

Making

A Will of Your Own

A Simple Guide



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If you need to obtain advice on any of the matters discussed in this booklet you should consult a solicitor or one of the organisations named in page 24 of the booklet.

Making a Will is one of the most important legal and financial steps we ever take, yet many people still hesitate at the idea of making a Will. Some people may consider even the thought of creating a Will too difficult, too daunting or too expensive.

Contrary to these beliefs, creating a Will of your own and understanding your rights can actually bring peace of mind to both you and your family.

A Will gives you the opportunity to decide what happens to your assets and how your loved ones are looked after when you die.

Taking the time to understand the basics – as outlined here in *Making A Will of Your Own* – can help to reduce the financial and emotional costs and stresses of not having a Will.

You're never too young to create a Will and a Will can always be altered or re-written as your relationships and life circumstances change.

Making A Will of Your Own provides you with a guide to taking control of your assets and finding peace of mind for yourself and your loved ones.



The importance of making a Will

Most people during their lifetime will have a family and acquire assets. Because these things are important to us, having the choice to decide how our loved ones will be looked after, or what happens to our assets after we die, is invaluable. Creating a Will allows us to formulate our choices legally.

Having a Will is a responsible move because it is the only way you can tell others how you want your assets distributed after your death. It also means you can name a guardian for your children if you have any, and provide for people who may depend on you financially.

The people who you name in your Will to inherit your assets are called your beneficiaries.



What happens if I die without a Will?

If you die without having made a Will it means you are intestate. The government will decide what happens to your assets. To do this they use a standard formula to distribute your wealth. This usually takes longer than if you had a valid Will prepared and may cost more as well.

The formula used to decide how to distribute your assets is governed by a particular Act in each state. In NSW the formula is found in the *Wills, Probate and Administration Act*. In Queensland it is outlined in the *Succession Act* and in WA, in the *Administration Act*.

Although there may be some minor differences in the formula for each state, the following generally applies:

- i) The surviving spouse and children are always taken care of first;
- ii) If there are no children then the partner inherits everything. If there are children and no partner, the children will inherit equally;
- iii) If there are no children or partner, a search is made to identify the next of kin;
- iv) If no next of kin can be found the estate may go to the government.

Intestate rules can get complicated in regards to ownership of the family home where there is a de facto relationship involved. In these instances, further advice should be sought from legal advice centres or your solicitor.

Case study

Margaret (67) lived in a de facto relationship with her partner Cecil (72) who died without leaving a Will. His three adult children from his former marriage assumed his home and bank accounts would go directly to them. The law relating to de facto relationships of more than two years, meant that Margaret was entitled to the family home and a share of the remaining estate with his children. The children were shocked and not happy.

The necessary application for Letters of Administration was made unpleasant and very complicated by the fraught relations between the parties. "I felt it degrading to have to fight for my rights and prove my relationship with my partner when I should have been grieving," Margaret said.

Even if you do not have significant assets now, having a Will gives you - rather than the government - the option to decide what happens to what you do have. Your affairs will be arranged as you would want them to be.

Fact: Anything in writing is better than nothing at all but it is always better to have a proper Will compiled.



A valid Will must contain the following:

1. The formal statement including the name and address of the person making the Will. The Will maker is known as the testator.
2. A statement that rules out any Wills you may have made previously. This is known as the revocation clause.
3. The appointment of a supervisor (or a body of supervisors) to carry out your wishes (known as the executor).
4. A statement describing what you are giving to your beneficiaries, that is, the people who will inherit your assets.
5. The date of the Will.
6. The formal ending to the Will where the Will maker and two witnesses sign. This is known as the attestation clause.

Fact: Wills can be written in any language but a certified translation will be required when the Will maker dies.



An example of a Will

The following example is a Will that covers the appointment of an executor, the distribution of gifts to one person, providing for children and appointing a guardian.

This is the last Will and testament of William Doe of 16 Wideweb Street, Dotcom Valley in the State of New South Wales.

I revoke all former Wills and Testamentary dispositions made by me and declare this to be my last Will.

