

Why should I have a Will and what happens if I die without one?

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Date: Monday May 4, 2020

A Will deals with the appointment of the person(s) who you wish to manage your estate (your Executor) and how you wish for your estate to be divided in the event of death. Even if think you don't need a Will or if the topic is something you prefer to avoid, the preparation of a Will is an important step that can save your family a lot of stress, hassle, disagreement and even money.

What happens if I die without a Will?

If someone dies without a Will, they are said to die 'intestate'. This means that the estate would pass in accordance with the hierarchy created under the *Succession Act*. This hierarchy is generally the following order:

- A spouse (which may include a de facto spouse)
- Children
- Grandchildren
- Parents
- Siblings (including half-siblings)
- Grandparents
- Aunts &Uncles
- Cousins

There are several other rules under the *Succession Act* that will affect this order, some of which are addressed below.

If there are no living relatives of the deceased, then the estate may ultimately pass to the Government.

If you don't have a Will, you also won't have direct control over who becomes your Executor. Instead, the court will appoint an Administrator who fulfills a similar role, but may not be who you would intend to conduct that role.

Without a Will, distribution of your estate becomes more complex in some circumstances

1. Blended family

If you die with a spouse but you also have children from previous relationships who are not related to your spouse, then your spouse receives all personal effects, a statutory legacy (being a sum of money specified under the Act) and one half of the assets of the estate left over after the legacy is paid.

Your children (including those you have with your current spouse) would receive the other half of the assets of the estate left over after the legacy is paid.

There can be further issues and further arguments among family members if the estate is not large enough to pay the statutory legacy with any amount remaining. In that case, under the laws of intestacy, your children would not receive anything from your estate.

2. Multiple spouses

It is not uncommon for a divorce not to be finalised before a new de facto relationship is entered into. That is, you may still be legally married when you commence a new relationship.

If there are multiple spouses upon death, then the spouses may need to agree to a proposed distribution, apply to court to determine the distributions, or share the estate equally. Depending on the relationship of the multiple spouses, coming to an agreement in relation to the distributions can often be difficult and could result in costly court proceedings.

Benefits of preparing a Will

There are several key issues with intestacy which could be avoided if you prepare a Will.

1. The process that family members need to follow if there is no Will is far more convoluted than the process to obtain a Grant of Probate for a Will. It extends the time required for the application to court to be finalised, by several months. All of this occurs at a time that the family would otherwise be grieving.
2. Your estate may pass in a way that is undesirable or which could lead to a distribution of the estate to persons (or the Government) you would prefer it not to go to. Your Will can specify who receives any specific assets and, amounts of money

and how much they receive.

3. It may be preferable for a deceased to appoint an Executor who is different from the beneficiary or beneficiaries of the estate. Your Will can control who is the person(s) that you trust to carry out the terms of your Will.

4. Your Will can also account for other matters which would not be otherwise addressed. For example, if you had particular directions as to your funeral, whether you would prefer to be buried or cremated, or if you had specific directions for how your assets may be treated after death (including allowing someone to reside in a property for a period after death), then a Will would be able to include these directions.

5. If you and your spouse die within a short period of each other, then one extended family may benefit to the detriment of the other. For example, if a husband dies in a car accident and the wife dies a month later in hospital, then the wife's extended family (assuming there are no children) would receive the estate and the husband's extended family would miss out. A Will can be prepared in such a way as to ensure that both extended families receive a portion of the estate, or as otherwise intended.

6. If you and your spouse are in a de facto relationship, then it would be necessary for your spouse to prove that you were in fact de facto partners in order to be recognised as the appropriate beneficiary. This can be a burden to establish to the satisfaction of the court; it can be time-consuming and costly. This can also be a source of dispute between the spouse and other members of your family who might benefit if the spouse is not recognised by the court. A Will removes any need to 'prove' the relationship if they are included as a beneficiary of your Will.

7. If the distribution of the estate under intestacy is to a class of beneficiaries (such as siblings, aunts and uncles or cousins), the proof the court requires that these persons fit that relationship description is very onerous on the Administrator. The Administrator needs to prove these relationships using official documentation such as birth, death &marriage certificates, immigration documentation, etc. The difficulty of obtaining this 'proof' that the court requires can be so high that it may be necessary for the Administrator to engage professionals who specialise in tracing the family history far enough back to establish this 'proof'. Of course, this adds delay to the distribution and costs to the estate.

In summary, preparing your Will now is beneficial to you and your family

The act of preparing your Will is the act of making a clear choice as to who **you** wish to benefit from **your** estate and who **you** wish to manage **your** Estate.

Without making a Will, it is left to chance who would manage your estate and benefit from your estate, depending on who your closest relative is at the date of death.

To get started in making your own choices about the distribution of your estate, contact one of our estate planning lawyers or complete our secure online estate planning questionnaire to get the process started; in your own time and place.

Get help from a Wills and Estates lawyer

Contacting E&A Lawyers

For more information or to arrange a consultation with a lawyer, you can call or email us.

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Further reading about the importance of your Will

- The risks of DIY Will kits

This article is of a general nature and should not be relied upon as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact E&A Lawyers.