

Why have a Will?

- A Will, if validly executed, enables the Testator (the person making the Will) to facilitate the transfer of the assets they own at the time of their death to their intended recipients (beneficiaries).
- In the absence of a valid Will, the manner in which a deceased's assets are disposed is determined in accordance with the rules of intestacy (discussed below). There is a considerable risk that the intestacy rules do not align with what a person may otherwise desire.
- It enables the Testator to appoint the person/s they believe most suitable to fulfil the role of their Executor, that is, the person who is responsible for handling the affairs of the Testator upon their death.
- A well-constructed and considered Will allows the Testator to provide for their beneficiaries in a way that is most appropriate having regard to their personal circumstances (e.g. allowing for the creation of trusts to safeguard the interests of certain beneficiaries – in particular, beneficiaries that are minors, disabled or vulnerable).
- More likely than not, by having a Will that effectively records the wishes of the Testator, it will result in considerable savings (both time and money) when it becomes time to administer the estate.

What to consider when making a Will?

- Who to appoint as an Executor? More than one person can be appointed, but not more than four in the first instance.
 - It is the duty of the Executor/s appointed to attend to the immediate affairs of the deceased – such as, attend to appropriate funeral arrangements, protect the assets of the deceased (changing locks/maintaining any property), notify asset holders and creditors, collect details of the deceased's various assets and liabilities, apply for Probate (if necessary), attend to the payment of the deceased's expenses and liabilities and distribute the estate in accordance with the terms of the Will.
- What property can be disposed of under a Will? It goes without saying, that a Testator can only dispose of assets that are legally recognised as property of the Testator.
 - Real estate that is jointly owned with another person is subject to the rule of survivorship, that is, the property passes to the surviving joint owner and is not capable of being disposed of under the Will of the predeceased owner. However, the surviving joint owner can deal with the property under their Will. This can be contrasted against property that is held as tenants-in-common, which allows for the interest of the Testator in the property to form an asset of their estate and thus, be disposed of under their Will.
 - Similar to the above, bank accounts that are in joint names will automatically pass to the surviving joint owner and are not capable of being disposed of under the Will of the predeceased owner.
 - Superannuation – a Testator's superannuation fund and the proceeds payable as a consequence of the Testator's death are not considered an asset of their estate and is ultimately subject to the governing rules of the fund. Often, the fund will provide for the member the option to enter into a Binding Death Benefit Nomination, which if validly executed, allows the Testator to nominate a person (usually a dependent) to be the beneficiary of the fund. Each fund has its own set of rules that require

strict compliance and it cannot be presumed that the proceeds of the fund will be distributed in the same manner as provided for under the Testator's Will.

- Whether there are any specific funeral and/or burial arrangements? Unfortunately, funeral and burial instructions are not binding on the executor; however, if they are reasonable instructions, more often than not, they will be complied with.
- Are there any family trusts or companies that need to be dealt with?
- Are there any specific items that are to be gifted? It may be the case that the Testator wishes for a certain piece of property (such as a family heirloom/piece of jewellery) to pass to one particular beneficiary in favour of another.
- What is to happen to the share of a beneficiary if they predecease the Testator?
- Has the Testator made certain loans to beneficiaries during their lifetime that are intended to be forgiven or to be taken into account when calculating the entitlement of that beneficiary?

What happens if there is no valid Will?

- If a person dies without a valid Will, the laws of intestacy apply. As mentioned above, the distributions provided for under the intestacy regime may result in an undesirable outcome.
- The following is a brief summary of the current intestacy rules (applicable to those who pass away post 1 November 2017):

