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Legal Information Fact Sheet: Wills

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Should You Make a Will?

Any adult who is likely to have assets at the date of his or her death should make a Will – and this is most of us. Although you may think you own nothing, most superannuation policies have an accompanying life policy. Most workers are superannuated through the Superannuation Guarantee Scheme.

Your Will ensures as much as possible that your estate if left to the people you want to benefit.

What if You Do Not Make a Will?

If effect, State legislation determines how your estate will be distributed.

Even if you are happy with the path followed by that legislation, estate administration is more involved than when you have made a Will. This can be distressing to your family and more expensive in terms of estate administration.

The Executor

The Executor is the person or persons (or trustee company – but often at considerable expense) you appoint to administer your Will. Once the assets have been called in, the Executor holds them *in trust* to be dealt with in accordance with the Will. At this point, the Executor becomes the 'Trustee' of the estate.

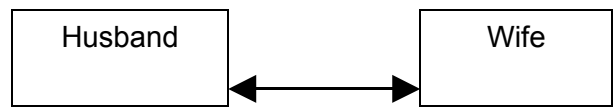
In most cases, an Executor's role is reasonably simple and the main work is done by the solicitor (and accountant). However, where the finalisation of the estate is going to be delayed because of minor beneficiaries or, perhaps, a disabled beneficiary – or where there are likely to be disputes or conflict – the choice of Executor can be important.

Usually, spouses are named executors of each other's Will with one or more children nominated in reserve. However, the appointment is not an honorarium: the person you select should be capable of being balanced and effective. The loving child, for example, may be too emotional and not able to deliver effective instructions or administration.

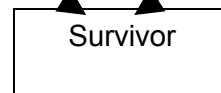
Should You Make a Simple Will or Use Testamentary Trusts?

A **traditional** approach may be to leave an estate as follows (subject to variations):

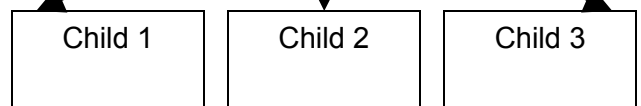
Estate left each to each other



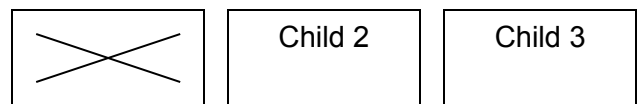
Survivor holds estate assets



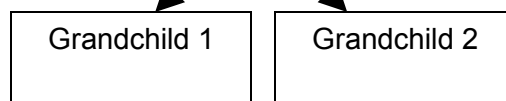
Survivor's estate passes to children



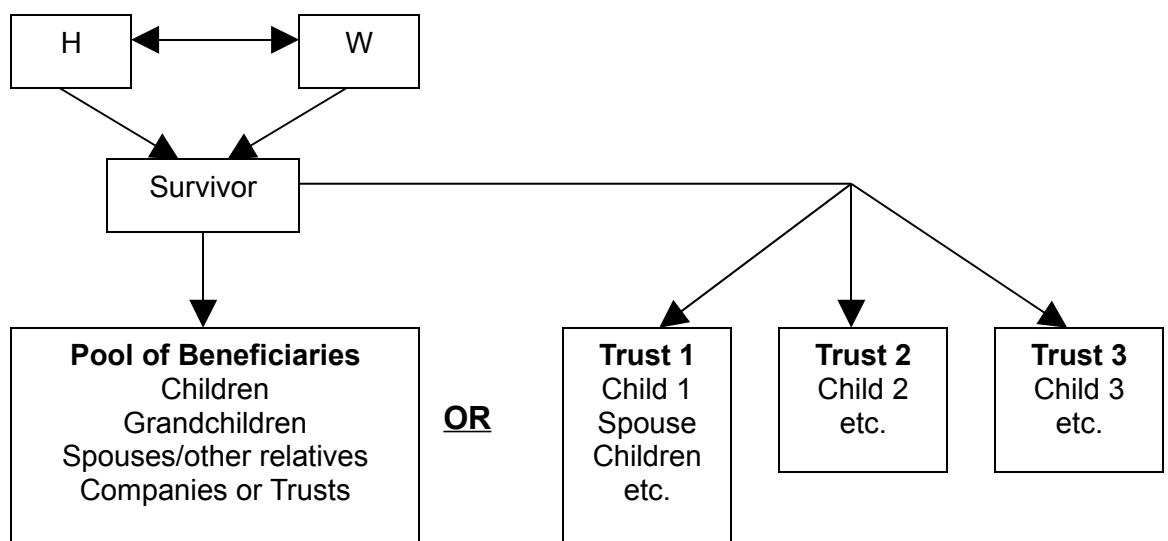
Children of child who dies before survivor inherits their parent's share.



[In this example, grandchildren 1 and 2 inherit from their parent, Child 1's one-third share – ie, they get a one-sixth share each.]



An **alternative approach** is to create a **testamentary trust**, either involving the whole family or limited to children and grandchildren. It is as follows:



OR Each party may create a trust with their surviving spouse/partner ("Survivor" in the table above) being one of the beneficiaries in the Pool of Beneficiaries.

What factors may influence your decision?

Subject to any financial advice the testamentary trust is more likely to be used where:

- the likely value of the estate is such that it would clearly justify the tax advantages of a testamentary trust;
- you have some real concern (or even instinct) about a beneficiary's circumstances which would justify a testamentary trust (such as financial irresponsibility; a prospective failed marriage and likely financial fallout; where your child is with a spouse or partner who has children from another relationship but your child has none and is not likely to);
- where the benefit a beneficiary is likely to receive is substantially greater than the assets that beneficiary is likely to already own at the time of your death. This point would be more relevant if either or the two other points above apply.

Superannuation – Should You Nominate Your Choice of Beneficiary?

You have three choices:

1. To make a **binding nomination** (of the person who is to receive your superannuation entitlement). Strict legal rules apply. However, if complied with, your nomination will override your Will. As a general rule, we only usually recommend this when you may need to quarantine this asset in favour of a specific person such as a child from a former marriage or a spouse rather than children from a former marriage (or vice versa).
2. To make a **non-binding nomination**. The Trustee of the Super Fund may, but is not bound to, follow your nomination. As a general rule, we usually recommend that you nominate your estate so that your Will controls your wishes.
3. To make **no nomination**. The Fund will usually pay to the estate so that your Will then controls your wishes.

'Second Marriage' Wills

This is an area fraught with potential conflict and unhappiness in terms of the competing entitlements of the new spouse and children from the former marriage. We can discuss a number of options to help minimise these problems.

Who May Challenge a Will?

A Will can be challenged where it is apparent that you lacked 'testamentary capacity' at the time you made the Will. We are able to monitor and record for evidence at a future time, issues relevant to your testamentary capacity and the reasons for your decisions at the time of you making your Will.

This aside, there are only a **limited category** of persons who can contest a Will. Most members of the extended family (siblings, grandparents and aunts and uncles for example) **cannot** usually contest a Will. Ask us more about this.