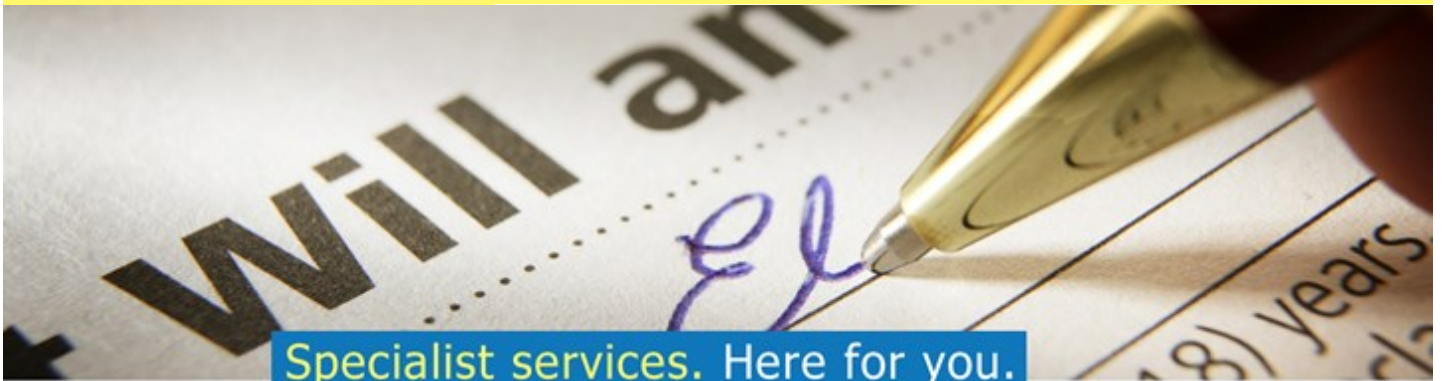


Wills & Estates



Specialist services. Here for you.

Q
&
S

QUINN &
SCATTINI
Lawyers

Why you should have a Will

Appoint who you want as executor/s

Otherwise, there may be a costly dispute about who is entitled to administer your estate. There could also be confusion over who is responsible for your funeral.

Give your estate to who you choose

Otherwise, your estate will be distributed under the “intestacy rules.”

Family Trusts

If you are the trustee, principal or appointor of a family trust, you may need to appoint a new officer of the trust in your will.

If you don't have a will

Family members who have been estranged from you for many years may be entitled to your estate. There may be a family dispute about who is entitled to make the funeral arrangements. Your estate could be administered by the Public Trustee. It generally costs more to deal with an estate where there is no will.

Excuses people sometimes make for not making a will (and why they are “just excuses”)

“All my property is owned jointly with my spouse.”

If you out-live your spouse, or if you and your spouse die at the same time, there should be a will to deal with all of the property that was jointly owned.

“I don't have any significant assets.”

Superannuation might be paid to your estate, at the discretion of the trustee of the super fund. Life insurance may also be paid to your estate.

“I am happy for my estate to go to my next of kin anyway.”

Your will does more than just give away your estate (although that is its main function). It also appoints an executor, and may express your wishes regarding burial or cremation and other matters.

Benefits of having a Testamentary Trust

- Provide for your beneficiaries in a tax-effective manner.
- Protect your estate from being dissipated upon family breakdown of a beneficiary.
- Provide for vulnerable beneficiaries.

Why have an Enduring Power of Attorney (“EPA”)

- If you lose capacity to make decisions for yourself, and if you do not have an EPA, the Queensland Civil and Administrative Tribunal will need to appoint someone to make decisions for you.
- That could be a person you wouldn't want to act for you.
- It could even be the Adult Guardian or the Public Trustee.
- The Tribunal process may be costly and stressful for those involved.



If you would like to discuss a wills & estates matter with a Quinn & Scattini lawyer or enquire about any other similar issue, please contact us on 1800 999 LAW (1800 999 529), or email us at mail@qslaw.com.au

Wills & Estate Planning

Estate Planning means planning for your death or incapacity, by means such as a will, an Enduring Power of Attorney, a Binding Death Benefit Nomination for your superannuation, and an Advance Health Directive.

