

# Making a will

Your will is one of the most important documents you will ever sign. A badly written will often leads to delays and disputes.

The information provided here does not cover all issues about making a will. It is only about Western Australian law on wills.

Where possible it is best to get the services of a lawyer rather than drafting your own will.

## What is a will?

A will is a legal document, which sets out how you want your property distributed after you die.

## Why make a will?

The most important reason for making your will is to make sure that after your death, your property is distributed in the way you would have wished it to be.

Another important reason for making your will is to appoint your “executor” who is the person named in your will to make sure that all of your requests are carried out.

## What happens if I do not leave a will?

If you do not leave a will, there are laws that cover how your property will be distributed. For more information see the Legal Aid WA infosheet: *Dying without a will*.

## Where do I start?

Some newsagents will sell forms. This standard form is useful because it helps you to remember the essential points to be included. These are:

- The document should say that it is the will of the person making it – the testator – and should give their address.

- Clearly dating the document is important because the latest will in time automatically replaces any earlier will.

It is not essential for you to include your marital status.

Think carefully about whom to leave things to in your will. These people are called “beneficiaries”.

If the will does not properly look after a person that you had a duty to provide for, that person can apply to the Supreme Court. In some circumstances, the Supreme Court can change the distribution of your property after your death.

“ If the will does not properly look after a person that you had a duty to provide for, that person can apply to the Supreme Court ”

For more information about this power of the Supreme Court and when it can be exercised, see the Legal Aid WA infosheet: *Challenging an unfair will*. You should also get legal advice.

## What property and other arrangements can I include in my will?

In your will, you may leave any part of your property, including personal items, real estate or amounts of money to particular people. While it is not necessary to list every item of your property, your will should deal with all your property. The best way to do this is to use expressions like "all of my property of whatever kind" or "all my remaining property of whatever kind".

If your will fails to deal with all your property, any property not dealt with will be divided among your relatives according to law. This kind of division might not be what you wanted.

You may wish to make special arrangements for a number of things, for example:

- disposal of your body or organ transplants
- payment to your executor
- the occupation of your home
- the release of a debt owing to you
- a gift to charity.

You can generally write these types of things in ordinary language so that they can be understood. If you are in any doubt, or there is a large amount of property involved, you should see a lawyer.

If you:

- Have specific wishes as to burial or cremation you should make your wishes clear prior to your death.
- Wish to be an organ donor, it is recommended that prior to your death you make your intention clear. After death your relatives and/or executor may find the subject difficult to deal with.
- Are the parent of a child, you may wish to appoint someone to be guardian of that child after your death. You can include this but not all such appointments are effective. Get legal advice.

## What if my will is complicated?

Drafting your will becomes more complicated as more situations are covered.

Any will more complicated than a simple will should be given to a lawyer to write.

Examples of matters that may make a will more complicated are:

- there is a lot of property
- a business partnership, company or family trust is involved
- there is property other than the family home
- remarriage
- children from more than one relationship
- the people involved live overseas
- property is located overseas

## What do I need to think about in appointing an executor?

The executor has a very important role. It is not necessary for an executor to have any special qualifications, but they must be:

- a responsible person
- over the age of 18 years
- someone you believe will carry out their duties properly.

You should:

- Get the consent of the person you wish to appoint as executor because they do not have to accept the position.
- Make sure that an alternative executor is available and refer to this person in your will. This is in case the first executor refuses to accept the appointment after your death.

For more information about what executors do see the Legal Aid WA infosheet: *Duties of an executor*.

## What are the main formal requirements for making a will?

To be valid a will should be in writing and should be signed and witnessed correctly.

When making your will, you must sign it in the actual presence of at least two witnesses who:

- must sign and add their complete name and address. (Adding occupation may also make it easier to find the witnesses if necessary in the future), and
- must not sign unless they have actually seen you sign the will.

The maker of the will and the witnesses must all remain together during the signing of the will.

Blind people are not able to witness the signature on a will.

The will must be made by you of your own free will, without pressure being put on you by anyone.

