

Making a Will

You have worked hard all your life to build your wealth so shouldn't you be able to decide who receives it?

What is a Will?

A Will is a written document which declares how your estate assets are distributed on your death.

Preparing a valid Will

For a Will to be valid in Victoria without the interpretation of a court, it must meet a number of legal requirements. These requirements are set out in the *Wills Act 1958 (Vic)* and include:

- > the willmaker (**testator**) must be at least 18 years of age (unless married or has obtained permission of the court);
- > the testator must have testamentary capacity to make a Will;
- > the Will must be in writing;
- > the Will must be signed by the testator and witnessed by at least two independent individuals over 18 years of age who are not vision impaired (the witness must be able to see the testator sign his or her name on the Will); and
- > when signing the Will the testator must sign it with the intention that he or she is executing their Will.

Key parts of a Will

When making a Will, it is important to consider:

- > whether a prior Will needs to be revoked;
- > the application of the Will – whether it applies to worldwide assets or just Australian assets;
- > the appointment of an executor and trustee; and
- > your directions to the executor regarding how you wish your assets to be distributed.

Who can you leave your estate to?

You can leave your assets to anyone you wish including family, friends or charities. However, it is important to remember that although you can leave your estate to anyone you choose, if you leave someone out of your Will whom you should have provided for, then the courts may ultimately determine who will benefit from your estate.

Therefore, in deciding who you will leave your assets to, you should think about who may be entitled to challenge your Will.

Who are your beneficiaries?

When preparing your Will, you should consider the circumstances of your intended beneficiaries. Receiving an inheritance can sometimes adversely affect a beneficiary's personal or financial circumstances.

For example, if your beneficiary has a disability, a gambling addiction or a drug addiction, then receiving an inheritance may prove difficult for them to manage. If they are bankrupt they could lose their inheritance to creditors, or if they are on a government pension they could lose their entitlement to government allowances.

Informal Wills

Certain informal writings can be approved as a Will by the Supreme Court of Victoria even though they do not meet the formal requirements of the Act.

It is important to remember that even if an informal Will is held to be valid by the court, this does not mean that the terms are certain or satisfactory. You may need to obtain further instructions from the court as to the interpretation of the Will.

Obtaining court approval can be costly and often difficult, so informal Wills should be avoided.

Who can challenge your Will?

The law recognises that a person can deal with their assets on death as they wish, however there is also legislation in place to protect the people who the testator had a moral responsibility to provide for. Only an eligible person may challenge a Will.

Part IV of the Act sets out the circumstances the courts will consider in determining whether a person has been adequately provided for.

Generally speaking, if you were financially dependent upon the deceased at the time of his/her death and you can demonstrate you have not been adequately provided for, then you may have grounds to contest the terms of the Will.

The eligibility criteria to bring a Part IV claim changed on 1 January 2015. Consequently each case is decided on its facts and merits.

While it is not possible to prevent a Part IV application, having a Will gives you the opportunity to assert your own wishes as to how you would like your estate assets distributed.

What if I die without a valid Will?

If you die without leaving a valid Will (intestate) then your assets will be treated in accordance with intestacy laws, which can sometimes result in unsatisfactory and unintended distributions of your estate assets.

For example, a single adult with no children dies without a valid Will and is survived by two siblings and an estranged father. The deceased had not spoken with the father for 20 years as a result of physical and emotional abuse during childhood years. Unfortunately, in accordance with the laws of intestacy it is the deceased's father who will inherit the estate and not the siblings.

Under the laws that came into effect on 1 January 2015, the siblings would not be able to challenge the distribution.

Issues to consider before preparing your Will

- > How do you own your assets (individually, joint-ownership, business, trusts etc)?
- > What are the personal and financial circumstances of your beneficiaries and how might this inheritance affect them?
- > If you have minor children, who will act as their guardian?
- > Who will you appoint as your executor and trustee?
- > Who is entitled to benefit from your estate?
- > Who do you wish to leave your estate to?
- > What are your funeral wishes?

Every person should make a valid Will to give effect to their testamentary wishes to the extent that this is legally possible.

Tony and Amanda's story

Tony is in business for himself and Amanda was a stay at home mum looking after two young children. Their family home was encumbered by a mortgage with a small balance, but was in Amanda's name to protect the home against potential creditor risk from Tony's business. Their share portfolio was also in Amanda's name for the same reason.

