

## Things to Consider When Making a Will

Before you start making your own Will, or go to see a lawyers, you need to consider the following points:

- What do you own (your estate)?
- Who do you want to leave your estate to?
- Who will be the executor of your Will?
- Do you want to leave directions about the payment of debts and funeral expenses?
- Should you set up a trust, or leave gifts directly?
- Do you have any concerns about who will be a guardian for your children?
- What sort of burial or cremation arrangements do you want?

### WHAT IS IN YOUR ESTATE?

Your estate may include things such as your house, land, car, bank accounts, jewellery, clothes, household goods, and investments. Proceeds from life insurance policies and superannuation may be assets in your estate, but that will depend on the wording of the policy or superannuation trust deed. Remember, where the deceased and another person own property as joint tenants, the surviving co-owner automatically owns the deceased's share regardless of a will or intestacy rules (see [NSW LPI's Tenancy Factsheet](#)).

### WHO DO YOU WANT TO LEAVE YOUR ESTATE TO?

Beneficiaries can be individuals or organisations such as charities. For more information about relationships and Wills, see [NSW Trustee & Guardian's Intestacy FAQs](#).

## SHOULD YOU SET UP A TRUST?

If you do want to set up a trust (for example, for your children), you must decide who you wish to appoint as trustee. Your executor can also be your trustee. You should seek professional help if you wish to set up a trust in your Will. See also [Testamentary Trusts](#).

## WHO SHOULD BE YOUR EXECUTOR?

It is important to appoint someone you trust because they will be responsible for seeing that your wishes are carried out and that your body is disposed of in the manner you wish. Usually a major beneficiary is nominated unless the beneficiary is under 18 years of age or mentally incapable of acting.

It is a good idea to also name an alternative executor to take responsibility in case your first executor dies before you or shortly afterwards, or is incapable mentally or physically of acting as your executor.

## APPOINTING A GUARDIAN OF YOUR INFANT CHILDREN

You may wish to appoint a guardian if the other parent is deceased. If there is a dispute about who will be guardian, the court will make the appointment. Whatever you write in your Will may be taken into consideration by the court.

## DECIDING ON BURIAL OR CREMATION ARRANGEMENTS

Although it is common to leave instructions about burial or cremation in a Will or elsewhere, it is up to your executor to decide whether or not they will carry out your wishes.

It is advisable to inform your next of kin or your executor of your wishes as well as including that information in your Will. Often your funeral will have taken place before your Will is read.

## RESIDUARY CLAUSES

Every Will should include a residuary clause. This will deal with any assets not specifically disposed of in your Will and the proceeds of any specific legacies which lapse (for example, if a beneficiary has died within 30 days of you). Failure to include a residuary clause may mean that part of your estate will be administered in accordance with intestacy rules which may be not be in accordance with your wishes.

A new provision in the *Succession Act 2006* (section 31) provides that if any gift is ineffective, the Will takes effect as if the gift formed part of your residuary estate. There is also a new provision in the Act which state show a gift of residue will be construed (section 42). Legal advice should be obtained if you have concerns about the wording of a residuary clause.

## DEBTS

Any debts you owe must be paid first before your beneficiaries receive anything. There are specific rules about which of your assets are used to pay debts. If you wish to specify from which assets your debts are to be paid, you should seek professional help with your Will.

## LAWYERS WHAT HAPPENS IF A BENEFICIARY DIES?

A major change introduced by the *Succession Act 2006* (section 35) is that if the Will-maker leaves a gift to a person within 30 days of the Will-maker, the Will takes effect as if the beneficiary died immediately before the Will-maker. An exception to that rule occurs if the beneficiary was issue of the Will-maker and died leaving children who survive the Will-maker by 30 days. In that case, the gift will pass to the issue equally and not to the deceased beneficiary's estate as was the case previously (section 41).

The Will-maker can exclude the 30-day rule from their Will or lengthen or shorten the period. The Will-maker can also make specific provision in the Will as to what is to happen if a beneficiary dies within 30 days of the Will-maker's death.

This is another good reason for having your Will prepared professionally.

## DETERMINING TIME OF DEATH

If two or more people die at the same time and the order of death cannot be determined, the law in NSW presumes that the oldest died first. The estates are divided accordingly.

## KEEP THE WILL IN A SAFE PLACE

After a Will is made, you should keep it in a safe place (for example, at the bank or with a lawyer). It is sensible to keep a copy among your personal papers, with the name of the Will-maker and the witnesses printed in and a note explaining where the original is kept. It is also wise to tell your appointed executors where the original Will is kept.

A new provision of the *Succession Act 2006* allows any person to deposit a Will in the office of the Registrar for payment of a fee (section 51).

It is also a good idea to keep a clear, comprehensive list of your assets (bank accounts, investments, insurance policies, title deeds and so on) and update this from time to time. This will make your executor's task much easier and quicker. It will be helpful if you leave a list of people and organisations to be notified of your death. These might include Centrelink, the Department of Veterans' Affairs, superannuation funds, clubs, and particular relatives or friends.



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