incurred in administering the estate and is usually entitled to an executor's commission. This can be up to 5% of the estate's value.

What is probate and when does this need to be obtained?

The grant of probate is a court order confirming that you made a valid will. Documents must be filed in the office of the Registrar of Probate in the Supreme Court to obtain this order. The Registrar of Probate will then decide if your will is valid or not.

When don't I need to get probate?

When all your assets are jointly owned or are of a fairly modest value, there are occasions when it is not necessary to apply for probate. We can advise you if probate is necessary.

What happens if my executor dies before me or does not wish to accept my appointment?

In these circumstances the court can still grant probate of your will however the court will appoint an administrator to take the place of your executor.

What other issues should I consider when I am preparing a will?

Power of Attorney

At the time you are preparing your will you may also wish to consider whether it may be appropriate for you to appoint a power of attorney to someone that you trust. This allows another person to act on your behalf in your absence and is particularly useful if you are too ill to make decisions or if you are overseas. There are three main types of power of attorney.

1. *General Power Of Attorney*

This gives a person power to act for you in limited circumstances. It may be that you will be absent and, for example, sell your home. This would allow another person to negotiate the sale of your house to a price that you had previously agreed.

A general power of attorney will specify when and in what circumstances it is to operate, and it will cease operation upon the completion of those circumstances or prior to that if you withdraw it.

It should be in writing and made by a person over 18 years of age who is able to understand the nature of the power of attorney.

2. *Enduring Power of Attorney (Financial)*

An enduring power of attorney (financial) allows a person to whom you grant the power to make decisions for you of a financial nature even if you are no longer able to physically or mentally able to make such decisions for yourself.

3. *Enduring Power of Attorney (medical treatment)*

This gives your agent the power to make decisions about medical treatment on your behalf if you become incapable due to age or mental or physical disability or injury.

Should you require further information or any assistance in relation to wills and probate please ring Warwick Barton or Ken MacKinnon of 495 Main Street, Mordialloc on (03) 9580 8311.

Disclaimer: This information is of a general nature and should not be used to ascertain the entitlements of any particular individual. There can be exceptions to the above circumstances and individuals should obtain specific advice to address their circumstances. Further the law changes and information contained herein may no longer be accurate.