

What is a Will?

A Will is a legal document that sets out what you want to happen upon your death. A Will lets you:

- decide who oversees your estate and ensures your wishes are upheld;
- name the beneficiaries who are to receive gifts of your estate;
- appoint a guardian for any minor children;
- document your wishes with respect to burial or cremation.

Why have a Will?

If you don't make a Will, the law decides who oversees the distribution of your estate and who gets your money, property and other assets when you die. Depending upon your circumstances this might be family members you do not like – or worse, the government!

Can't I just use a Will Kit?

If prepared properly, a Will Kit Will is lawful and binding. However, far too often Will Kits are not properly filled out or are completed in ways that can be misinterpreted or given several meanings, causing many problems during administration of the willmaker's estate. This can lead to increased costs or an invalid Will. Will Kits also are inflexible in their approach to the modern family and do not deal with blended families, special needs beneficiaries, or give you access to valuable taxation, superannuation, and other estate planning advice, including information on what assets can't be gifted by Will because they don't form part of your estate or options for achieving your goals.

Who can make a Will?

Any person over the age of 18 years who is of sound mind, memory and understanding can make a Will. In limited circumstances, it is possible for a person without capacity to make a Will if an application is made to the Court for the Court to make a Will on the person's behalf. These are called "statutory wills".



Types of Wills

In addition to statutory wills, Wills may be traditional in nature or establish trusts, such as testamentary discretionary trusts or special disability trusts.

Traditional Wills gift your beneficiaries their inheritance outright upon your death. Your beneficiaries are free to do what they want with this inheritance and the inheritance becomes mixed with their own personal assets once they receive it.

Wills with testamentary discretionary trusts set up trusts for the benefit of nominated beneficiaries. The trust holds the inheritance intended for the beneficiaries and give significant protection from relationship breakdown and bankruptcy.

The trusts also have taxation advantages with special tax rates for minors and by allowing the splitting of income. Gifts can be given to “at risk” or “vulnerable” beneficiaries (eg drug addicts, gamblers, the financially unstable, or easily influenced) and their future financial security ensured without the beneficiary having control over that inheritance.

A separate trust can be established for each nominated beneficiary (ie, if there are two children, then two separate discretionary trusts are established – one for the main benefit of each child). We can tailor your Will to suit your individual circumstances and requirements.

A special disability trust is a special type of trust set up under a Will for the benefit of a person with a severe disability. These trusts are recognised by Centrelink and Department of Veterans’ Affairs and won’t affect the beneficiary’s entitlements.

What can’t I give away in my Will?

It is not possible to give away everything that we think of as ours in our Will. For example, we cannot gift the following:

- money held on deposit in a joint bank account;
- jointly held shares;
- an interest in land or buildings co-owned as joint tenants;
- life insurance proceeds under policies on your life if you are not named as beneficiary;
- superannuation unless the trustee elects to pay it to your estate or you have a binding death benefit nomination in place that does so;
- interest in a partnership if there is no partnership agreement or the agreement sets out other rules in the event of a death of a partner.

If your estate plan requires special consideration of any of these issues, we can help you.

Challenges to Wills

A Will can be challenged if it is invalid. A Will might be invalid because the willmaker did not have capacity at the time of making the Will, made the Will under duress or because of undue influence, or because the Will does not meet the formal requirements of the legislation. In recent times, however, the Courts have been more willing to grant probate in respect of informal Wills, such as suicide notes.

If a willmaker’s spouse (including de facto spouse), child (including step-child or child of de facto spouse) or dependent (a person who is wholly or substantially maintained or supported by the willmaker and who is also either a parent of the willmaker, a parent of a child of the willmaker or a child under the age of 18 years), believes that they have not been adequately provided for under the willmaker’s Will, that person may make a family provision application to the Court for further and better provision to be made for that person out of the willmaker’s estate. What is adequate depends upon all of the circumstances including the size of the estate, and the competing needs of the beneficiaries.

If you would like to make an appointment with a solicitor from Rapid Legal Solutions’ estate planning team to discuss the preparation of your Wills, please contact us on 4755 9100 or enquiries@rapidlegal.com.au

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