Your Will

The most important part of estate planning is making your will. Your will may be simple or complex, according to your particular circumstances. The most important thing is to make sure that your will is both **valid** and **effective**.

Making a **valid** will requires that your will be properly signed and witnessed. It also requires that you have “testamentary capacity” when you sign your will, and that you understand and approve the terms of your will.

“Testamentary capacity” is a complex legal concept. But, in essence, it means that you must have mental capacity to understand everything you need to know about making a will. It is sometimes a good idea to get a doctor’s report on the day you sign your will, to confirm your testamentary capacity. This is especially important if there is a possibility that someone might contest your will after you pass away.

Making an **effective** will is more tricky than it might seem. You might be tempted to make your own will, especially if you only intend to have a simple will. The real difficulty with this is that your will might make perfect sense to you, but when someone else reads it they might not understand it the same way you do. There also may be legal issues, of which you might not be aware, that impact on your will.

An effective will is one that accomplishes what you want it to accomplish. This requires an assessment of your wishes in light of your personal and family circumstances, and an application of the legal principles of Succession Law.

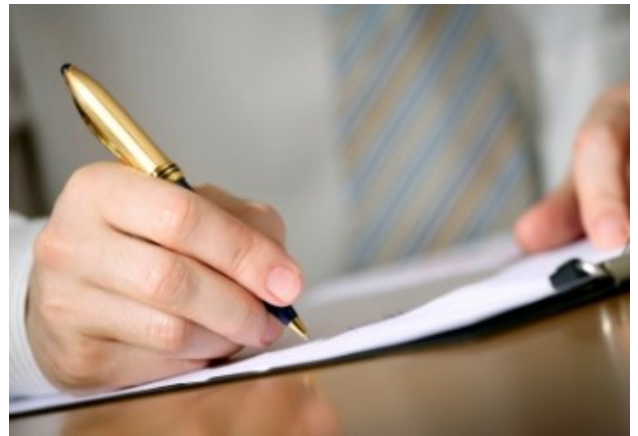
If you are house-bound or in hospital, or if you have a family member who needs an urgent will, we can make a house call or hospital visit.

Wills with Testamentary Trusts

Your will may include a “testamentary trust.” This is a type of trust that can continue, if you wish, long after you have passed away.

Testamentary Trusts are commonly used:

- To set up a tax-effective structure for your children or other beneficiaries.
- To protect your estate from the potential risk of family breakdown or other financial setbacks among your children or other beneficiaries.
- To provide for disabled children, or beneficiaries with special needs.



Mutual Wills

You can change your will at any time, while you retain the mental capacity to do so. Sometimes it is desirable to make an agreement (usually with a spouse) that a will is not to be changed without someone else's (your spouse's) consent. For example, if you and your spouse each have children from a previous marriage, you might want to leave your estates to each other, with a condition that all of your children and your spouse's children share equally when you have **both** passed on. But if you leave everything to your spouse in your will, he/she is then free to make a new will leaving everything to his/her children alone (or to his/her new spouse). “Mutual Wills” are one method of ensuring that your estate will go where you want it to go, under your spouse's will as well as under your own will.

Mutual Wills require the making of two wills, as well as a separate contract that says you both will not change the wills.



Enduring Power of Attorney (“EPA”)

An important part of your estate planning is preparing for the possibility that you may become incapacitated. This means preparing an Enduring Power of Attorney.

Your EPA can apply immediately if you want it to. But most people choose to make an EPA that will come into effect if they become incapable of managing their own affairs.

An EPA appoints one or more people to act on your behalf. Your “attorney” is the person you appoint to manage your affairs under your EPA. Your EPA can also give specific instructions, or specify limitations on how your attorney is to act on your behalf.

Business Succession Planning

If you have your own business, your estate plan should include business succession planning. Business succession planning involves making sure that your business is able to carry on without you. This can involve, for example, taking out insurance, and, if you have partners or co-shareholders, entering into a Buy/Sell Agreement or a Shareholders Agreement.

Advance Health Directive (“AHD”)

The best way to explain an Advance Health Directive is to compare it to an Enduring Power of Attorney (“EPA”). An EPA gives someone power to make decisions on your behalf; whereas an AHD tells them what decisions to make.

Although an EPA may give someone power to make financial, personal or health decisions on your behalf, an AHD relates only to health decisions.

