



August 2022

# Wills and Estate Planning

## Key considerations in Wills and Estate Planning

### **If you don't have a Will**

The law sets out who is entitled to share in your estate, and often it depends on your family structure and how long you have been in a relationship.

### **Is your Will valid?**

Wills have to comply with certain legal requirements and if they don't, it can sometimes be even more difficult to administer the estate than if there had been no Will at all.

### **Contesting a Will**

Wills can be contested by certain family members. If you want to ensure that your assets pass as you intended, there are often ways of doing that outside of your Will.

### **Power of Attorney**

Allows you to appoint family or friends to look after your legal and financial affairs if you are unable to do so, and for you to specify how they do that.

### **Advance Care Directive**

Allows you to give directions about your health and welfare decisions and to appoint family members or friends to make medical decisions on your behalf if you can't do so for yourself.

If you don't currently have a Will, your loved ones may not receive the assets you wish to leave them when you pass away.

## What is a Will?

A will is a legal document that sets out your wishes regarding the distribution of your assets, your wishes regarding any minor children and your wishes regarding the disposal of your body upon your death.

## Why do I need a Will?

It's important that you have a written Will to maximise the likelihood that your wishes are carried out upon your death. Your Will should be in writing and dated and signed by you and signed by two independent witnesses. If your Will does not meet these standards, your Will may not be valid.

You will need to elect a person or people to be the executors and trustees of your Will. These are the people that will make an application for Probate (if necessary) and then distribute your assets in accordance with your wishes.

## What happens if I don't have a Will?

If you do not have a Will, the law deems that you have died intestate. That is, without a Will and your assets will be distributed in accordance with a set formula.

## Can I change my Will and when do I need to change it?

Your Will may be changed at any time you wish but this usually only needs to be done if your circumstances change. For example, when you get married or re-married, when you divorce or separate from a spouse or partner, or when you have more children.

## What happens with my Will after I die?

The executor(s) named in your Will take custody of the original Will and take steps to carry out your wishes. This often requires your executor(s) to make an application for Probate in the Probate Registry of the Supreme Court.

Probate is the process where the Court proves the Will meets the requirements of a valid Will under the law and authorises the executor(s) to collect the assets of the estate and distribute them in accordance with your wishes.

## What else should I consider when making my Will?

You should also consider making an Enduring Power of Attorney and an Advance Care Directive.

### Enduring Power of Attorney

An enduring power of attorney is a legal document which allows you to appoint a person or persons of your choice to manage your assets and financial affairs if you are unable to do so due to incapacity such as illness or an accident or in your absence.

### Advance Care Directive

An Advance Care Directive is a legal document that allows you to specify in writing your wishes in respect to your future health care and living arrangements in the event that you suffer serious illness or incapacity and you are not able to make such decisions yourself.

In the Advance Care Directive you nominate a person or people that you wish to make such decisions on your behalf when you are not capable of making such decisions.

## Other estate planning options

In certain family situations, it may be more desirable to have a 'Testamentary Trust Will' rather than a regular Will.

A Testamentary Trust Will does not gift your assets to your beneficiaries immediately upon your death but instead the assets are held in a trust which is managed by a trustee.

The income or capital of the trust is then distributed between one or more beneficiaries from time to time.

The main benefits of setting up a Testamentary Trust Will are:

- to decrease the risk that assets passing to your children who are going through a separation with their spouse or partner, do not end up going to that spouse or partner as part of the property division;
- where there is a disabled child or partner or who has special needs, then the trust ensures that the assets are applied in a way which sustains the child or partner in the longer term;
- tax advantages if there are income producing assets.

## Contesting a Will

There are two main ways to 'contest' a will which are:

1. Making a claim for provision to be made to you out of the estate; or
2. Challenging the validity of the Will where you have evidence that the Will maker lacked capacity to make the Will at the time it was made.

The above matters are quite complex and we recommend you seek legal advice before deciding to contest a Will.

**For more information on all things related to Wills and Estate Planning, please visit our website: [andersons.com.au/services/wills-estates](http://andersons.com.au/services/wills-estates)**