



**DONOVAN OATES
HANNAFORD**

LEGAL + CONVEYANCING

Preparing your Wills and Estate

Getting your Life (and Death) Documents in Order

Planning your Wills and Estate

Most of us desire to live well and die well. That is we all wish to enjoy our retirement and then leave a positive legacy.

We move through different stages of life: raising children, acquiring homes and wealth, retirement and ultimately, death. At each stage our needs and objectives may be different but our desire to live well and leave a positive legacy doesn't change.

Wills and estate planning can present a complicated situation if you are dealing with blended families, children who are affected by drug or alcohol, who are estranged, disabled or irresponsible with their money.

While you can never know what's just around the corner, effective planning and robust legal advice can bring peace of mind.

Facts About Wills

1

Studies show that at least 45% of Australians do not have a valid Will*

2

If you die without a Will your estate will be distributed according to a pre-determined formula and, if your only living relatives are more distant than cousins, your estate will pass to the Government.

3

Marriage and divorce affects the validity of a Will, unless the Will expressly states it is in the contemplation of marriage or divorce.

4

No Will is completely water tight. For example, a spouse, child (biological or legally adopted and in some cases dependent step-children) can contest a Will for greater provision out of an estate.

Key Information to Know

Glossary of Key Terms

Will

A Will is a legal document that sets out who you want to receive your assets when you die.

Testamentary Trust

This is a trust that arises upon your death and is set out in your Will. It allows for the circumstance where you may not want to transfer the ownership of your assets directly to your beneficiaries. Instead you transfer assets into a testamentary trust and hold for the specified beneficiaries of this trust. Testamentary trusts are generally created for young children, children with disabilities or where children may be deemed financially reckless in the management of money or assets. They can also be created for financial planning purposes.

Dying Intestate

This term is used to describe a situation when someone dies without a Will in place.

Binding Death Benefit Nomination

This is a legally binding nomination that allows you to advise your Trustee as to who is to receive your Superannuation benefit in the event of your death.

Estate Plan

This is a set of documents that includes your Will as well as any other directions on how you want your assets distributed after your death. It will include information that will govern how you will be cared for, medically and financially, if you become incapable of making your own decisions in the future.

Codicil

This is an additional document to your Will that outlines any updates that you may make to your Will. NB: We recommend drawing up a new Will, should you have any updates, to ensure that your wishes are contained clearly in one single document.

Memorandum of Wishes

If you have created a discretionary Testamentary trust you may want the Trustees to take into account certain wishes, but without affecting their discretionary powers.



The Key Roles

Executor

This is the person who is legally responsible for carrying out your wishes as expressed on your Will.

Beneficiaries

Your beneficiaries are the people that you choose to receive all or parts of your estate when you die.

Trustee

If you are concerned about the ability of one of your beneficiaries to manage the assets or money that they might receive in a Will, you will appoint a Trustee who will be responsible for managing the assets or money in a way that benefits the beneficiary and protects their interests.

A Trustee is generally required when you have a child that is drug or alcohol affected, is not particularly great at managing money or is disabled.

Guardian

If you have children under the age of 18, a Guardian is the person that you nominate in your Will to be responsible for these children.

The following two roles do not form part of your Will, however we recommend you nominate them at the time you are setting up your Will and Estate.

Enduring Guardian

The person you appoint as your Enduring Guardian will make decisions about medical treatment you receive if you lose the capacity to do this yourself. These decisions could include:

- where you live
- what healthcare you receive
- what personal services you receive; and
- the consenting to medical treatment and obtaining information in respect of medical treatment on your behalf

Importantly, your guardian is also able to refuse medical treatment if you are in a terminal stage and unconscious, in a vegetative state, even if that refusal was to lead to your death.

Attorney

Your Attorney, as set out in your Power of Attorney document, essentially refers to an authorised representative who has power over your finances should you lose your mental capacity. This person can be your Lawyer, however it is most likely to be a trusted family member or close friend.



Setting up your Wills and Estate

Writing your Will

Having a clear, up-to-date and legally valid Will is the best way to ensure that once you pass away, your assets are distributed the way you wish.

If you die without a Will in place, your assets will be distributed according to a set formula by the State.

Your Will is one of the most important documents you will ever sign so it's important that the contents are correct.

As such, we recommend that you seek legal advice and guidance when preparing a Will as opposed to attempting to complete one yourself.

Step 1	Decide who you want as your Executor
Step 2	Identify your heirs
Step 3	Identify Guardian for minor children
Step 4	List all property and assets for distribution
Step 5	Provide the above information to your Lawyer so they can prepare you a Will.

Setting up your Superannuation Nomination

Superannuation does not ordinarily form part of your estate. If you nominate your legal personal representative under a binding death benefit nomination the Super Trustee is then bound to pay the proceeds of your superannuation including your death benefit to your Executor to hold on the terms set out in your Will.

Step 1	Obtain details from your superannuation fund as to the nature of the nomination you have already made and satisfy yourself that they meet your requirements.
Step 2	Speak to your Financial Adviser about your objectives
Step 3	Provide these instructions to your Lawyer



Appointing your Attorney and Enduring Guardian

Your Enduring Power of Attorney and Appointments of Enduring Guardian documents are incredibly powerful.