When Amanda died unexpectedly, Tony discovered that Amanda never made a Will. As a result her estate was distributed in accordance with the laws of intestacy. As one of the children is a result of another relationship, Amanda's estate was to be distributed as follows:

- > personal chattels including any car not used for business purposes were passed to Tony;
- > Tony received the sum of \$559,660 plus interest on this amount; and
- > the balance of the estate was divided, with one half of the balance going to Tony, and the other half going to his stepchild.

The family house had a net value of \$1,000,000, and the share portfolio was valued at \$300,000, consequently Tony was entitled to an amount of \$929,830, while his stepchild received \$370,170. Even if Tony decided to transfer the share portfolio to his stepchild he would still need to find an amount of \$70,170 to pay out his stepchild's entitlement.

Tony had to refinance the family home to cover the additional amount owed to his stepchild. If Tony was unable to refinance he would have been forced to sell the family home. While managing to save the family home, the property is now solely in Tony's name and it is now vulnerable to creditors of his business.

If Amanda had made a Will which included the establishment of a testamentary discretionary trust under which Tony and the children were discretionary beneficiaries, the estate would have been protected from liability and provided the surviving family members with the ability to split income, providing a more tax advantageous situation whilst also protecting the family home from creditors of Tony's business.

What assets form part of your estate (known as estate assets)?

Asset type	Does your Will determine who will receive this asset type?	If no, what happens to this asset on death?
Assets owned in your name (sole ownership)	Yes	
Assets owned as tenants in common	Yes, your share of the asset can be distributed	
Assets owned as joint tenants	No	It will pass to the survivor or survivors of the joint tenancy
Assets held in family trust	No	Terms of the trust deed govern how the assets of the trusts are to be dealt with
Assets held in a private company	No	The company is the legal owner of the assets; the directors and shareholders in accordance with the company's constitution and corporations law can deal with the assets owned by the company
Shares in a private company	Yes, but the constitution of the company may restrict who the shares can be transferred to	
Life insurance	Yes, if your estate is nominated as the beneficiary; or if you are the policy owner and no beneficiary is nominated	Your life insurance policy governs who receives the proceeds on your death, in most cases the policy allows the owner to nominate the beneficiary of the proceeds on death
Superannuation	Yes, if your death benefit is paid to your estate	The trustee of your superannuation fund decides how your death benefits will be paid on your death, however most funds now allow the member to make a binding nomination; this nomination directs the trustee to pay the death benefits to the nominated beneficiary/s

Key estate planning terms

Testator – the person making the testamentary declaration, also known as the willmaker.

Executor – the person or trustee company appointed to administer the Will of the testator.

Trustee – the person or trustee company appointed to administer and manage any funds to be held on trust for the benefit of one or more beneficiaries.

Beneficiary – the person or persons named in the Will to receive a gift or share in the testator's estate.

Guardian – the person or persons nominated by the testator to be the caregiver for the testator's minor children.

Estate – describes the assets owned by the testator at his or her time of death.

Legacy – A gift of personal property by Will. Originally used to describe a gift of money but now used generally to describe any gift of personal property.

Bequest – a specific gift of personal property to a nominated beneficiary.

Devise – a gift of real estate.

Our Wills, Trusts & Estates team

We provide comprehensive Wills, trusts and estate planning services to professionals, executives, business owners, investors, mums and dads and retirees.

For further information, please contact a member of Wills, Trusts & Estates team below.



Rachael Grabovic
Partner & Notary Public
Accredited Specialist in Wills & Estates Law
T +61 3 9321 7826
E RGrabovic@rigbycooke.com.au



Christian Teese
Partner
T +61 3 9321 7983
E CTeese@rigbycooke.com.au



Thalia Livadaras
Senior Associate
T +61 3 9321 7881
E TLivadaras@rigbycooke.com.au



Marcus Schivo
Senior Associate
T +61 3 9321 7892
E MSchivo@rigbycooke.com.au



Ashwin Reddy
Associate
T +61 3 9321 7868
E AReddy@rigbycooke.com.au



Jenna Bayindir
Lawyer
T +61 3 9321 7891
E JBayindir@rigbycooke.com.au

Areas of expertise

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RIGBY COOKE LAWYERS

Level 11, 360 Elizabeth Street
Melbourne Victoria 3000
T +61 3 9321 7888
www.rigbycooke.com.au