Circumstance	Outcome
Deceased leaves no child or other issue but a partner	Partner entitled to the whole of residuary estate (but does not apply if more than one partner).
Deceased leaves a partner and a child or other issue who is also a child or other issue of that partner	Partner entitled to the whole of residuary estate (but does not apply if there is more than one partner or if there is a child or other issue who is not also a child or other issue of that surviving partner).
Deceased leaves a partner and a child or other issue who is not the child or other issue of that partner	If the residuary estate does not exceed the partner's statutory legacy (currently \$451,909), the partner is entitled to the whole of the estate, including personal chattels; or If the residuary estate exceeds the partner's statutory legacy (currently \$451,909) the partner is entitled to personal chattels, statutory legacy and interest, and one half of the balance of the residuary estate with the children of the deceased entitled to the other half of the balance of the residuary estate.
Deceased leaves no child or issue but multiple partners	The partners are entitled to whole of the residuary estate: <ul style="list-style-type: none"> • If there is a distribution agreement, in accordance with that agreement; or • If there is a distribution order, in accordance with that order; or • In equal shares.
Deceased leaves more than one partner and a child or other issue who are also a child or other issue of one or more of those partners	The partners are entitled to whole of the residuary estate: <ul style="list-style-type: none"> • If there is a distribution agreement, in accordance with that agreement; or • If there is a distribution order, in accordance with that order; or • In equal shares.
Deceased leaves more than one partner and child or issue not the child or issue of one or more of those partners	<ul style="list-style-type: none"> • The partners are entitled to share the personal chattels further to a distribution agreement, distribution order or equally; • If the residuary estate is not worth more than the statutory legacy (currently \$451,909), then the partners share the amount of the statutory legacy further to a distribution agreement or distribution order or equally, and share one half of the balance of the residuary estate further to a distribution agreement or distribution order or equally, with any children of the deceased entitled to share the other half of the residuary estate.
Deceased leaves no partner but leaves a child or children	<ul style="list-style-type: none"> • The child or children are entitled to the residuary estate in equal shares (if none of the deceased's children have predeceased the deceased);

	<ul style="list-style-type: none"> • If one or more of the deceased's children predeceased the deceased who leave children who survive the deceased – <ul style="list-style-type: none"> ○ The share of the deceased child is to be divided between that deceased child's children; ○ If any of those grandchildren of the deceased predeceased the deceased leaving their own children who survived the deceased, the deceased's grandchild's share is to be divided between the deceased's grandchild's children.
Deceased leaves no partner, no children or other issue	The deceased's parents equally, or if only one parent, the whole of the residuary estate.
Deceased leaves no partner, no children or other issue	The deceased's siblings equally or if a sibling predeceases the deceased leaving a child who survives the deceased, then that child is entitled to the sibling's share.
Deceased leaves no partner, no children or other issue, no parents, no siblings	The deceased's grandparents equally, or if only one grandparent, the whole residuary estate.
Deceased leaves no partner, no children or other issue, no parents, no siblings, no grandparents	The deceased's aunts and uncles equally, or if only one aunt or uncle, the whole of the residuary estate and if an aunt or uncle predeceases the deceased leaving a child who survives the deceased, the child is entitled to the aunt or uncle's share.
Deceased leaves no one entitled above	The residuary estate is taken to be property with no owner and passes to the Crown.

What is Probate/Letters of Administration?

- Probate is the process required to be followed where a Testator dies leaving a valid Will and has an interest in real estate or assets that exceed the value of \$50,000 (approximately). A Grant of Probate represents the official proving of the Will and once obtained, entitles the appointed Executor to formally administer the assets of the Testator in accordance with the terms of their Will.
- Letters of Administration is applicable when the deceased leaves no valid Will and has an interest in real estate or assets that exceed the value of \$50,000 (approximately). It is for an interested party (usually the next-of-kin) to apply to be the appointed Administrator and ultimately entitles that person to administer the deceased's assets in accordance with the intestacy rules.

Have any questions?

We are more than happy to assist regarding any of the above matters.

24 Cotham Road
Kew Victoria 3101



PO Box 121 Kew
DX 32409 Kew



t: (03) 9853 3222
f: (03) 9853 3679



www.abnatoli.com.au



ABN 95 007 162 110

founder:
Angelo B. Natoli - 1949