Making a Will - A Fact Sheet

What is a Will?

A Will is a legal document that outlines how the will-maker wants their assets (the things they own) to be distributed after they die. A Will must be in writing and witnessed by two independent witnesses, and the will-maker must be of sound mind when they make and sign their Will.

I don't have a Will. What happens to all the things I own if I die?

If you die without a Will, you will not have a say in how your estate is to be distributed. Instead, your assets will be distributed according to WA law, which sets out the formula for dividing your estate among specified surviving family members.

If you die without a Will, your property would be distributed to your spouse/de facto partner and your children or, if you're not married or in a de facto relationship and have no children, to immediate family members like your parents and siblings. If you have none of these people, then your assets would be distributed to extended family members such as uncles/aunts, cousins and so on. If no living relative legally entitled to your property can be found, your assets go to the government.

If you die without a Will, your assets may not be distributed according to your wishes. It also makes things more complicated and costly for the relatives you leave behind. Unless your estate is very small or all your assets are owned jointly with another person, someone (usually your next of kin) will need to apply to the Probate Office of the Supreme Court to get authority to administer and distribute the estate. This is known as an application for letters of administration. Our fact sheet on **Letters of Administration** has more information about that.

What are the basic requirements to make a valid Will?

To make a valid Will, the will-maker must be at least 18 years old and of sound mind. They must be acting of their own free will, not under undue influence (pressured by a more powerful person) or duress (persuaded by threats or violence) from others.

The Will itself must be in writing - preferably typed and computer printed, although handwritten Wills are acceptable. In the Will, you must have appointed someone to carry out your wishes on your behalf (your "executor") and stated how you want your property to be distributed after you die.

The Will must be signed by the will-maker and witnessed by 2 adult people.

What does being "of sound mind" mean?

For a will-maker to be "of sound mind" means they understand what they are doing at the time they make their Will, that is they understand:

- they are making a Will and know what a Will is;
- their relationship to those mentioned in their Will; and
- what types of property they own, how much of it they own, and how they want to distribute that property,

and they do not have any medical condition which may affect their judgement or decision-making.

This is also known as having **testamentary capacity**.

Sometimes there could be a question or concern about whether the will-maker is of sound mind and has testamentary capacity. It's best then that they ask their treating doctor to write a letter about their testamentary capacity and understanding and keep the letter with their

Will. A Will can be ruled invalid if the Court decides the person did not have the testamentary capacity to make it at the time they signed the Will.

What do I have to consider if I want to make a Will?

Some of the main things to think about when you're preparing to make a Will are:

- Who will be your executor to carry out your wishes. You should also consider appointing a substitute or 'backup' executor just in case your initial choice is unable to act.
- What assets you have and who you're going to leave them to. Think if you want to give specific gifts, for example items with sentimental value, or who will get major assets like your house. You should then think about who will get the rest of what you own.
- What would happen if the person/s you are leaving your things to were to pass away before you. That can happen and it's helpful to say in your Will who else you would want the assets to go to.
- If you have children, think about appointing a guardian for any aged under 18, although the Family Court makes the final decision about that.
- Your dying wishes, such as whether you want to be buried or cremated. However, you should make such wishes clear to your family or executor before your death, as there may be a delay after you die before your Will is read.

Who is an executor?

An executor is the person you appoint in your Will to carry out your wishes after you die. They deal with your estate, paying your debts and distributing your assets to beneficiaries as set out in your Will. An executor is sometimes also called a "personal representative".

Who is a beneficiary?

A beneficiary is a person named in your Will to receive a share of your estate.

Who can be my executor?

An executor can be anyone over 18 who is of sound mind. They don't need to have any special qualifications but should be someone you trust and feel will carry out their duties as executor properly. They can be someone like your spouse/de facto partner or child.

What does an executor do?

When you die, your executor:

- organises your funeral and burial/cremation;
- applies for Probate, if it's required;
- is responsible for managing your estate and accounting for all of your assets (including
- all money);
- collects the assets of your estate, pays any debts and taxes, and distributes your assets according to the Will; and
- looks after the financial well-being of any minor beneficiaries (aged under 18).

Can an executor distribute a will-maker's assets in a manner not set out by the Will?

No, an executor can't decide how your things get distributed. They must follow your wishes as set out in your Will and distribute your estate accordingly.

Is there a limit to the number of executors I can appoint?

You can appoint one or more executors. It's also advisable to appoint one or more alternative or substitute executors in case the first-named executor is unable to act for any reason.

If you appoint two or more people as executors or substitute executors, they must act jointly, that is they must all act together. If one of the joint executors dies or is unable to act, the remaining executors may not be able to act unless the Will clearly states that they can.

Think carefully about appointing too many executors, as there can be practical difficulties in getting them all to agree and take whatever action is needed.

Do I need to ask someone for their permission before appointing them as executor of my Will?

Although you don't need their permission, it is best to make sure the person is willing to act as your executor before providing instruction about that for your Will. A person cannot be forced to act as your executor and the named executor can refuse to act.

Are there any assets that don't form part of my estate?

Yes, there are some assets that can't be distributed in a Will. These include:

- assets you own jointly as joint tenants with another person, such as a house, shares, or a bank account. These automatically pass to the other owner who is alive.
- superannuation and insurance policies, if you've already nominated a beneficiary for your policy. If you haven't made a nomination then these assets may form part of your estate. However, some superannuation trustees have a discretion as to how they pay benefits, even when there is binding nomination. Contact your superannuation or life insurance company to clarify this.
- property that you hold as a trustee, rather than own in your own right.