It is important that you place the utmost trust in the people who you select to act in these critical roles as these people will make crucial, legally binding decisions about your life and finances.

We recommend that you have a conversation with both your Guardian and family concerning the above matters so that everyone is aware of your wishes.

Step 1	Decide who you want to be your Attorney or Enduring Guardian
Step 2	Talk to your proposed Attorneys or Enduring Guardian and ensure that they are aware of what responsibilities they will have in that role and that they are OK to be nominated in this role
Step 3	Pass this detail on to your Lawyer for inclusion in Power of Attorney and Enduring Guardian documents
Step 4	Communicate with any relevant family members who you appoint as your Power of Attorney and Enduring Guardian

Setting up a Testamentary Trust

You may be in a situation that you wish to transfer your assets into a Testamentary Trust as opposed to directly to a beneficiary in order to protect your assets for a certain period of time.

Under a Testamentary Trust, the Trustee will hold the ownership of the assets for the rightful beneficiaries of the trust. The Trust is managed by a Trustee. Any income arising from those assets within the trust is dealt with according to the terms of the trust.

Step 1	Decide who will be the Trustee
Step 2	Work with your Legal Adviser to draw up some guidelines around how the Trustee will manage the assets or money on your beneficiary's behalf. You may also want to consider guidelines that outline how your Trustee will transfer control when your beneficiary is ready





Frequently Asked Questions - Wills and Estate

I have a child who has a gambling problem. I want to provide for them in my Will, however I'm worried they won't be able to manage their assets effectively.

If you are in the situation where you have a child affected by drugs or alcohol, a disabled child or perhaps a child who is reckless with their spending you can protect the assets and money that you leave for them by setting up a Testamentary Trust.

How do I provide for my disabled child in my estate?

A Special Disability Trust is a Trust established solely for succession planning by parents and immediate family members for the future care and accommodation needs of a person with a severe disability.

The income from the assets of a Special Disability Trust is not counted in the application of the Centrelink income test and to the beneficiary of the Trust. Only assets exceeding \$669,750 (as of 1 July 2018) are included in Centrelink means testing.

I am re-married, and we now have a blended family. How can I ensure that my Will provides adequately for my children and my current spouse?

In the case that a husband and wife have children from previous marriages and they want to ensure that their children (including step-children) are appropriately provided for in their Will, a Mutual Will agreement can be drawn up.

This will ensure that their Wills will adequately provide for each other in the first instance and then their respective kids. This agreement says that once the first partner dies – the survivor cannot change the Will without incurring potential significant damages from the children who miss out. This is an agreement that is enforceable by the beneficiaries against the surviving spouse.

You can also grant a Life Interest to a spouse where for example you can allow a surviving spouse to live in a house or have the benefit of your estate for the duration of their life. Once they pass away the house and other assets pass onto another assigned beneficiary.

Can I prepare my Binding Death Benefit Nomination (BDBN) myself?

Binding Death Benefit Nominations can be fraught with a few complex regulations that can deem them null and void if not complied with.

For example, a BDBN requires you to allocate 100% of superannuation funds at once. This means that your direction to your Trustee has to be exactly that. Too many times we have seen people complete DIY nominations and make errors such as trying to allocate 33.3% of total super funds to three different people. A mistake may mean the nomination is non-compliant and your funds will not be allocated as per your stated wishes.

Also, beware of lapsing BDBN's. Generally your nominations will lapse after three years. It's up to you to ensure this is updated.

If you are remarried and have children from a past relationship, without a BDBN the Trustee may pay the full amount of your super to your current spouse. This might mean your children miss out completely on your superannuation.

How do I distribute my share of land that I own jointly?

Land ownership can be jointly owned in two different formats; Tenants in Common or under Joint Tenancy.

If you own the land with a spouse as Tenants in Common your share vests with your Executor so you can divvy up your share and distribute it as part of your Will.

If you are a Joint Tenant, your land will automatically vest in the survivor. Most spouses hold land as Joint Tenants.

Owning the land as Tenants in Common will entail including the fees and the time invested in that process. To avoid these costs and delays, you can own the land and other assets as Joint Tenants then set a Mutual Will arrangement. This way probate expenses may be avoided until the survivor dies.





About Donovan Oates Hannaford

Donovan Oates Hannaford is different. We are legal experts as well as people experts.

Our aim is to make sure you remain at the centre of your legal matter or proceeding at all times.

We ensure we have a thorough understanding of your situation before providing advice and you can be confident that that we understand your needs and expectations.

We offer our clients superior and professional advice which is easily understood and is provided in a timely manner.

We are a locally based law firm which has been servicing the Port Macquarie region since 1946.

Wills and Estate - Services we Offer

We can help you organise your affairs to support you in retirement and to leave a positive impact on the lives of those people and organisations which are important to you.

Our lawyers can help you with:

- Probate and administration
- Wills, estate planning, powers-of-attorney and guardianship
- Trusts including Family Trusts, Special Disability Trusts and Testamentary Trusts



Looking for further advice?

Contact our Wills and Estate Specialists



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