1. I appoint Fred Executor of 235 Cyber Crescent, Webville to be Executor of my Will and Trustee of my estate. If my Trustee is unable or unwilling to act, or dies before my estate is distributed, I appoint Nadine Executor to be Executor of my Will and Trustee of my estate.
2. Subject to the payment of my debts, funeral and testamentary expenses and all probate and other duties payable in respect of my estate or in consequence of my death I give everything I own to my wife, Alannah Doe.
3. But if the said Alannah Doe fails to survive me, I give the balance of my estate to my Trustee upon trust for such of my children who survive me and attain the age of eighteen years absolutely and if more than one in equal shares.
 - (a) I empower my Trustee to apply for the maintenance education and benefit of any minor beneficiary as my Trustee in their absolute discretion shall think fit the whole or any part of the capital or the income or both of that part of my estate to which that beneficiary is entitled or may in the future be entitled.
 - (b) I give my Trustee a discretionary power of sale over the said estate.
4. I appoint Greg Online as the Guardian of my children until they attain the age of eighteen years.

In witness where of I have here unto set my hand this day of two thousand and one.

Signed by the said Testator
(in our presence and witnessed)

by us in the presence of
(name of witnesses and each other)

Signature of 1st witness
Signature of 2nd witness

Avoid common mistakes when preparing your Will by...

- Keeping it up to date.
- Making sure its location is known.
- Complying with the basic form of a Will.
- Making sure that if you want to omit someone from your Will, this is clearly stated.
- Don't ask beneficiaries or their partners to witness your Will – if you do, they won't be entitled to any part of your estate!

Fact: The term 'sister' or 'brother' generally includes half brothers and sisters but if there is no Will, then half siblings will only inherit if there are no full sisters or brothers of the deceased.



Challenging a Will

A legal Will must be signed and can be typed, hand written or a bit of both. Instructions should be written carefully and considerately because they can be challenged after your death by family members who feel they have been treated unfairly in your Will.

You can reduce the chances of this happening by providing fairly for those who depend on you financially and making sure your Will is clear and concise.

It is important to remember that any challenge to your Will could cost your estate thousands of dollars in legal fees.



It's time to change your Will if...

- It is very old and your assets have changed.
- There are new members in your family.
- You have married or divorced. (The laws affecting Wills and divorce are slightly different in different states. For example, in Victoria, a divorce will automatically revoke any gift you may have left your former spouse. Gifts to other beneficiaries will remain the same though.)
- You have entered a new relationship.
- Tax laws change.
- You want to change details of an existing Will.

There are two main ways you can change your Will. You can either make a new Will, that will automatically revoke your previous Will or you can make a codicil to your current Will. A codicil is a legal addition to a Will.

Codicils can be complicated so it might be an idea to get further advice before making additions. Any codicils you make must be signed and witnessed in the same way that the Will is. Generally speaking it is better to make a new Will.



When young people die it is usually without a Will and in tragic circumstances. If there is any property or death benefits, it is up to the next of kin to make an application for Letters of Administration.

Letters of Administration are the authority granted by the court to a person allowing them to distribute the assets of an intestate person. Letters of Administration will allow the next of kin to distribute any superannuation or death benefits the young person may have been entitled to.

Case study...

Teresa suddenly died at the age of 20. She had no partner and no children. She had no Will and her family thought she had no estate. Unknown to the family was the fact that Teresa's employer had taken out a death benefit for her as part of her superannuation that upon her death was worth \$150,000. This is common practice.

Although Teresa had clearly nominated her mother as the beneficiary of the benefit on the insurance form, her mother was not a 'dependent' and under the rules of that particular insurance company the monies could only be paid into Teresa's estate which, under the rules of intestacy in NSW, had to be divided equally between Teresa's parents.

Despite the fact that Teresa's parents had not seen or spoken to each other for more than 15 years they had to undertake an application for Letters of Administration. It was a long drawn out process that a valid Will could have prevented.

Interestingly, had Teresa died in Western Australia, the first \$78,000 would have gone to her parents with the remaining \$72,000 divided equally between her brothers and sisters.

An Executor is the person nominated by you in your Will to carry out the instructions of that Will. Before you nominate your Executor, you should talk to them and let them know your intentions. Make sure they are comfortable with the idea as it is a big responsibility to take on.

If your estate is simple, your Executor will have an easy job. However, if there is real estate or shares in your name, bank accounts with balances in excess of \$15,000 (this figure will vary between financial institutions), your Executor will need to apply for a grant of Probate from the Supreme Court. Probate is not a complicated process and does not need to cost a lot of money. It is not, as many people assume, the old Death Duties tax.

