THE LAW SOCIETY OF NEW SOUTH WALES

KNOW YOUR RIGHTS

MAKING A WILL

What is a will?

A will is a legal document which sets out who'll receive your property and possessions when you die.

When you have a valid will, you give yourself the best chance of making sure your assets go where you want them to. So you should always make a will if you have a family or if other people are financially dependent on you.

What makes a will valid?

A will generally needs three things to be valid:

- It must be in writing (whether handwritten, typed or printed)
- It must be signed, and
- Your signature must be witnessed by two other people who also need to sign the will.

But even where you've met these three requirements, your assets can't be distributed immediately. Sometimes, a court needs to grant probate first.

What happens if you die without a will?

If you die without a valid will (known legally as 'dying intestate'), a standard formula is used to distribute your property and possessions. Usually, this means all your assets will pass to your spouse or children.

But the situation becomes much more complex if you have a legal spouse and a de facto spouse (ie you've separated and have a new unmarried partner), if you have children from different relationships, or if you die with no spouse and no children.

The court's formula usually also only lets your family members inherit from you. So having a valid will is vital if you want to leave gifts to friends or charities.

Who makes sure your wishes are carried out?

When you make a will you'll need to appoint an executor and trustee, who will handle your affairs when you die. People usually choose one person to perform both roles, but you can name different people as executor and trustee, and you can name as many executors as you like (although appointing more than two can complicate things).

An executor's role is to obtain probate, pay your debts, and distribute your assets in line with your will.

Generally, a trustee administers any trusts set up in the will. This usually happens where you leave assets to people under the age of 18.

Before you nominate someone as an executor or trustee, you should make sure they're comfortable taking on the responsibility you're giving them. It's often a good idea to appoint someone younger than you, or to nominate reserve beneficiaries, in case the ones you've appointed die before you do.

Because of their expertise in administering wills, people often choose to appoint their solicitor as executor.

Can you change your will?

You're free to change your will whenever you like. And you should always change your will when your circumstances change – for instance, if you divorce or remarry, or if one of your beneficiaries dies.

But you can't just change your will by crossing something out and writing something different.

Instead, where you want to make a minor change, you'll need to make a codicil – which is effectively an authorised amendment to the will.
As with a will, a codicil needs to be in writing and signed and witnessed by two people.

Where you want to make a major change, you're usually best off making a whole new will.

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What happens if you marry or divorce?

Generally, getting married cancels the terms of any will you've previously drawn up. But there are exceptions, which your solicitor can explain to you.

If you divorce, it cancels any gift you made to your former spouse under your will. It also cancels their appointment as trustee, executor or guardian under your will, except as trustee for property left to any children.

You should always make a new will if you marry, divorce, or if you've been separated for a long time.

Who can you leave your assets to?

You can leave your assets to whoever you like, but you have a general obligation to provide adequately for your spouse or de facto partner, your children, and any other dependents. If you don't they can bring a claim against your estate.

Where should you keep your will?

You should always keep your will in a safe place and let your executor know where you've put it. That's because, if you misplace your will and no one can find it, it won't be effective. Your solicitor can store your will for you (usually free of charge) and give you a copy for your own records.

Some people also choose to give their executor a letter of instructions separate to their will, letting them know their intentions in more detail.

The truth about homemade wills

Some people choose to make their own will. We think that's a mistake. Although writing your own may seem easy enough, the law around wills can be complex.

When you make a homemade will, you risk not drawing it up properly or not expressing your intentions clearly enough. It's also easy to create a tax liability which your beneficiaries will have to pay. Finally, a DIY will is more likely to be contested, which means the whole process of giving away your assets could end up in court.

That's why, when you make your will, it's important you have it drafted by someone who understands the law and can advise you on the best way to make sure your assets end up where you want them to. And that means engaging a solicitor.

How can a solicitor help?

It's a good idea to involve your solicitor whenever you want to make changes to your will or draw up a new one. Your solicitor can:

- Make sure your will is valid and that it is properly drawn up, signed and witnessed
- Make sure you've expressed your wishes in the best possible way, so nothing is left to chance
- Advise you on how to provide for your spouse or de facto partner, children and other dependents. They'll also let you know about your rights and obligations to former partners and others
- Advise you on tax planning, including the best way to minimise any potential capital gains tax from the gifts you're making
- Give you a thorough understanding of the role of your executor and trustee and help you choose appropriate ones
- Advise you on the best way to arrange your estate
- Store your will in a safe place so that your beneficiaries always know where it's kept.

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