You must discuss your AHD with your doctor, as well as having it properly prepared and witnessed.

Superannuation

When you pass away, your superannuation is paid out as “death benefits.” This will include any life insurance you might have within your superannuation. The basic rule with your superannuation is that the trustee of the super fund will determine to whom the death benefits will be paid (subject to certain limited categories of potential recipients).

Some super funds allow you to make a “death benefit nomination” directing the fund trustee about who you want to receive the death benefits, but it is still up to the trustee to decide whether or not to comply with your direction. Some (but not all) super funds allow you to make a “**binding** death benefit nomination”) (“BDBN”) that binds the trustee to pay the death benefits in accordance with your directions.

A BDBN is as important as a will, and should be professionally prepared, even if the super fund has a particular form that must be used for the BDBN.

If you have a self-managed super fund (“SMSF”), you can ensure that the rules of the fund allow you to make a BDBN.

We can assist you with establishing and managing a SMSF.



Administering a Deceased Estate

When someone passes away, their assets and liabilities comprise their estate. The process of dealing with the estate is called estate administration or estate management. The person who has the responsibility of managing the estate is called either the “executor,” “administrator” or “personal representative” of the deceased person. For simplicity, we will here refer to that person as the executor.

The executor’s job is to collect the assets of the deceased, pay debts, and distribute the estate. The executor must distribute the estate to the beneficiaries named in the will, subject to the laws of succession. If there is no will, the executor must distribute the estate to the beneficiaries specified in the “intestacy rules.”

Probate and Letters of Administration

“Probate” does not have anything to do with taxes. “Probate Duties” were abolished in Queensland many years ago. Nowadays, the usual expenses associated with Probate are the court filing fee, advertising costs and legal fees. No taxes as such.

To put it simply, Probate is a document issued by the Supreme Court. It contains the court’s official seal, so that it is accepted as your authority to deal with the estate.

To obtain Probate, you must prove to the court that:

1. The person named in the will is deceased;
2. The will is in fact the last and valid will of the deceased person; and
3. You are in fact the executor named in the will.

This is proven by affidavits (sworn statements) verifying these details. If there are any conditions attached to your appointment as executor, the fulfillment of those conditions must also be proven to the court.

It is not always necessary to obtain Probate. However, if you administer an estate in accordance with a will, and that will is later found to be not valid or not the last will of the deceased, then you will be personally liable to the true beneficiaries for the value wrongly distributed. You will **not** be liable in this way if you have obtained Probate of the will.

You will need to get Probate if an asset-holder (such as a bank) insists on it. They will usually do this if the estate asset they hold is very substantial (e.g. a bank account over the Probate threshold set by the particular bank – usually about \$50,000).

It usually takes about 3 months to get Probate. This includes placing advertisements (you will see them in the Public Notices section of a newspaper), waiting for the 14-day public notice period to expire, preparing the necessary documents and filing them in the Supreme Court, and then waiting for the court to assess the documents and issue the Probate document.

In some circumstances (for example, if there is no will), the court will issue “Letters of Administration” instead of Probate. The effect of Letters of Administration is the same as Probate.

Managing a Trust

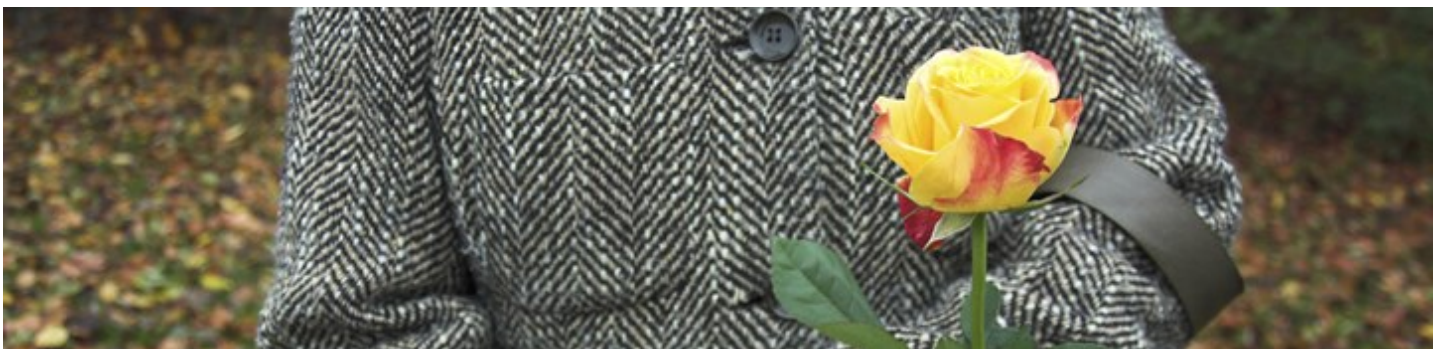
You will likely be involved in a trust at some time in your life. Perhaps through a family trust, either as trustee or beneficiary. Or perhaps as executor or beneficiary of a will, as deceased estates involve particular duties of trusteeship. And increasing numbers of people are setting up self-managed superannuation funds, which are also a special type of trust.

