

RMO

RYAN  
MURDOCH  
O'REGAN  
Lawyers

# Wills & Estates



Specialist services. Here for you.

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## About Ryan Murdoch O'Regan Lawyers

We are a general law practice which is organised into teams of specialised experts in each of our areas of law.

Our practice area teams are committed to focussing on their area of law to ensure you always have the expertise that you need.

And, unlike some other firms – who focus on only one area of law – we can offer expert solutions for all legal areas, without the need for you to search around.

As a client you can have comfort that irrespective of what problem you may encounter in whatever area of law, our teams in all our practice areas will be able to work in tandem to offer any other specialist solutions you might require – utilising the history we already know about you and / or your business.

*"Often, we meet our clients for the first time at the most stressful period in their life. Together we work to solve their personal and / or business problem, leading to a lifetime relationship."*



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# Wills & Estates: An Overview



Ryan Murdoch O'Regan's Wills & Estates team can assist you with:

## **Wills & Estate Planning**

- Wills
- Testamentary Trusts
- Enduring Power of Attorney ("**EPA**")
- House Calls & Hospital Visits to Make a Will or EPA
- Will Information Pack

## **Probate & Administration**

- Probate
- Estate Administration
- Letters of Administration on Intestacy
- Advising Executors
- Administering a Deceased Estate
- Acting as Executors, Administrators or Trustees
- Guardianship & Administration Applications

## **Will/Estate Disputes & Litigation**

- Contesting a Will
- Defending a Will
- Claiming Further Provision from an Estate
- Defending a Claim for Further Provision
- "No Win, No Fee" or Deferred Fees, in Approved Cases

## **The plan we will develop for you:**

1. Takes into account your individual circumstances – **we listen!**

2. Draws on our experience – **we are the experts!**

3. Helps you achieve the best possible outcome – **you win!**

***"Invest in the best. RMO Lawyers"***

# Why you SHOULD have a Will



## The Importance of Estate Planning

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 Make For Not Making A Will (& 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.

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.

## Wills

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.

# Wills & Estate Planning (continued)



## **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**

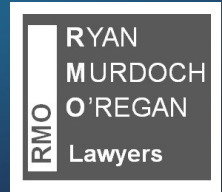
If you have your own business, your estate plan should include business succession planning. Business succession planning involves making sure that your business is able to carry on without you.

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.





# Wills & Estate Planning (continued)



## **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.

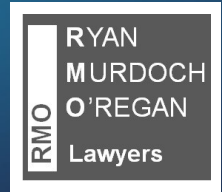
A BDBN is as important as a will, and should be professionally prepared, even if the super fund has a particular form that must be used for the BDBN.

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.



# Estate/Trust Management



## 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 & 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:

- The person named in the will is deceased,
- The will is in fact the last and valid will of the deceased person, and
- 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 fulfilment of those conditions must also be proven to the court.

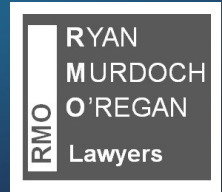
It is not always necessary to obtain Probate. However, if you administer an estate in accordance with a will, and that will is later found to be not valid or not the last will of the deceased, then you will be personally liable to the true beneficiaries for the value wrongly distributed. You will not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



# Estate/Trust Management (continued)



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, and
- 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.

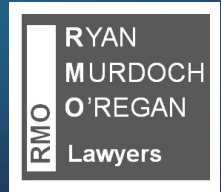
A trustee who does not make the correct decision will be exposed to personal liability for any losses suffered by the entitled beneficiaries.

Ryan Murdoch O'Regan 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

Ryan Murdoch O'Regan 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:

- Challenging the validity of a will.
- Claiming further provision from an estate.
- 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.

Ryan Murdoch O'Regan 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.

# Will/Estate Disputes (continued)



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.

Ryan Murdoch O'Regan 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.

Unique legal issues face Australia's older citizens, unlike any generation that preceded them. It is also one of the fastest developing and growing areas of law facing nations the world over.

Ryan Murdoch O'Regan have a number of lawyers with the depth of experience and compassion necessary to provide assistance in this area where it is essential that lawyers deliver highly customised advice to older clients.

## What Does Elder Law In Practice Cover?

- Aged-care facilities, accommodation bonds and disputes with administrators.
- Granny flats, relocatable homes and downsizing accommodation.
- Financial and physical elder abuse, including undue influence in property transfers.
- Substitute decision-making; appointment and removal of attorneys and agents.
- Queensland Civil and Administrative Tribunal ("**QCAT**") hearings, including the need to properly test and call government officials to account.
- Diminished or diminishing capacity.
- Social security pensions.
- Health and end-of-life legal decision-making processes.
- Wills and succession to family property and businesses.
- Superannuation and trusts.
- Family Law issues.
- Discrimination and mistreatment of elderly persons.
- Funeral plans, funeral plots, and disputes relating to burial or cremation.
- Redemption of life insurance policies and commuting pensions.
- Foreign pensions, foreign domicile and migration issues (excluding migration agency).
- International travel and domicile, and illness or accident abroad.