When you are thinking about who you might want as your Executor, you should keep a few things in mind: choose someone who will probably survive you and who will have the time and concern to take care of your affairs. You should appoint a substitute Executor in your Will in case there are unforeseen problems with your first choice.

Often an Executor is also a beneficiary in the Will. Still, if you would like your Executor to be rewarded for their time and effort

in carrying out their affairs, you can arrange this in your Will.

What does an Executor do?

- Deals with third parties to make sure your affairs are handled the way you would want them to be, for example, the government and insurance companies.
- Prepares an inventory and valuation of your assets.
- Pays off any remaining debts of your estate (which may involve selling some assets). This is done before distribution of the estate to beneficiaries.
- Prepares your final tax return.
- Obtains court approval, that is, Probate. The Executor can do this personally as well as a lawyer or a Trustee company.

Joint Executors

If you like you can appoint joint Executors to make joint decisions and applications. This is not a good idea though if you think there might be friction between the two of them.

Appointing minors as Executors

This can only be done if that person will more than likely be over 18 when you die. If you choose a minor, it is also good to choose someone else as an alternative Executor in case that person is not 18 when you die.



When does the role of the Executor merge into that of the Trustee?

Because an Executor may be looking after the assets of the deceased for quite some time before they are passed on to the beneficiary, their role sometimes resembles that of a Trustee. A Trustee is basically a person who holds property for the benefit of another person. For example, if property is left to a child under a Will, the trustee might look after it until the child becomes an adult.

If you think that organising your estate might become complicated, it might be a good idea to appoint a professional Trustee; that way the Executor only has to distribute the gifts and not have to hold them for the beneficiary.

Can I appoint a professional Executor as well?

Yes. Executors can be professionals, family or close friends. Professional Executors will charge your estate for the work that they do. If you like you can hire a Trustee company or a solicitor. Like all businesses and services, different companies and solicitors will charge differently. It is best to do some research and find the service that best suits your needs.

Not all people will need a Trustee. Whether or not you do generally depends on the size and value of your estate.

Fact: Many people choose their partner as their Executor especially if they are the main beneficiary.



Your Will allows you to provide for all your children, whether they are from a previous marriage or a defacto relationship.

You can also choose a guardian for your children in the event that the other parent dies soon after you (for example, if both parents are involved in a motor accident).

A guardian is the person you name in your Will to look after your children after you die.

Choosing a guardian

Choosing a guardian is a big decision. Becoming someone's guardian is a big responsibility and can change someone's life dramatically, so it's best to consult the person you want to nominate as guardian and obtain their consent.

You can also arrange financial assistance for your child/children independent of their guardian.

A surviving parent will always remain the guardian of children under 18.

Looking after children with disabilities

Children with a disability can also be provided for in the terms of your Will. You can arrange it so they receive ongoing care and an income.

You can choose a guardian and a financial manager for them as well.

In the event of non-appointment, the Guardianship and Administration Board can appoint guardians and financial managers for people with disabilities. When choosing a guardian they usually allow any remaining family to informally appoint the guardian.

In the event that there is no family willing to become guardian and no financial manager has been appointed, the board can appoint a Public Guardian, (also known as a plenary guardian) and arrange for their finances to be supervised by the Protective Commissioner.

When making decisions about disabled dependents in your Will, research your options and your selection of guardians and financial managers thoroughly. Get the best advice available so you know you are making the best decision.

Fact: Adopted children are treated as biological children for the purpose of inheritance.

There are a few things you can do to make it easier for your beneficiaries to claim the gifts you leave them after you die.

Joint accounts and putting property in the names of both you and your spouse will mean that the survivor has immediate access to funds and property in the event of your death.

If you do keep accounts in separate names, financial institutions will usually release up to \$15,000 in funds on the presentation of the Will and a death certificate.

Another way to avoid complications and the red tape is to plan your estate so that your partner will not need to apply for Probate (which can be a time consuming exercise) after your death.

Superannuation and your will

As we saw in the case study, superannuation and death benefits are often a forgotten asset of the deceased. Upon joining a super fund we are asked to nominate a person for the money to go to after we die. If the person nominated is not a dependent, Probate or Letters of Administration will be required before the money will be released.

If you have nominated someone in your Will to receive your superannuation after you die who isn't a dependent, there is

no guarantee that your wish will be fulfilled. Although the law defining who can receive your super is pretty broad, there are some limitations. Ultimately it is up to the discretion of the trustee of your super fund. The Superannuation Claims Tribunal may be called in to resolve any disputes that may arise.

