

Why make a will?

A guide to making a will



LEGAL ISSUES FOR OLDER PEOPLE

A will is a legal document that sets out how you want the things you own to be distributed when you die. Wills aren't just for people who own property or have lots of money.

Making a will is a positive step you can take to:

- provide for the people you care about
- leave particular items to certain people
- appoint a person you trust to carry out the instructions in your will (your executor)
- leave any other instructions you may have (for example, about your funeral arrangements), or
- make a gift to charity if you wish.

Making a will removes the doubts and difficulties that can arise when there is no evidence of the deceased person's wishes.

Even if you don't have a lot of money or you don't own a house, you may want to leave other valuable or sentimental items such as art works, coins, jewellery, antiques, letters, or photographs to particular people.

After your death your property and belongings are referred to as your estate.

Why do I need a will?

If you don't have a will, you don't have any say about how your estate is distributed. If you die without a will (known as 'dying intestate') your estate will be distributed to your relatives according to a legal formula (called the 'intestacy rules'). This could be very different from what you wanted or intended to happen. Dying 'intestate' can also cause complications, delays and extra costs



for those you leave behind. If you die intestate and you don't have any relatives closer than a first cousin, your estate will go to the government.

A will only takes effect after you have died. If you want someone to look after or make decisions about your finances while you are still alive but become unable to do this yourself, you will need to make an enduring power of attorney. For more information about enduring powers of attorney see the Legal Aid NSW brochure *'Who will decide for you if you can't decide for yourself?'*

Who can make a will?

Anyone over 18 can make a will as long as they have mental capacity. A person with a mild intellectual disability or in the early stages of dementia may still be able to make a will if they have capacity at the time the will is made. If their capacity is in doubt, an assessment of their understanding needs to be made by an appropriate person, such as a doctor, psychologist or psychiatrist. The Supreme Court can approve the making of a will by a person under 18.

How do I make a will?

Making a will can be a simple process and need not be expensive. A will must be signed and witnessed properly to be legally valid. It is also important that your intentions are expressed clearly to reduce the chance of any argument over who you wanted to get what.

It is therefore best to have a solicitor, the NSW Trustee and Guardian or a trustee company do your will for you. While there are do-it-yourself will kits, it is safer to get a professional to do your will to make sure it is done properly and is appropriate for your needs. A professional can also advise you on any tax issues you need to take into account when drafting your will.

How much does it cost to make a will?

Solicitors' fees vary and can depend on how complex the will is. You can shop around to compare how much solicitors will charge. Trustee companies charge a fee for preparing a will and fees also apply to administer your estate after you die.

The NSW Trustee and Guardian (NSWTAG) charges a set fee to make and update your will unless you are on a full Centrelink Age Pension in which case they will prepare your will for free. If you appoint the NSW Trustee and Guardian as your executor, fees will apply when your estate is administered after you die. For more information on NSWTAG fees, see www.tag.nsw.gov.au/fees-and-charges-wills.html.

How long will my will last?

Your will lasts until you die, unless you change it, make a new one or revoke (cancel) it.

A marriage will also revoke a will unless the will was made anticipating that particular marriage. If you plan to marry or divorce you may need to update your will. You should get legal advice about your situation.

You should also get legal advice about updating your will if your circumstances change in other ways, for example, if children or grandchildren are born, or if your partner dies.

Who should I appoint as my executor?

The executor is the person named in your will who will be responsible for dealing with your estate after you die. This should be someone over 18 who you trust and who is prepared to take on this responsibility. Or you can appoint a professional, such as the NSW Trustee and Guardian or a solicitor, in which case you will be charged fees. You should make sure your executor knows where your will is kept.

Where should I keep my will?

Most solicitors will keep the original will in safe custody for a client for no charge. This is the safest option because if the will disappears it is assumed you tore it up to revoke it. You can also keep it in a safety deposit box in a bank, or in a safe place at home. It is a good idea to keep a signed copy with your personal papers, with a note explaining where the original will is. You should also give a copy to the executor (in a sealed envelope if you prefer) or tell them where the original will is.

Can I change my will if I change my mind?

You can change your will at any time as long as you have mental capacity. However you cannot change your will by crossing out something in your will and initialling it, or writing something different in its place. You can make a 'codicil' (a separate document

in which you make a change to your will) which will need to be signed and witnessed in the same way as when you made your will. It is usually best to just make a completely new will.

Can I leave a gift to a charity?

Leaving a gift in your will to a charity (a 'bequest') is a good way to express your support for a cause that is important to you. You may choose to leave:

- a residual bequest (whatever is left after all other gifts and costs have been deducted from your estate)
- a percentage of your estate
- a specific sum of money, or
- a gift of property or shares.

It is important to get legal advice to make sure this is done correctly (the charity must be correctly described) and that your loved ones are properly looked after.





Can my will be challenged?

A will can be challenged on the grounds that it is not valid. The person contesting an invalid will would have to show that:

- it was not your last will (you had made another one at a later date)
- it was not properly signed and witnessed
- you did not have mental capacity when you made it (which is why it is important to make a will while you are still well and there is no question about your mental capacity)
- it was changed after it was originally signed, or
- you were forced or pressured (rather than just encouraged) into making the will.

Certain categories of people (mostly family) can also contest a will within 12 months of your death if they believe they weren't properly provided for in the will. This is called a 'family provision claim'. Having your will made by a solicitor can lessen the chances of this happening.

Where can I get more help?

Seniors Rights Service

Provides free legal advice and assistance for older people in a range of areas of law.

Tel: **1800 424 079**

www.seniorsrightsservice.org.au

LawAccess NSW

LawAccess NSW is a free information service run by Legal Aid NSW. Anyone who has a legal problem in NSW can contact LawAccess NSW for legal help.

Click on the Chat with us button at www.legalaid.nsw.gov.au or call **1300 888 529** between 9am to 5pm, Monday to Friday (excluding public holidays).

Ageing and Disability Abuse Helpline

Provides confidential information, support and referrals for people who have experienced, witnessed or suspect the abuse of an older person living in the community.

Tel: **1800 628 221**

www.ageingdisabilitycommission.nsw.gov.au

Other brochures available:



Adult children living at home

What do you do if you want them to leave?



They want me to leave

Staying in your house when your partner dies



Are you experiencing violence or abuse?

You can make it stop



Who will decide for you if you can't decide for yourself?

Think about planning ahead



Are you a grandparent?

Your legal questions answered



Your home and the age pension

What you need to know



Helping your family financially?

Understand the risks



Moving in with the family

Make sure you protect your interests

This publication is a general guide to the law. You should not rely on it as legal advice, and we recommend that you talk to a lawyer about your situation.

The information is correct at the time of printing, however it may change. For more information contact LawAccess NSW on **1300 888 529**.

This publication is available in Arabic, English, Simplified Chinese, and Vietnamese.



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Do you need help to contact us?



If you need an interpreter, call the Translating and Interpreting Service (TIS National) on **131 450** (9am–5pm) and ask for LawAccess NSW.

Do you find it hard to hear or speak?



If you are deaf, or have a hearing or speech impairment, contact us through the [National Relay Service NRS](http://www.nrelayservice.com.au). Ask for LawAccess NSW on **1300 888 529**.