We recommend seeking legal advice if any of these apply to you.

What do I have to do before meeting with my lawyer to make a Will?

When preparing to see a lawyer about your Will, it helps to have the following information ready.

- A list of all people in your immediate family, including their full names and contact information, their relationship to you, and the ages of all your children (including stepchildren).
- The full name and address of the person/s you want to appoint as your executor. It's advisable you have a substitute or 'backup' executor in mind too.
- The full names and addresses of any other people or organisations that you want to give bequests (gifts of property) from your estate to.
- A list of all your assets such as your home, car, investments, and items of significant or sentimental value. It's also important you describe how you own any property (for example if you own it solely or jointly with someone else).
- Details of any superannuation and life insurance policies you own and whether you have signed a document nominating beneficiaries for those policies.
- If you have children under 18, who you want to be their guardian if their other parent dies before you.

I've finished drafting my Will. What do I do now to validly execute it?

There are a few things you need to do to make sure your Will is validly executed.

First, you should be present with 2 witnesses and identify to them that the document is your Will. You and the witnesses must all sign with the same pen, preferably with blue ink, at the bottom of every page of the Will and sign and date the last page at the end of all the text.

The witnesses should see you sign the Will and then sign it themselves. You and your 2 witnesses must all be together when you sign the Will and as stated above, all use the same pen to sign your Will.

If you make any changes or amendments to the Will such as correcting spelling mistakes then you and your 2 witnesses need make the amendment either before or immediately after executing the Will and all 3 of you initial the changes made. However, it's advisable not to

make any changes to your Will – it's better to prepare a new Will with any changes needed.

Who can be a witness to my Will?

A witness to a Will can be anyone who is over 18 and of sound mind. It's best if they're independent and not an executor or beneficiary to your Will or the spouse of an executor or beneficiary. Although it's not required, it's helpful to have people that the executor knows as your witnesses. This is to help the executor when they apply for Probate as they have to provide the witnesses' current residential addresses—if they can't do that, they will need to explain what steps they have taken to try to find the witnesses' addresses.

How do I store my Will safely once I've made it?

Once you've made your Will, it's very important that you keep the original in a safe place. That could be in a safe at home or a safety deposit box in a bank. The Public Trustee also has a Will Bank which you can use. Do not staple, pin or clip anything to your Will or write anything on it, as any marks on the Will may need to be explained when Probate is applied for after you die.

It's advisable that you tell the executor where the Will is kept. You can also give copies to the executor and beneficiaries if you wish to do so, but you don't have to.

Can I change my Will?

If you want to make a change to your Will, there are a few options. One is using a codicil, a legal document that amends your Will and can be used for making specific minor changes such as adding or deleting a beneficiary. However, codicils need to be signed and witnessed following the same formal procedures as Wills and they can cause problems.

It's usually better and more reliable to make an entirely new Will. This automatically cancels your old Will and makes your new Will your only valid one.

Can I revoke (ie cancel) my Will?

Yes, you can revoke your Will at any time, either by making a new Will (as long as you're of sound mind at the time) and/or by intentionally destroying your old Will. If you destroy your Will accidentally, it won't be revoked. If that happens, it's best to make a new Will (as long as you're of sound mind at the time) to avoid any uncertainty and so that there is an original signed Will in existence.

There are also some circumstances that automatically revoke a Will. If you marry, get an annulment, divorce, or remarry then your Will is revoked, unless you wrote the Will in contemplation of marriage or divorce. Separation from a spouse does not revoke a Will.

When should I make a new Will?

There are some key times when you should think about making a new Will. These include when:

- you marry, get an annulment, divorce, or remarry if your Will wasn't made in contemplation of that marriage or divorce;
- you start a new de facto relationship;
- you want to change your executor;
- you want to change your beneficiary or any bequests you've made;
- you no longer own an asset you have gifted to someone under your Will;
- your beneficiary dies and you haven't specified who the property should go to if this happens;
- your financial circumstances have changed; or
- you have more children and haven't made provision for them.

What happens if I make a new Will and then decide that I like my old Will better?

Making a new Will revokes all prior Wills, permanently. Once the old Will has been revoked it is invalid and can't be revived.

If you make a new Will and then want to go back to your old one, you need to make another entirely new Will that replaces the current Will.

Can I leave some of my relatives out of my Will?

It is your Will and you can distribute your assets to anyone you want to. However, keep in mind that under WA law, people with certain relationships to you can challenge your Will if they are left out of it or feel your estate has been distributed unfairly.

These are:

- your spouse/de facto partner;
- your children;
- your parents; and
- in some cases, your grandchildren and stepchildren.

People with other relationships to you such as siblings, extended family members, and friends can't challenge your Will if they are left out or feel they have been treated unfairly. Again, it's advisable to seek legal advice about these issues when making a Will.

Is there a time limit for challenging a Will?

Yes, there is. If someone wants to challenge your Will they have a 6 month period starting from the date of Probate being granted to file documents to start proceedings in the Supreme Court of Western Australia. In certain circumstances, they may be able to apply after the time limit has passed.

If you wish to challenge someone's Will, you should get legal advice.