The implementation of a trust requires important decisions to be made. One important decision is to determine who will manage the trust, either as trustee of a trust or as executor of your will. These are not decisions to be taken lightly.

The duties of a trustee are many and complex, such as: Avoiding conflicts of interest and conflicts of duties, the duty to provide information and accounts to beneficiaries, the duty to invest properly, the duty to distribute the trust funds in accordance with the trust deed or the will and according to law. Failure to act appropriately as trustee can result in costly litigation with the beneficiaries. Trustees who fail in their duties can be sued by the beneficiaries, or can be removed by the Supreme Court.

In some situations the beneficiaries can require the trustee to terminate the trust and transfer to the beneficiaries the funds or property that was held by the trust. A trustee who does not make the correct decision will be exposed to personal liability for any losses suffered by the entitled beneficiaries.

Quinn & Scattini provides professional trustee services. Our experts can be appointed as trustees of your trust (except a SMSF) or executors of your will. Or you can turn to us for advice in the managing of a trust or deceased estate. If you have been appointed executor of a will, we can manage the estate on your behalf, or we can advise you in carrying out your duties.



Will/Estate Disputes

No Win, No Fee

Quinn & Scattini represent clients in estate disputes on a “no win, no fee” basis in approved cases.

3 Main Types of Estate Disputes

There are 3 main types of disputes involving deceased estates:

1. Challenging the validity of a will.
2. Claiming further provision from an estate.
3. Challenging a transaction.

1 Challenging the Validity of a Will

If the deceased person did not have mental capacity (“testamentary capacity”) at the time they made their will, the court may declare the will to be invalid. Medical and other evidence will be needed to establish the lack of capacity.

If the deceased person was unduly influenced, or placed under duress, to make their will in a particular way (e.g. to make a gift to a particular person), the court may declare the will to be invalid.


If the will is declared invalid, then the previous will becomes the operative will. If there was no previous will (or if a previous will was also invalid) then the person is deemed to have no will, and in that event the estate will be distributed under the laws of intestacy.

Quinn & Scattini can apply to the court on your behalf to challenge the validity of a will, or we can act on your behalf to defend such an application to the court.

2 Claiming Further Provision from an Estate

This is commonly referred to as a “Family Provision” claim. You may hear lawyers refer to this type of claim as an “FPA” (meaning “Family Provision Application”) or a “TFM” (meaning “Testator’s Family Maintenance”).

If the deceased person had a spouse (including de facto), child/ren (including adult child/ren and step-child/ren) or certain other categories of dependant/s, then the law says that the deceased person had a duty to provide for them in his/her will in the manner of a “prudent and caring” or “just and wise” spouse/parent/provider. If the distribution under the will does not adequately provide for their needs for “maintenance and support,” then they are entitled to take court action to seek further provision from the estate. The court can then override the will and make an order that they receive further provision from the estate.



If the deceased did not leave a valid will, the same principles apply if the laws of intestacy do not result in adequate provision being made for the maintenance and support of spouse, child/ren or dependant/s.

What is “adequate provision” depends on the circumstances of each case. There is no mathematical formula or minimum amount that applies to all cases. The amount of provision that the court may award the claimant will depend on many factors, such as:

- The size of the estate.
- The number and type of claims against the estate.
- The financial position of each of the claimants and beneficiaries.
- Whether each of the claimants and beneficiaries had a good relationship with the deceased; and if not, the reasons for the strained relationship.

