



Villamanta Disability
Rights Legal Service Inc.

Villamanta Disability Rights Legal Service Inc.

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Making a Will

What is a Will?

A Will is a legal document that comes into operation upon your death, that you use to set out who you want to give your assets to after you die.

Who is able to make a Will?

If you are over 18 years of age provided you have the capacity to understand what you are doing. If you are under 18 years of age, and satisfy either of the following:

- you are married or are making the will in contemplation of marriage; or
- you have obtained an order from the Supreme Court of Victoria to authorise the making of a Will.

When does a person have legal capacity to make a Will?

You have legal capacity to make a Will if:

- you understand the nature of what a Will is and its effect;
- you understand the nature and extent of the property you are giving away;
- you are able to comprehend and appreciate the claims of dependants who you should be supporting; and
- you are not experiencing any mental illness or disorder.

If there is any doubt about your capacity to make a Will a doctor or other health professional should be asked to say whether you have capacity at the time of giving instructions to draft your Will and at the time of signing it. It is advisable to get this in writing.

If I do not have legal capacity to make a Will, can I still have a Will?

Yes. If you do not have legal capacity you personally cannot make a Will. However, the Court can authorise a will to be made on your behalf by another person in specific terms approved by the Court. You should be aware that the costs involved in Supreme Court proceedings may be large. In order to approve the Will the Court must be satisfied of three things:

- that you do not have legal capacity to make the Will;
- that the proposed Will reflects your likely intentions, or what your intentions might reasonably be expected to be, if you had drawn up the Will yourself; and
- it is reasonable in all the circumstances to approve the Will.

A Will may only be authorised after an application is made to the Court. This is a two-step process:

- The person wishing to draw the Will on your behalf must apply to the Court to do so.
- If the Court grants permission, the proposed Will must then be approved by the Court.

IMPORTANT NOTE!

Remember - this Information Sheet has been produced only for use in **Victoria, Australia**. Some of the laws mentioned in this Information Sheet will be different in other places.

The Court may require information to assist in determining an application. The person wishing to draw the Will on your behalf may be required to provide information including:

- a written statement of the nature of the application and the reasons for making it;
- an estimate of the size and character of your estate (ie. what you own);
- a draft of the proposed Will;
- evidence of your wishes; and
- evidence about the likelihood of you regaining legal capacity (ie. being able to make a Will yourself at some later stage).

What is a beneficiary?

Beneficiary is the term used to describe the people who are entitled to receive a benefit under your Will. That is, the people that you will give your assets to when you die.

Who will be responsible for making sure what I say in my Will is carried out?

When making a Will you need to decide who to appoint as your Executor (also referred to as a Trustee). Your Executor is the person responsible for the administration of your estate after you die. The role of your Executor includes the following:

- Carry out the terms contained in your Will.
- Determine the assets of your estate.
- Pay any debts.
- Distribute your assets to beneficiaries named in the Will.

Who can the Executor be?

The Executor should be someone that you trust to ensure that your wishes are carried out. You can have more than one Executor. Importantly, your Executor should be able to handle the responsibilities associated with such an appointment. For example, an executor can be a family member or friend, a beneficiary or professional such as a lawyer, or a public trustee company such as State Trustees. A professional or public trustee company acting as your Executor may charge fees for work performed in making sure the wishes set out in your Will are carried out. Relatives, friends and beneficiaries typically do not charge fees for their work, however, you may decide to include an allowance in your Will ensuring they are paid for their work in administering the Will.

Is everything I own dealt with by my Will?

No. Assets that you own jointly with another person will pass automatically to that person when you die. If you have a life insurance policy, you may usually nominate the beneficiaries. If you nominate a person, the life insurance will be paid directly to that person. If you advise your insurer to pay the life insurance to your estate, the life insurance will form part of your estate and can be distributed under your Will. If you have a life insurance policy it is important that you find out from the life insurance company the process involved to nominate beneficiaries. If you have a superannuation fund, money is usually paid directly to the nominated beneficiaries. You can advise your superannuation fund to pay your benefits to your estate so that the proceeds can be distributed under your Will. However, most superannuation funds do not have to abide by your wishes, so it is important to obtain proper legal advice when preparing your Will to ensure your wishes are carried out.

When I make a Will, do I have to leave my assets to my family?

This is a personal choice. You should consider those close to you when making your Will, especially those who are financially dependant on you. If a person thinks they have been treated unfairly they can apply to the Court for a larger share. In most cases, the cost of their application is paid by your estate, which results in less money being available to other beneficiaries.

What if I think I should have received something under a Will but did not, or did not receive what I believe I should have under a Will?

You may be able to challenge the validity of a Will to receive the entitlement you believe you should have received. You do not need to be a relative of the deceased. The Court will, however, consider certain criteria in determining whether you should receive any entitlement. These factors include:

- the size of the estate;
- your financial dependence on the deceased;
- whether the deceased has any obligations or responsibilities to you;
- any contribution you have previously made to the deceased estate;
- your character and conduct.

