



Wills and Deceased Estates

Drafting your Will, Power of Attorney or Advanced Care Directives is an activity which requires special skills to help minimise tax and help ensure the outcomes you want. Managing a deceased relative's estate and appointing an executor of your estate are other important areas for advice.

Why should I make a Will?

In summary, to make sure that the people you want to receive your assets after you die do receive them. A Will helps ensure this happens and occurs with minimum legal costs and in a tax effective manner.

There can be significant consequences if no Will exists.

Why should I pay someone to make a will when I can make my own?

After you die the last Will that you make must be submitted to the Probate Court to check that it is a valid Will and complies with all of the rules regarding Wills. If any rule regarding Wills is not met, the Court will ask for extra information and documents to be lodged with the Court. This puts your estate to added legal expense and delays the administration of your estate. Each additional document could cost at least as much as it would have cost to have a standard Will prepared by someone who is knowledgeable and experienced in the administration of estates and the preparation of Wills.

Preparing your own Will with the help of a book or internet forms can be a costly mistake. If you don't know and understand the rules regarding Wills and how they apply to your situation, any mistakes will not be discovered until after you die. This can include taxation implications. It is cheaper to ensure that your Will is correct before you die than it is to fix mistakes after you die.

Why should I consider estate planning?

Estate Planning is not 'one size fits all'. Unless you are a solicitor or an experienced Wills and Estates Administrator, you have no way of knowing whether the document you have prepared is appropriate for your individual situation. A trained and experienced professional estate planner can envisage circumstances that you may not consider, can identify potential problems and fix them. He or she can dramatically improve the chances of your plan actually working as anticipated.

Scammell & Co. will look at each person's individual circumstances and then advise on various estate-planning strategies that can be used to give your beneficiaries the ability to:

- Minimise taxes on income earned from their inheritance.
- Retain their inheritance for your descendants only.
- Protect vulnerable or incapacitated beneficiary's inheritance.



What is a grant of Probate?

A Grant of Probate is a Certificate from the Probate Court which:

- Verifies that your Will is legally valid.
- Certifies who the person is, who has the legal authority to deal with your assets, that is your Executor or Administrator.

One of the reasons for the formal Grant of Probate process is to prevent fraud. The process usually takes four to six weeks after the lodgement of the application for Probate at Court.

What is wrong with completing a will kit?

Will Kits are designed to cover only the most basic circumstances and do not provide for variations in people's circumstances. There is no personal attention or advice on the legal consequences of certain estate planning choices. They do not offer the opportunity for beneficiaries to minimise tax, or protect their inheritance against claims by others.

In most cases when Will Kit Wills are submitted to the Probate Court after a person's death the Court requires additional documents. The cost of each of these documents is usually in excess of the cost of having a standard Will made by a law firm. The added cost and delays often cause the deceased's family stress, which could have been avoided.

How does tax affect my estate?

The way in which your Will is worded can affect the amount of tax that your beneficiaries pay through your estate. This includes Capital Gains Tax on disposal of assets, penalty rates of taxes for underage beneficiaries and also income tax.



How are minors taxed on their inheritances?

Minors are taxed differently depending on whether their income is 'excepted income' or not. Generally, a minor's income from a deceased estate is not excepted income and penalty tax rates apply. Penalty tax rates are very high, see below:

Amount of Minor's Income that is Not Excepted Income	Penalty Tax rates without Low Income Offset
0 - \$416	Nil tax
\$417 to \$1,307	66% on amounts from \$416 to \$1,307
Over \$1,307	45% of the total amount

Fortunately, you can structure your Will so that the minor beneficiaries avoid losing so much of their inheritance to tax. This is usually achieved by using a Testamentary Trust.

If a minor receives income from a Trust created in your Will they can receive \$6,000 per year tax free before paying reasonable concessional tax rates. Concessional Tax rates start at 15%.

Taxable income	Tax on this income
0 - \$18,200	Nil
\$18,201 - \$37,000	19c for each \$1 over \$18,200
\$37,001 - \$87,000	\$3,572 plus 32.5c for each \$1 over \$37,000
\$87,001 - \$180,000	\$19,822 plus 37c for each \$1 over \$87,000
Above \$180,001	\$54,232 plus 45c for each \$1 over \$180,000

What is a Testamentary Trust?

A Testamentary Trust is created by your Will, but only comes into effect upon your death. You decide on the rules and terms of the Trust which are set out in your Will. The Trust can be as flexible or as inflexible as you want the Trust to be.



What type of trusts are made in a Will?

There are many different types of testamentary trusts and they are used for many different reasons, depending on your family's individual circumstances.

Some include:

- A disabled person's trust.
- A spendthrift person's trust.
- An income maintenance trust.
- A capital protected trust.
- A staggered time release trust.
- A protective trust.
- A beneficiary controlled trust.
- A fixed life interest trust. A flexible life interest trust.

Why might it be better not to leave assets directly to a child or children of adult age?

The answer is the example of Mrs Smith who was adamant that she wanted a simple Will that left the whole of her estate equally to her three adult children, James, Alison and Beth. After her death the results were not what Mrs Smith would have wanted.

James was divorced and had to provide maintenance for his two children from the first marriage. His second wife was a stay-at-home Mum who looked after their two young children.

James invested his inheritance and lost 45% of the income each year in tax. He used the remaining 55% of the income to pay maintenance for his two families. The maintenance was paid in 'after tax' dollars.

James would have preferred to be given the option to establish a Testamentary Trust with his inheritance so that he could distribute \$60,000 of the income to his wife and children tax free and then pay only 15% tax on the remainder of the income.

James owned his own company and ran the risk of being sued personally through his line of work. If his inheritance was in a Testamentary Trust the assets may have been protected from claims if he was ever sued.

James died a few years after his mother and his widow, Josie, married Bob the Builder. When Josie died, Bob the Builder successfully contested Josie's Will. The result is that Mrs Smith's estate eventually ended up with Bob the Builder's family, not Mrs Smith's own grandchildren.



If James' inheritance was in a Testamentary Trust then on his death his inheritance could have stayed in the Trust and when Josie died her new husband, Bob the Builder, would not have been able to make a claim. The inheritance would have gone directly to Mrs Smith's grandchildren rather than to Josie's new husband.

A2. Alison and her husband are divorced. During her marriage Alison had nothing to do with her husband's business but she had signed a personal guarantee to the bank. The divorce did not discharge her from the bank guarantee, and she did not get advice from a family lawyer at the time of the divorce. Alison was relying on her inheritance from her mother to raise her two minor children. Alison's former husband's business was in financial difficulty and her ex-husband's creditors received the whole of Alison's share in her mother's estate. None of the estate benefited Alison or her children. It could have been protected by a Testamentary Trust.

A3. Beth is unemployed and a compulsive gambler. A Protective Trust would have ensured that Beth's inheritance would benefit her rather than being lost to the casino and poker machines.

Is it more expensive to make my will using a solicitor, when compared with using a trustee company?

No, in fact the opposite is the case. A Trustee Company will prepare your Will for no charge or a minimal charge if you appoint it to be your Executor. After you die, the Trustee Company charges commission on the gross value of your estate (not the net value). For example if you own a house valued at \$400,000 with a mortgage of \$300,000 the commission charged by the Trustee Company is on the value of \$400,000 and can be as much as 8% of the gross value.

Also your beneficiaries have no choice in the administration of your estate and if unhappy with the Trustee Company they cannot fire the Trustee Company and appoint another trustee company.

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