The following time limitations apply in Queensland:

- Within 6 months after the date of death, the claimant must notify the executor that he/she intends to claim further provision from the estate.
- Within 9 months after the date of death, the claimant must commence court action to claim further provision.

These time limits can be extended by the court in exceptional circumstances. However, it is too late to claim further provision if the estate has already been fully distributed.

If you are the executor/administrator of the estate, we can represent you to respond to a claim for further provision. All the legal fees will ordinarily be paid by the estate.

3 Challenging a Transaction

Sometimes a person may be unduly influenced into a transaction, such as giving away property.

Improper transactions can in some circumstances be reversed by the court, even after the person has passed away.

If the deceased person was unduly influenced, or placed under duress, to transfer property before they passed away, (e.g. if they transferred real estate as a result of duress or undue influence), the court may declare that transfer to be void. In that event, the property will return to the estate.

Quinn & Scattini can apply to the court on your behalf to challenge the validity of a transfer of property, or we can act on your behalf to defend such a claim.

FAMILY LAW & DE FACTO LAW

**WHY YOU MUST URGENTLY REVIEW
YOUR WILL & ESTATE PLANNING!**

None of us know when our “time will be up.” We hope we will be around for a long time. But the reality is that accidents and illnesses happen every day. And even though we don’t like to think about it, deep down we know that a tragedy could happen to anyone at any time.

With proper preparation, your affairs can be left the way you want them. **Without proper preparation**, your hard-earned assets could be dealt with as in the following situation, or worse.



The following is a true story.

A married couple separated. They owned their house in equal shares. They each saw their own solicitors and were negotiating a property settlement, but had not reached agreement when one of them was suddenly diagnosed with cancer and passed away after a short battle.

The deceased spouse had spoken to a solicitor about making a Will, but died before signing it.

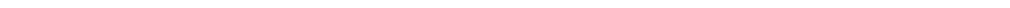
The surviving spouse remained the owner of half of the house. **And because the deceased spouse died without a Will, the surviving spouse was also entitled to the lion’s share of the deceased’s estate, even though they were separated.**

To avoid this risk, you need to make a valid Will.

The couple had two adult children. The children could see that the outcome was not fair, so they both contested it through court. The court proceedings resulted in the children receiving a fairer share of the deceased estate, **but at a cost of many tens of thousands of dollars.**

But it could have been even worse. If this couple had owned their house as “joint tenants” (as many couples do) instead of as “tenants in common,” the surviving spouse would have automatically received ownership of the **entire** house upon death of the other spouse.

You may need to take steps to ensure that any property you own together with your spouse is held as “tenants in common.” Otherwise, if you die, the ENTIRE property will automatically pass to your spouse.



To have our Wills & Estates Team contact you to arrange a consultation for your Will & Estate Planning, please fill in the form below and return it to our receptionist, or send it to us by fax, email or post.

Your Details:

Name:

Address:

Phone number/s:

Email:

Your Will & Estate Planning may be able to be done on a deferred-fee basis. Conditions apply.





Delivering Solutions Since 1974

Brisbane

Level 2, 102 Adelaide Street
Brisbane
Tel (07) 3222 8222
Fax (07) 3221 5350

Gold Coast

Level 1, 2406 Gold Coast Highway
Mermaid Beach
Tel (07) 5554 6700
Fax (07) 5554 6900

Beenleigh

99 George Street
Beenleigh
Tel (07) 3807 7688
Fax (07) 3807 7514

Ipswich

55 Limestone Street
Ipswich
Tel (07) 3202 3177
Fax (07) 3202 3695

Caboolture

1 King Street
Caboolture
Tel (07) 5499 3622
Fax (07) 5495 6582

Cleveland

141 Shore Street West
Cleveland
Tel (07) 3821 2766
Fax (07) 3821 2083

Jimboomba

Shop 1, 689 Cusack Lane
Jimboomba
Tel (07) 5540 3940
Fax (07) 5540 3233

1800 999 529

www.qslaw.com.au

mail@qslaw.com.au

**Individual liability limited by a scheme approved under professional standards legislation.
This is general advice only. You should seek specific advice for your particular circumstances.**