It is important to note that challenging the validity or interpretation of a Will can be costly and complex. If you plan on challenging a Will, it is important to see a lawyer as soon as possible given there is a 6 month timeframe (after the date probate is granted) within which you have to apply.

I currently support a family member, but they are on a pension and I am worried that they will lose their benefits if I leave them money in a Will. What should I do?

If you support a family member on a pension they will usually have a strong claim to be provided for in your Will. We recommend that you do not decide to exclude them from the Will just to try and save their pension. Your lawyer will be able to best advise you on how to structure your Will, and the provision of financial advice would also assist. Details about the assets and income tests for pensions are available from Centrelink.

Can I attach conditions to my Will?

Yes. However, the best Will is the simplest Will that your circumstances permit. A simpler Will is often also cheaper. There may be circumstances where imposing conditions (ie. on the use of a house or receipt of income) are appropriate, but an unnecessary condition can just add expense and uncertainty to the Will, as well as making the estate more difficult to administer. If you want to put conditions in a Will it is important to seek legal advice. There are legal rules about conditions and how they are expressed, and a lawyer can help to ensure that what you say in your Will expresses exactly what you want to achieve.

What is involved in signing a Will?

You should have 2 adult witnesses. The 2 adult witnesses must both be present at the time you sign your Will. After you have signed the Will, they will need to sign the Will in your presence. Your Will must be signed using a pen, and we recommend the same pen is used by everyone. Although beneficiaries are not excluded from being witnesses, it is best to have independent witnesses. The witnesses to your Will should write their full names and addresses under their signatures so they can be located if there is any dispute in respect of the signing. If you are unable to read your Will, it should be recorded in your Will that it has been read to you before you signed. If you are unable to sign your Will, the "signature" can be an identifiable mark made by you, and it should be written in your Will that you were not able to sign.

What happens if I die without making a Will?

If you die without a Will your estate will be divided according to a statutory formula. This is known as intestacy, and results in specified family members receiving a particular proportion of your estate upon your death. Not only will a Court have to appoint an Administrator to distribute your assets, but the distribution of your assets may not be the same as your wishes, so it is important you make a valid Will.

Where should I keep my signed Will?

Your original Will should be kept in a safe place. For example, at a bank, with your lawyer, or in a private safe. Typically, people looking for the original Will later will usually contact your lawyer first to find the Will. You should also give your Executor a copy, and keep a copy at your place of residence with a note as to where the original is kept.

How can I change my Will?

The best way to change your Will is to make a new one. This process is typically quick, as in most cases it is relatively easy to update an existing Will. The new Will should cancel the old Will so there is no uncertainty which is the up-to-date version. Making a new Will provides you with an opportunity to review all of the provisions of your old Will to make sure that you are happy with them.

How often should I change my Will?

You should review your Will when there are any material changes in your personal or financial circumstances. As a 'rule-of-thumb' your Will should be reviewed either on the happening of a significant event, or every 5 years.

The following circumstances are examples of things that can affect wills:

- Death of the executor or beneficiary under the Will.
- Change in relationships.
- Birth or death of children or other beneficiaries.
- Acquisition (or sale) of specific assets which form (or formed) part of your estate.

Should I use a lawyer?

Yes. A Will is a technical legal document that must be completed in a certain way. A Will that is drafted poorly may result in the Will being invalid. If the Will is invalid, your assets will be distributed as through you did not have a Will according to the rules of intestacy (refer above - **What happens if I die without making a Will?**). Using a lawyer can help you to ensure that those people you want to benefit do not miss out, and those people you do not are prevented from benefiting by default. A lawyer can also advise you if there is a potential claim against your estate, and how to reduce that risk. A lawyer can also structure your Will to give the maximum benefit to your beneficiaries. For instance, a well drafted Will can reduce tax for your beneficiaries. Some lawyers prepare Wills for free in certain circumstances. However, even if you have to pay, the cost is not large and in return you get piece of mind knowing your Will has been professionally drafted.

How do I get a lawyer to help me with a Will, and will it cost much money?

Contact Villamanta Disability Rights Legal Service who can refer you to lawyers with specialist expertise. In preparation for an appointment with a lawyer to draft your Will, you should take full details of your assets, copies of any title documents (if you have a mortgage you can request a copy from your bank), copies of life insurance policies, and a letter from your superannuation fund explaining where funds are to be paid after your death in accordance with the fund's trust deed. You should also consider what you want before you meet with a lawyer, and if you and your partner are attending together, talk about it with each other first. You will need to consider who you wish to appoint as your Executor, who will benefit under your Will, and if you have infant children, who you wish to appoint as their guardians. Think ahead and be prepared.