

Wills

Wills, Executors, Beneficiaries, and Trusts. What does all this mean and what does it mean for you?

In legal terms, a Will is the legal instrument that permits a person to make decisions on how their estate will be managed and distributed after their death.

In many instances, although not all, nominating who you want to manage your Will and who you want to benefit from your estate are the easy parts.

The difficulty may come with identifying an individual's assets and debts and more importantly, how they are owned, so that they can be correctly dealt with in a Will.

Care must be taken when drafting a Will to ensure that the wishes of the Will maker are legally valid, unambiguous, and tailored to your specific circumstances. Professional drafting ensures the Will can be carried out and that the Will is worded and signed correctly.

Roles and definitions.

EXECUTORS – The **executor** is responsible to administer the person's estate according to their will including all assets and liabilities. You may wish to appoint one person or multiple people. This person or people can be a family member, a trusted family friend or an independent person or organisation such as a solicitor or trustee.

ALTERNATE EXECUTORS – The **alternate executor** is responsible to administer the person's estate according to their will including all assets and liabilities should your executor be unwilling or unable to act.

BENEFICIARIES - A **beneficiary** is a person or entity who is nominated by the will maker to inherit a share of their estate or a specific item in their estate (such as a property, cash legacy or pieces of jewellery) under their Will.

TRUST – A **testamentary trust** is a legal arrangement established within a will, created to hold and protect assets for beneficiaries, coming into effect only upon the will maker's passing. A trustee manages the assets according to the will's instructions, distributing income to beneficiaries, especially for vulnerable individuals like minors or those with disabilities.

POWER OF ATTORNEY - A **Power of Attorney (POA)** has no power over a will and cannot change, amend, or sign a will on behalf of the principal. A POA is only valid during the principal's lifetime for managing financial, personal or legal affairs depending on the appointment, whereas a will only takes effect upon death.

SPECIFIC GIFTS – a **specific gift (or bequests)** in a will are clearly defined, identifiable assets—such as real estate, jewellery, or specific cash amounts—left to a designated beneficiary. These gifts are distributed before the remainder of the estate. To be effective, the items must be owned at the time of death, or the gift may fail.

RIGHT OF OCCUPANCY – A **right to reside** (or right of occupancy) in a will is a legal provision granting a beneficiary the personal, temporary right to live in a property, often without owning it. It is commonly used for spouses or partners, lasting for life, a set period, or until a specific event occurs (e.g., re-marriage or moving out), after which the property passes to residuary beneficiaries.

MUTUAL WILLS – **Mutual wills** are separate, binding wills made by two people—typically spouses or partners—based on a contract, where both agree on the terms and promise not to change or revoke their will without the other's consent. They are commonly used in blended families to protect the inheritance rights of children from previous relationships by ensuring the surviving partner cannot change their will to disinherit them.

Who can make a claim against my Will?

The law has traditionally recognised the rights of individuals to freely dispose of their estates in whatever way they see fit. However, a Will can be challenged where a deceased has failed to make adequate provision for persons to whom a deceased owed a moral duty or moral obligation of responsibility.

If the aggrieved individual feels that a person who has died has not made adequate provision for them in their Will, they can challenge the Will and have the Court make provision for them out of the deceased's estate. This is commonly known as a Testator's Family Maintenance application.

The court must decide whether the applicant has been left with adequate provision for the applicant's proper maintenance and support. The court will consider the applicant's financial position, including:

- The applicant's financial resources (including earning capacity) at the time of the court hearing and for the foreseeable future
- any prior benefits given to the applicant by the deceased
- whether the applicant was wholly or partly supported by the deceased before his/her death
- whether any other person has a duty to support the applicant
- Finally, the Court will consider whether the deceased actually failed in his/her duty to provide adequately for the applicant under the Will

An application may be refused if, the Court considers that the deceased owed no moral duty to the applicant due to the applicant's questionable character or conduct.

Eligible Persons to make a claim:

- **Spouse or Domestic Partner:** Includes married spouses, registered partners, and unregistered de facto partners.
- **Former Spouse/Partner:** Eligible if they were receiving or entitled to receive maintenance or had pending property settlement proceedings at the time of death.
- **Children:** Biological, adopted, or stepchildren.
- **Children with Special Circumstances:** Children under 18, full-time students under 25, or disabled children.
- **Adult Children:** Must prove they are experiencing financial difficulties and were not adequately provided for.
- **Registered Caring Partner:** Anyone in a registered relationship under the Relationships Act 2008.
- **Grandchildren:** Often must demonstrate they were dependent or partly dependent on the deceased for maintenance.
- **Household Members:** Anyone who was, or was likely to become, a member of the deceased's household.
- **Person with a "Close Personal Relationship":** Individuals who can prove a significant, close relationship.

Key Considerations:

- **Time Limit:** A claim must generally be filed within six months from the date probate is granted.
- **Grounds for Claim:** The applicant must show they were left without "adequate provision for their proper maintenance and support".
- **Assets:** Claims are generally limited to assets owned personally by the deceased, not trusts or superannuation.

What about Real Estate?

If you own Real Estate as a Sole Proprietor or as Tenants in common with other parties, you are able to bequest your share of that real estate in your Will. In this instance, Probate of your Will is required at the time of your death to allow your Executor/s to deal with the Real Estate.

However, if you own real estate with other parties as Joint Proprietors, upon the death of one of the joint Proprietors, the remaining proprietors will automatically be entitled to own the deceased proprietor's real estate, and it cannot be dealt with in a Will. In this instance the transfer instrument is an "Application by Surviving Proprietor" and Probate is not required to deal with the real estate.

It is possible to change the manner of holding a Title to Tenants in Common or Joint Proprietors, depending on your requirements and individual set of circumstances. This type of change to the Title does not attract a Stamp Duty fee.

Special consideration is required when bequeathing real estate.

What should I do about a vulnerable individual or child with special needs.

On occasion consideration is required to make allowances for vulnerable individuals or children with special needs to ensure assets are protected and managed for the needs of the beneficiaries.

A **testamentary trust** can be established within a will, to hold and protect assets for beneficiaries, coming into effect only upon the will maker's passing. thought needs to be given to whether this type of life interest is applicable in your particular circumstances and the clause needs to be carefully drafted in order to ensure that your wishes are accurately reflected. A trustee will then manage the assets according to the will's instructions,

How we can help

If you do not have a Will or have not reviewed your Will recently, please contact our team to book your consultation in person or via zoom. We have a range of cost-effective set packages that include a one-hour consultation, drafting and in person follow up signing appointment.



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