Fact: The Superannuation Claims Tribunal can be contacted on 13 14 34.

De facto partners and your Will

The definition of a de facto spouse includes a person who is the sole partner of the deceased and was not a partner in another de facto relationship. This includes same sex partners. Basically, de factos have the same rights as a married spouse.

To avoid unnecessary heartache, mention your de facto in your Will if you want their benefit to pass to them smoothly.

If they are not mentioned in your Will, it is easier for de factos to make claims against your estate these days under the Act in each state which governs inheritance. In Queensland it is the *Succession Act*, in South Australia it is the *Family*

Inheritance Act and in NSW, the *Family Provision Act*.

If you have both a spouse and a de facto upon your death, whether the de facto will inherit depends on the length of the relationship and whether there are children from the de facto relationship.

What you leave in your Will is up to you. You can leave assets such as cars, houses, shares, money as well as specific items like a violin or painting. Be specific when listing items so they can be easily identified.

Who you leave your gifts to is also up to you. You might even want to include charities or not-for-profit organisations as beneficiaries in your Will. Who you leave your gifts to is a very important decision so think about it carefully. Make sure you leave enough to provide for those who depend on you financially.

Gifts to beneficiaries that might require extended attention from the Executor need careful consideration when you are putting your Will together. If using a professional Executor, don't let your estate drag on for years, getting eaten up by the Executor's fees before it is distributed to your family.

Fact: 'Gift' is the word used to describe the inheritance beneficiaries receive after having been named in someone's Will.

Gifts to your children

What you leave your children and when they are able to take their entitlement depends upon their age. If you leave assets to a person under the age of 18, they must be held in trust until that person turns 18 (or older if you like). Under-age children are usually provided for financially through a trust fund and provisions given to their guardian.

Disinheritance

Even if you are adamant that you want to disinherit a potential beneficiary, they may still be able to challenge your Will after you die. The court is obliged however to take your wishes into account when considering any challenge, so it is important that you specify and justify the disinheritance in your Will.

Case study...

Tony's grandmother left everything in her estate equally between her son and his three children. In the latter years of her life she became angry with one of her grandsons, Mark, over a small issue and left his share of the estate to his children, to be held in a trust until they turned 18.

After her death, the ramifications of her decision to disinherit her grandson were felt throughout the family. Mark was hurt and resentful as he watched his two brothers pay off their mortgages and take holidays. Tony was named Executor in the Will and as a result of his grandmother's decision, he was left with the 15 year job as trustee for Mark's children's money. To use his words "...if she only knew what trouble she had caused within the family."

The carer

Frequently a person who becomes important to a Will maker is the carer who looks after them in the last months of their life. By this stage, the Will maker might be incapable of updating the Will and the carer receives no additional recognition. The various State Acts covering inheritance include mechanisms to rectify this if the contribution by the carer is not acknowledged in the Will.

People who may be considered a carer are:

- Partner
- Child of the deceased
- Other dependents

Fact: Acts which govern inheritance also cover people who should have been considered as beneficiaries in someone's Will. Basically these acts are drawn up to assure potential beneficiaries that they will be taken care of in the Will.

Make sure your Will includes a residuary clause, that is a clause that leaves any unspecified part of your estate to somebody in particular.

If someone has 'Power of Attorney', it means they can legally act on the behalf of another person, for example, they can withdraw money out of your account on your behalf. There are general Powers of Attorney and enduring Powers of Attorney.

A general Power of Attorney covers you while you are alive and of sound mind, while an Enduring Power of Attorney covers you up until your death no matter what your mental faculties become.

You can give more than one person the Power of Attorney and upon your death, any Power of Attorney ceases.

A 'Powers of Attorney' document can be obtained from a solicitor, barrister or a clerk of petty sessions. There are also a few 'do-it-yourself Power of Attorney' kits available. The Power of Attorney Kit from Legal Kits Victoria is one example and shows you how to make all three common types of Power of Attorney:

- General (financial)
- Enduring
- Medical Treatment.

The Kit also shows you how to use Powers of Attorney, how to copy it and how to terminate it.

Fact: It is a good idea for married and de facto couples to give each other Power of Attorney.



Probate

The idea of Probate may confuse people who think that it is a complex legal matter only handled by lawyers - this isn't so.

All 'Probate' really is, is a certificate issued by the State Government's Probate Office allowing the Executor of a Will to deal with the Will maker's estate.

