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DO YOU HAVE A GOOD WILL?

We regularly come across people who do not have a Will and do not know why they should have a Will. Most often people tell us **combination of reasons for not having a Will:**

1. ***“I am young and in good health”***, this is because young people believe that the best time to make a Will is when a person reaches an advanced age or becomes seriously or terminally ill.

Waiting for old age or serious illness is not a wise decision as often such circumstances come together with some impairment of *testamentary capacity* (a mental capacity to make and execute a will). This in turn will either stop you making a Will, or if you do a Will with some impairment will expose that Will to a challenge in the Court after you pass away. This will cost the deceased estate (assets of the departed person before they are distributed to beneficiaries) lots of money, which mostly will be your money, in effect thrown away!

2. ***“I am busy; it is not important for now. I’ll do my Will later”***.

Nobody knows the day when a person departs from this world. Passing away without leaving a Will is called *dying intestate*. While there are provisions in the law on the distribution of the deceased estate *on intestacy*, they may not result in the outcome you or your family will find fair or right.

Also, you should avoid taking a long time to finalise your draft Will because if you pass away before it is finalised, your draft Will may be brought to the Court to prove that it indeed contains your last wishes. This will incur additional legal costs to the deceased estate.

It is proper to assume that a Will prepared for you in draft becomes your urgent matter.

3. ***“My affairs and assets are simple, no big deal. I already told my family what to do and how to deal with assets after I die, or I will get my family to decide how to divide my assets after I die”***.

No matter how simple your affairs are, often such approaches lead to misunderstanding eventuating in disagreements between relatives as to their entitlements. Such will have to be resolved, and often in the Court, before distribution of the deceased's assets. Court inheritance disputes are very costly. At least part of the costs will be paid from the deceased estate before distribution.

4. ***“I don't have anything large, just small for now, and I will make a Will if and once I become richer.”***

A person can make a Will any time and can update a Will many times provided they have at that time sufficient *testamentary capacity*. Any person, even if they do not hold many assets should make a Will in their current stage of life for a variety of individual reasons. We recommend our clients to prepare a draft Will which can be completed in a timely manner after further consideration. Better a draft than no Will!

5. ***“I don't have close relatives or someone I trust to put in my Will”*** ,

When discussing this aspect with our clients, we often discover that in fact there are persons who clients trust and sometimes they are not the family. However, clients do not know how to deal with it in a Will and are concerned about a possible claim from people left out of the Will. These can be addressed in various ways and should not deter you from making a properly planned Will.

6. ***“I cannot deal with death and to make a Will.”*** It is very understandable that a decision to make a Will is hard and emotional for people, but it is best to make it while you are fully able, for the sake of your family and friends.

7. ***“I don't believe my privacy and confidentiality will be kept. I will tell my lawyer just a part of information about me and my assets and liabilities”***.

Your instructions to and advice by a lawyer are confidential. Lawyers are disciplined and can be deregistered if they do not keep the privacy and confidentiality of their clients.

A professional lawyer does not judge you for your family relationships or personal matters relevant to preparation of your Will.

Incomplete disclosure of your family relationships, personal matters or of a number, nature and value of your assets and liabilities for your Will preparation is not helpful to you. This is because your Will most likely will be incomplete or incorrect and may be litigated in the Court after you pass away.

Your Will is a private confidential document until you pass away. You do not have to give a copy of your Will to anyone (including executors or beneficiaries of your Will); the original is usually kept with lawyers who prepared a Will.

WHEN YOU SHOULD MAKE A WILL

We recommend you consider consulting an experienced estate planning lawyer and consider making a **properly planned and drafted Will** if **any of the following applies** to you:

(a) *Family and personal matters:*

- you are part of a *blended family*: if you and/or your spouse or partner was previously married to or in a de facto relationship with another person, and have children from that previous marriage or relationship;
- your children are from different relationships;
- you children are adopted or foster, or are born through surrogacy;
- you have young children whose second parent passed away or is not in any way involved in your children's upbringing;
- your child has a serious chronic illness or disability;
- you child is an adult with bad habits (gambling, alcohol or drug use etc);
- you are in more than one current personal relationships;
- you may be or are going through separation or divorce;
- you plan to enter or have entered in any binding financial agreement;
- relationship between you and one or more of your family members are not on best terms;
- you have a person in your life who thinks or may think they are entitled to receive part of your estate, and you do not wish to give it to them;
- you wish to protect your assets for your children and grandchildren after you pass away, from unwise decisions of their young age or losing your assets to their spouses on any separation or divorce;
- your close relatives live outside Australia; and
- you wish to make a gift from your estate to a particular charity.