“A beneficiary, or the spouse or de facto partner of a beneficiary, can be a witness to the signing of your will. However, Legal Aid WA strongly recommends that beneficiaries and the spouse or de facto partner of a beneficiary not witness a will. This may avoid some disputes about the validity of your will.”

You must sign the will in front of all the witnesses and they must sign the will in front of you and in front of each other.

It is important for the will to include a statement saying:

- that the person making the will signed in the presence of two or more witnesses, and

- the witnesses signed in the presence of the person making the will.

Without this special statement, called an “attestation clause”, the will is still valid, but the job of the executor becomes difficult and time consuming.

Wills should be signed at the end. It is best to sign immediately at the end of the wording, leaving no room for additions.

Where there is more than one page, you and each of the witnesses should sign at the bottom of each page. Unless this is done, there may be problems in proving the will.

## Check list

Remember to:

- State your full name, address and occupation on your will.
- Make sure your will is clearly dated.
- State the full name and address/es of your executor/s.
- Add the attestation clause.
- Never attach or pin anything to your will.
- Never erase any part of a will.
- Keep your will in a safe place and make sure your executor knows where that is.

## What if I can't sign my will?

The law makes special provision for persons who are unable to sign their will. If you are such a person, you should get advice from a lawyer before making your will.

## Can I change my will?

You can change your will as often as you like. The best way to change it is to make a new will.

A codicil is a legal document that is used to alter something in an earlier will. People may use a codicil instead of making a new will. A codicil must comply with all the legal rules that apply to a will.

Codicils can cause problems. Legal Aid WA does not recommend the use of codicils. Get legal advice.

### When should I review my will?

You should review your will regularly. This is to make sure that your will continues to reflect what you want in light of any changes that may have occurred in your financial or family circumstances.

## What if I get married after making a will?

If you marry after you have made a will, your marriage cancels your will unless it was made in "contemplation" of marriage.

If, when you make your will, you are about to get married, you should include a statement that says you wrote your will "in contemplation of marriage", that is, when planning this marriage, and you should name the person you intend to marry. If you then marry that person your will is not cancelled.

As there are other situations where the will is not cancelled when you get married, if you have married after making your will you should get advice from a lawyer to find out if the will is valid. Alternatively, you could consider making a new will to include your changed situation.

## What if I separate after making my will?

If you have a will and you separate, your will is not affected. In this situation you may wish to consider making a new will. Making a new will automatically cancels your old one.

## What if I get divorced after making my will?

If you get divorced or your marriage is annulled on or after 9 February 2008 your will is cancelled unless:

- a contrary intention is expressed in your will, or

- there is other evidence showing this intention.

So if you do not want your will cancelled when you get divorced you should state this in your will. If you then get divorced your will is not revoked.

If you were divorced before 9 February 2008 your will was not cancelled when you divorced. You may want to consider making a new will to cover the new situation.

## Where should I keep my will?

Your will must be kept in a safe place such as with your lawyer. You should tell your executor where your will is kept.

## Where can I get more information or legal advice?

- Any queries or problems relating to your will should be discussed with your lawyer.
- Legal Aid WA does not give legal advice about making wills. Copies of any Legal Aid WA infosheets referred to above can be obtained by contacting the Legal Aid WA Infoline on 1300 650 579 or from any Legal Aid WA office. Office locations and contact details are provided at the end of the infosheet.
- Contact the [Citizens Advice Bureau](https://www.citizensadvice.org.au/) on (08) 9221 5711 to get help with drafting a will for a fee.
- Contact the [Public Trustee WA](https://www.publictrustee.wa.gov.au/) on 1300 746 116 which offers will drafting for a fee.
- Contact the Law Society of WA on (08) 9324 8600 for a referral to a lawyer who specialises in this area.
- Aboriginal artists can get more information about wills and a sample will for visual artists from the [Artists in the Black](https://www.artslaw.com.au/artists-in-the-black/) website at: <https://www.artslaw.com.au/artists-in-the-black/>.

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