No matter what your elder law problem, we have the right people to assist.



# Our Proven Experience



To further demonstrate our expertise in these complex areas of law, we have outlined an example of our proven experience.

## Family Provision Application Comes To Fruition

**Case Reference:** T160944

**The Situation:** \*David was diagnosed with cancer in 2015. Shortly after the diagnosis, he prepared a new will naming his son \*Peter as the main beneficiary. In early 2016 David was twice admitted to hospital. During his second hospital admission, a lawyer attended at the hospital and took instructions from David for a new will. The changes included a reduced benefit for Peter.

The lawyer returned to her office that afternoon and prepared the draft will. The lawyer then received a phone call advising that David's condition had deteriorated and that he would need to remain in hospital. The lawyer then emailed the draft will late that afternoon to David's brother for David to review. David's brother read out the new will to David. Despite David's condition deteriorating, David's brother believed that David understood what was being said to him.

When the lawyer arrived at the hospital to have David sign the new will, David was unable to hold the pen and had difficulty keeping his eyes open. The lawyer was then advised that David had been given morphine after his condition deteriorated. The document was never signed. After David passed away, the executors named in the new draft document applied to the court for the document to be approved as a will. On Peter's behalf, we argued that the document drafted while David was in hospital was not a valid will.

**The Result:** Multiple affidavits were presented to the court during the trial. The Supreme Court gave judgment in our client's favour.

The judge concluded that David did not have testamentary capacity at the time of giving instructions to the lawyer, nor did he comprehend what was being said when his brother read out the newly drafted will shortly before he passed away, despite those who were there at the time arguing to the contrary.

Our client's costs were paid by the estate.

*\*Names have been changed for confidentiality. As every case is different, the cases reported here cannot be taken as an indication of a similar outcome being likely in your case, and these reports are not to be taken as legal advice about your particular situation.*





# What Our Clients Had To Say



*"I don't normally recommend businesses but RMO Lawyers, "Forget the rest, come straight to the best". They guided me through an Estate case, he is very forthright and I learned early in the piece, follow his instructions and you are on a winner. He worked for me, not for an outcome. Come the main day, wow, do these guys know their stuff and the opposite legal crew pale in comparison. I cannot recommend these guys highly enough. I am happy to give me personal recommendations if you want to contact me. They went above-and-beyond and finally got me more than I had asked for, as I said earlier "Forget The Rest, Go Straight To The Best". JB"*

*"I really appreciate that you advised us how much time each matter we needed help on may take and that they helped keep me on task so I did not run overtime. It made me feel that my costs were not as important as their fees. We will certainly be back for all other legal advice of or issues. Thank you. VH"*

*"I recently updated my will with the help of RMO Lawyers. The process was simple, efficient and met all my requirements with the minimum of fuss. I would recommend RMO Lawyers to anyone seeking a similar service. JH"*

*"We wish to thank for all your assistance and help (and shoulder to cry on) during this period in our lives. ID"*

*"RMO Lawyers did an excellent job and helped us every step of the way with our Mum's estate as I've never been to a solicitor before. MS"*

*"After a rocky start with another law firm, I engaged the services of RMO Lawyers to administer our late mother's estate. RMO Lawyers were absolutely wonderful in handling all aspects of the matter resulting in a satisfactory conclusion. Once I supplied all the relevant information and documentation they processed the matter quietly and diligently to its conclusion. The fees quoted and charged were very reasonable and without any surprises at the end. I would certainly recommend the firm for any legal work. Thank you and well done team! NC"*

*"The service was first rate and professional from the beginning to the end. I cannot speak highly enough of their service, actions and attitude. LW"*

*"Very happy with service provided. DP"*





# 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.

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## 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.**

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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: .....

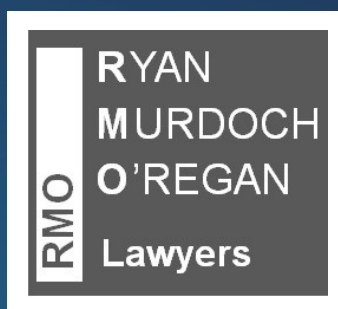
Address: .....

Phone number/s: .....

Email: .....

**Your Will & Estate Planning may be able to be done on a deferred-fee basis.** Conditions apply.  
[\*\*Receptionist: Please pass this completed form to the Wills & Estates Team\*\*]





# 1800 999 LAW

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Fax (07) 3821 2083

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### **Jimboomba**

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

*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.*