
MAKING A WILL

Why should you make a will?

A will allows you to say how your property is to be distributed when you die. It can also make appropriate provision for the care of your young children or other dependents.

Making a will is also an opportunity to structure your assets in a way that can assist your family after your death. For example, restructuring asset ownership in conjunction with an appropriately prepared will may assist your partner to become eligible for a rest home subsidy, or may provide relationship property protection and so ensure your assets pass to your own children and not your surviving spouse's new partner or his/her children.

If you don't have a will, what happens to your property?

If you don't have a will, the Administration Act determines how your property is distributed. It does not all go automatically to your spouse or partner. Rather, it is divided between various relatives in certain proportions, for example, quite a large proportion may go to your children rather than your partner. In our experience most people would not choose to divide their estate up in the way determined by the Act.

If you don't have a will, what happens to your children?

If you make a will you can name people who will act as guardians for your children. A guardian is responsible for decisions regarding custody, education and religion. Guardians do not necessarily have day to day care of your children, but they do decide who will have that, ensure they are properly looked after and make all other major decisions for them.

If you don't have a will someone (whoever feels they should) applies to the Court for a guardian to be appointed. That can lead to conflict if several people in a family believe they are best placed to care for your children. It is also expensive and time consuming.

What should or can you put in your will?

You should appoint at least one and preferably two or more **executors** and **trustees**. These are the people entrusted with carrying out your wishes after you die, so they should be people you trust implicitly. You may want to consider appointing an independent person such as your lawyer or accountant to act as a trustee. This can be especially useful if there is a difficult family situation.

You can say if you want to be **buried** or **cremated**, and can specify funeral arrangements.

You can make **gifts** of certain property or money to specific people or charities. This provides certainty and can be very important in delicate family situations.

You can write off debts to a family trust or leave assets in trust for special purposes, such as an education fund for grandchildren or nieces and nephews.

The remainder of your property after your gifts are made is called the **residue**. You can determine how you would like this divided. For instance, you may want this to go to your partner, or to be shared equally between your children, possibly when they reach a specific age.

While you must provide adequately for your children, you do not have to treat them equally and there may be very good reasons to provide for a child who has special needs. However you should seek legal advice if you want to do that as your will can be challenged if you haven't met the **Family Protection Act** requirements to provide for your dependants.

If your **children are under 20** when you die then generally any funds left to them are held in trust to be applied for their care and maintenance. When they reach 20, or any higher age you specify, the funds are paid to them.

You can provide for **substitution of grandchildren** so that if one of your children dies before you then their children take their share.

You can provide for what happens if you and your partner and children all die together. Often you and your partner may agree to divide your estate equally and leave half to each family, perhaps just siblings, or possibly including your parents.

How often should you review your will?

We recommend that you review your will every five years or when your personal circumstances change, especially if you:

- end a relationship or enter a new one.
- Inherit money or set up a new business.

What effect does marriage or separation have on your will?

Marriage will revoke an earlier will unless it includes a statement that it is made in contemplation of marriage to the person you in fact marry. If you do include that statement you can also make the will conditional or not conditional on the marriage taking place.

Separation does not automatically exclude your previous partner from taking under your will. Not everyone wants to exclude an ex-partner and separation can complicate things for him/her. If you separate it is very important to review your will to ensure it reflects what you want done.

Can I make my own will?

It is important to get specialised legal advice when making a will to ensure that your wishes can be carried out and also to minimise the risk of your will being challenged.

The Wills Act, the Law Reform (Testamentary Promises) Act, the Family Protection Act and the Property (Relationships) Act all need to be considered when making your will. The formalities for signing a will are also very specific and are not very flexible. Any issues of mental capacity also need to be very carefully managed.

The difficulty with DIY wills is that problems are not likely to be found until after you die, and by then it is too late to correct them easily or cheaply and may be impossible. That is good for litigators, but not for you, your family or us as your personal legal advisers.

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