The Probate document is an official document issued by the Probate Division of the Supreme Court. Once the Executor has Probate, they are able to release assets or transfer them to a beneficiary.

Gaining Probate is not related to the making of a Will at all and is up to the Executor to do.

To apply for Probate is a very simple thing. There are several kits on the market designed to assist with gaining Probate, one of which is the Probate Kit from The Law Consumers Association.

Some people are under the impression that gaining Probate takes a long time and involves a lot of money. Probate is an area where you can save thousands of dollars by comparing the different costs involved in making an application with a DIY kit, a solicitor or an Executor-assist organisation.

The Probate division of the Supreme Court is very efficient and usually grants Probate within days of a **correct** application being filed.

The technical words explained

Administer/ Administration	The work performed by an Executor when they carry out the instructions left for them in the deceased's will.
Assets	Those things of value which comprise the estate of a deceased person.
Beneficiary	A person or organisation that has been given entitlements under a Will.
Codicil	A document which is added later to a Will to change the Will.
Estate	The sum of all assets of a deceased person.
Executor/Executrix	The person(s) or organisation nominated by the Will maker to supervise and be responsible for the administration of the estate of the Will maker.
Gift	The benefit to be received by a beneficiary.
Grant of Probate	The document issued by the Probate Court which recognises the Executor. It also includes a copy of the Will and the Inventory of Property.
Guardian	A person or organisation named in a Will to protect and provide for a child under 18 years of age. The appointment may be enduring, in which case the appointment is by a specific document.
Inherit	To benefit from an estate of a deceased person – disinherit is to deny a gift to a possible beneficiary.
Interest	The future entitlement of a beneficiary.
Intestacy	Where the deceased died without a Will, or if it is incomplete, where there are assets that were not disposed of.
Joint Ownership	Where there is more than one owner of an asset.
Power of Attorney	A document giving power to another to act on your behalf. It may be limited or enduring.

Commonly asked questions

Pre-decease	To die before someone else.
Probate	A certificate issued by the State Government Probate Office allowing the Executors of a Will to deal with the Will maker's estate.
Residue/ Remainder	What is left of an estate after debts have been paid and gifts have been distributed.
Revocation	The statement which legally cancels previous acts, such as a Will.
Spouse	Your married partner.
Testamentary Disposition	Your Will, the last written statement by you describing who your assets are to go to after you die.
Testator	The person who makes the Will, the Will maker.
Trustee	A person or organisation legally established to manage the affairs of another.

Do I have to register my Will at the Court?

No, you just have to keep it in a safe place (check if you can leave it with your Financial Institution).

If I leave my Will with my solicitor does that mean he/she takes care of my estate after I die?

No, not unless he/she's your Executor. If they are not, then they have to hand the Will over to your Executor when you die.

Can anyone be a witness?

No. Your witnesses will not be able to inherit anything under your Will, so make sure your witnesses are not people you want as beneficiaries. It is better if the witness is not married to a person who inherits under the Will.

Witnesses must also be over 18.

What if I am very sick when I make my Will?

As long as you have the mental capacity, it's OK. If you are worried, get a doctor you trust to complete a statutory declaration stating that you understood what you were doing when you compiled your Will.

Can I nominate anyone as the Executor of my Will?

Yes, but in order to act as your Executor they must be over 18 years of age at the time of your death.

Can I leave my estate to whomever I like?

Yes.

Do I have to appoint a separate Trustee for benefits left to minors?

No, as long as you have an Executor, the Executor becomes a trustee.

Law for You

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www.law4u.com.au

Law for You is a comprehensive legal site covering legislation in all states and territories.

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Or visit their website:

www.lawconsumers.org

The Law Consumers Association produces a number of legal kits and has a free Will kit available for downloading from its website.

Legal Wills Made Easy

www.legalwills.com.au

A site which provides information on do-it yourself Will kits as well as links to qualified professionals.

These phone numbers and URL addresses were correct at the time of printing. Should they change please check your local directory or do an Internet search.

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Making a Will of Your Own - A Simple Guide is part of a series of information booklets supplied by the credit union movement as part of their commitment to keeping their members and the general community well informed about financial issues and management. The free booklets can be viewed and downloaded from the Australian Credit Union Network website at www.cu.net.au, or ordered through your local credit union.

Phone 13 11 28 to find your closest credit union.