

Your Will

What is a Will?

A Will is a written document which declares a person's testamentary intentions (how you would like your estate to be distributed on your death).

For a Will to be valid in Victoria it must meet a number of legal requirements. These requirements are set out in *The Wills Act 1958* (Vic) and include:

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



Other key components of a Will include:

- Revocation of prior Wills;

- Application of the Will – that is which jurisdictions it may apply to, eg all Australian assets or worldwide assets;
- Appointment of an executor;
- Funeral directions; and
- Directions to the executor regarding the distribution of your estate (your testamentary intentions).

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 money to a beneficiary.

Bequest/Devise – a specific gift to a nominated beneficiary; eg *I give my engagement ring to my sister Samantha.*

Testamentary Trust – a structure created by the terms of a Will. The trustee holds the testator's assets for the benefit of a specific beneficiary or group of beneficiaries or for a specific purpose. Depending on the terms of the trust the beneficiary may be entitled to receive part or all of the income each year until the trust vests (ends).

What assets are distributed in accordance with your Will?

	Does your Will determine who will receive this asset type?	If No, how do you deal with these assets on death?
Assets owned in your personal 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 a family trust	No	Terms of the Trust deed govern how the assets of the trust 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 company may restrict who the shares can be transferred to.	
Life Insurance	Yes, if your estate is nominated as the beneficiary.	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 benefit to the nominated beneficiary.

Who should you appoint as your executor?

- Someone who is likely to outlive you;
- Someone who has the time available to administer your estate;
- Someone who is financially confident; and
- Someone you trust.

Who can you leave your estate to?

You can leave your estate to anyone you desire, including family, friends or charities. But it is important to remember that although you can leave your estate to anyone you elect, if you leave someone out of your Will who believes you should have provided for them, then the courts may ultimately determine who will benefit from your estate. Therefore in deciding who you wish to benefit it is advised that you consider who may be entitled to challenge your Will if you were to leave them out or not adequately provide for them.

Who are your beneficiaries?

When preparing your Will you should also consider the circumstances of those you intend to benefit. Receiving an inheritance can sometimes adversely affect a beneficiary's personal or financial circumstances. For example if your beneficiary has a disability, a gambling or drug addiction, is a bankrupt or is on a government pension, then receiving an inheritance may prove difficult for them to manage or could see them lose their entitlement to government allowances.

Contact us to discuss how you can protect your beneficiaries.

Who can challenge your Will?

The law recognises that an individual has the authority to deal with their estate on death as they wish however there is also legislation in place to protect those persons who the testator had a moral responsibility to provide for.

Amendments were made to the *Administration & Probate Act 1958* which came into effect on 1 January 2015 which introduce category based eligibility requirements as to who may challenge a Will, Part IV of the Act also 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 their death and you can demonstrate you have not been adequately provided for then you may have grounds to contest the terms of the Will.

As each case is decided on their individual facts and merits it is advised you contact your solicitor to discuss your particular circumstances.

Issues for you to consider before preparing your Will

- How do you own your assets;
- Who will you appoint as your executor;
- Who is entitled to benefit from your estate;
- Who do you wish to you leave your estate to;
- The personal and financial circumstances of your beneficiaries;
- If you have minor children, who will act as their guardian; and
- Your Funeral wishes.