Estate planning

What is estate planning?

Estate planning is the overarching term used for making decisions in relation to:

- preparing a will – which allows you to nominate how your assets are to be distributed, who will act as guardians for your children and who will act as the executors and trustees of your estate
- preparing an enduring power of attorney – which allows you to nominate how you would like to have your personal, financial and health care matters managed, should you lose capacity to make those decisions.

What is a will?

A will is a legal document which, as far as possible, ensures your assets are distributed according to your wishes, after you die. Your will can cover all of your assets in your own name — your house, land, car, shares and bank accounts. It does not cover life insurance or superannuation.

A will allows you to appoint an executor to distribute your assets to beneficiaries (the people or other recipients who you choose to receive your assets). Your choice of an executor should be carefully considered as the role can be very demanding and often complex. It can require legal and financial knowledge or guidance.

Any person of sound mind from the age of 18 years or, in certain circumstances, under 18 years, can make a will.

What happens if I don't make a will?

Dying without a will (called intestacy) means your assets will be distributed according to rigid formulae set down by the laws of intestacy. Those laws may:

- force the sale of the family home or family car so that the debts can be satisfied and allow other beneficiaries to claim their share of your assets
- not provide future financial protection for your children and grandchildren
- give your assets to the government, if you have no relatives or any other persons who are entitled to benefit.

Furthermore, you lose your autonomy as to who will administer your estate.

Preparing your will

A will is a complex legal document that should be prepared by your solicitor. Before visiting your solicitor, you should consider:

- who to appoint executor and their powers
- who to appoint guardian of your children and how you would like to provide for your children's future
- what your current assets and liabilities are
- who should receive your assets
- what life insurance you hold
- what funeral arrangements you prefer
- what superannuation you have accumulated.

Can I prepare my own will?

You can prepare your own will but you do so at the risk of causing costly and emotional legal battles among relatives if a dispute arises after you die. When preparing a will, a number of legal requirements must be followed or it may be ineffective. If this occurs, and you have no valid earlier will, you may be presumed to have died intestate with the laws of intestacy to apply, unless the invalidity is rectified by court process, which can be expensive.

Alternatively, if your self-made will fails to clearly express your wishes, the court may need to interpret your will, which may add further costs and emotional burden to your loved ones.

Changes to your will

You are free to alter your will at any time and as often as you wish, if you have testamentary capacity to do so.

Your circumstances may significantly change over time, so it is advisable to regularly review your will in the event of:

- the birth of children or grandchildren
- death of a beneficiary or executor
- changes to financials
- changes to home or property.

On marriage, your current will is automatically revoked unless it states it is made in contemplation of your marriage. Any will you have in favour of a divorced spouse is immediately revoked when the divorce becomes finalised.

Amendments to the definition of marriage in the *Marriage Act 1961* in 2017 may have the effect of revoking a will made by a same sex couple prior to the commencement of these changes. It is strongly recommended that persons who have married another person of the same sex seek legal advice on the validity of any will signed prior to the changes to the *Marriage Act*.

Is there such a thing as a ‘free’ will?

The Public Trustee and trustee companies prepare wills at no cost to the will-maker. You should check, however, what charges may be involved if they administer your estate, and any other issues such as the appointment of your executor.

Can I appoint someone else to act on my behalf?

You can legally appoint a trusted friend or a relative, to act on your behalf to handle your affairs by signing an enduring power of attorney. The nominated person is known as your attorney. The person may handle your affairs or have the power to act on your behalf. An enduring power of attorney is just as important as a will. While a will operates on your death, an enduring power of attorney operates during your lifetime.

Appointing an attorney

Your appointed attorney:

must be	must not be
over 18 years of age	your paid carer or health care provider
someone you trust	bankrupt
able to understand fully what the appointment means	your service provider for residential service where you are a resident (eg retirement village)
capable of looking after your affairs	

Types of powers of attorney

General power of attorney

A general power of attorney is often used in a business context by a corporation or an individual. It can authorise your attorney to deal with your financial affairs. It comes into effect on the date you elect (ie it is not dependent on you losing the capacity to make decisions). It may limit the extent to which your attorney may deal with your affairs. A general power of attorney is normally used for the purchase and sale of land (eg while you are overseas).

Enduring power of attorney

Under an enduring power of attorney (EPA), you may give your attorney the power to deal with all or any part of your financial, personal and health matters. An EPA for financial matters can come into effect either immediately when you lose capacity, or on a specific date or at a specific event. There are a number of other considerations regarding this decision. It is advisable to obtain legal advice to ensure your choice is fully informed.

If your attorney under an EPA acts in conflict of their duties and your interests (eg in financial relationships), they would enter a 'conflict transaction' which they can only do if you authorise such a transaction. It is best to discuss this with your solicitor.

Revoking an enduring power of attorney

Your EPA is automatically revoked:

- on your death
- when you marry, unless your new spouse is your existing attorney
- when you divorce, if your attorney was your spouse
- when you appoint a new attorney
- if your attorney dies or loses decision-making capacity
- if your attorney becomes unqualified, for example, bankrupt or a paid health care provider.

You can choose to revoke your EPA at any time providing you have capacity and understand what you are doing. Your solicitor can advise you on the procedures to follow.

Legal costs

Just as estates vary in size and complexity, the legal costs to prepare a will and power of attorney will differ. At your first appointment, ask your solicitor about the costs involved.

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The information in this brochure is merely a guide. It is not meant to be a detailed explanation of the law and it does not constitute legal advice. Queensland Law Society recommends you see your solicitor about particular legal concerns.