(b) *property and financial matters:*

- you own a real property;
- you own assets of not insignificant value and/or located in different jurisdictions, with or without complex ownership structure;
- you hold joint ownership as a tenant in common with others in a real property or other asset, whether or not you have co-ownership arrangements with other co-owners;

- you run or have involvement in any business or company;
- you or your company is a controller, trustee or beneficiary of any trust;
- there is a trust established for your children/grandchildren;
- you wish to have a better tax approach to your estate after you pass away;
- you made any serious promise to anyone about giving them your monies or other assets after you pass away, and they may be or are relying on your promise;
- you have ongoing financial obligations, including personal, business or property loans and/or gave securities or guarantees for them; and
- you have assets and/or liabilities overseas, in addition to your assets in Australia. Due to differences in the inheritance law and interrelations between different jurisdictions, you may well need to make two Wills, Australian and foreign one, but in a way that they do not cancel each other and do not apply contrary to your intentions. Please feel free to contact us to help you.

SUPERANNUATION

Superannuation monies and assets do not by themselves form part of the deceased estate and therefore are not covered by a Will. It is important you make and always have a current *superannuation death benefits nomination* or arrangement with your industry superannuation fund or self-managed superannuation fund, prepared in accordance with a superfund governing deed and in correlation with your Will.

If you have a current Will but have not yet made your super death benefits arrangement, please do not delay with it. Please feel free to contact us to help you.

WHEN TO RE-CONSIDER YOUR CURRENT WILL

Often families go to the Court for interpretation of a Will which their deceased loved one made many years before they died, as that Will no longer correctly reflects the deceased' state of affairs.

If you have a current Will, to assist yourself and your family in future you should look through it in the following circumstances:

- (a) there are **changes in your family** (birth, separation/divorce, death of or change in relationships with family members);
- (b) you have **separated or divorced, started new relationship or recently married**. Generally, marriage will invalidate previously made Will;
- (c) your **health** is deteriorating;

- (d) **sale, purchase, transfer of or any other change in real property** and other assets; or **opening/closing of a business;**
- (e) you **gave monies or property to a person who is a beneficiary in your current Will** of the same or similar gift; and
- (f) you **loaned or gifted substantial monies to your adult children** who are beneficiaries in your Will.

Even in the absence the above it is recommended that **you read your Will every three to five years**, to see if its provisions are still current in your circumstances.

The above does not necessarily mean that you have to change your Will every several years, even if some of the above circumstances are present. Your Will if it is carefully planned and prepared may already impliedly provide for some of possible circumstances. Please feel free to contact us if you have questions or feel that your Will needs to be changed.

SHORT AND CHEAP WILLS. DON'T DO IT!

Some people choose an informal DO IT YOURSELF will or very cheap wills offered by some lawyers or internet resources. Such wills are often hurried, open-ended and not properly taking into account all your personal circumstances.

And despite your best intentions, short and cheap wills often are not the best estate planning for you. They regularly become a subject of court litigation, costing up to tens or hundreds of thousands of dollars in legal costs of all parties, with the deceased estate paying some part of it. The old saying “*you get what you pay for*” works here against you, family and assets.

WE CAN ASSIST YOU WITH A WILL

Having a valid Will prepared by an experienced lawyer is always recommended. Wills and estate planning is a complex area of law with many unknowns and pitfalls which are not obvious to ordinary people.

We, at Boyarkina Lawyers will be happy to assist you with any aspect of estate planning and prepare a Will suitable for you, your assets and circumstances.

We adopt a personal individual and detailed approach to you and your proposed Will. We uphold our values of integrity, care, honesty, ethics, experience and clients’ trust in what we do.

Natalya Boyarkina helped many clients over the past 15 years and look forward to hearing from you. Why not pick up the phone and call 0431 925 047 for a private chat, or email Natalya on natalya@boyarkinalawyers.com.au

If you know persons who will be interested in the information in this Guide, please feel free to send this Guide to them.

If you wish to receive our guides and newsletters in future, please feel free to provide your email address to us.

BOYARKINA LAWYERS



Natalya Boyarkina has been in practice as a Commercial, Property, Leases, Conveyancing and Wills & Estates lawyer in Sydney for over 15 years. After completing nine years with a Sydney CBD law firm Natalya started her own practice with office in Bondi Junction.

Natalya is a solicitor admitted to practise in the Supreme Court of NSW and the High Court of Australia.

Natalya holds Master of Law and Legal Practice and Master of International Trade Law degrees from University of Technology, Sydney and Bachelor of Laws with Honours majoring in International Law.

This Guide is for general information and reference purposes of clients and contacts of Boyarkina Lawyers and Natalya Boyarkina and members of public interested in the subject matter. It is not a comprehensive exhaustive or complete list of reasons for making a Will, re-considering a current Will or any other matter brought up in the Guide.

Information in this Guide is relevant to Wills under Australian laws for Australian assets and liabilities.

Information in this Guide does not constitute legal advice and should not be relied on as if it were a legal advice. A person should obtain professional legal advice specific to their circumstances before taking any action based on this Guide.

Reasonable care is taken that information in this Guide is current at the time this Guide was prepared (September 2023).

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