

Making a will

A 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 based on Western Australian law on wills.

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

What is a will?

A will is a written legal document setting out what you want to happen to your possessions (sometimes called your “estate”) after you die.

Why make a will?

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

If you do not leave a will, there are laws that cover how your property will be distributed. This may not be in accordance with your wishes.

Another important reason for making a will is to appoint your “executor”.

What does an executor do?

An executor is the person (or sometimes more than one person) named in your will to make sure that all of your requests are carried out.

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.

How do I make a will?

Most newsagents sell will forms. This standard form is useful because it helps you to remember the essential points to include in your will. If possible get legal advice.

To be valid, a will should be:

- in writing
- signed and witnessed correctly
- dated at the time of signing.

In some circumstances a court can approve a will that is not validly made.

The document should say that it is the will of the person making it, the “testator” or the maker of the will, and should give their address and occupation.

Clearly dating the document is important because the most recent will automatically cancels and replaces any earlier.

Think carefully about whom to leave things to in your will.

What if the will doesn't provide well enough for my children or other dependants?

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 cases, the Supreme Court can change the distribution of your property after your death.

For more information about this power of the Supreme Court and when it can be used get legal advice.

An information sheet called, ‘Challenging an Unfair will’ provides information about the law in this area. The sheet is available from Legal Aid WA offices.

What property can I leave in my will?

In your will, you may leave specific items of personal property or real estate or specific amounts of money to particular people.

While it is not necessary to list every item, your will should deal with *all* your property. The best way to do this is to use expressions such as “all of my property of whatever kind” or “all my remaining property of whatever kind”. Even if you do not list specific items, these expressions will cover everything.

If your will fails to deal with all your property, the part that is not dealt with will be divided among your relatives according to law.

This may not be in accordance with your wishes.

There are some assets you can't leave to another person in a will. For example, assets from superannuation or insurance fund (you usually nominate a beneficiary when you take out the policy).

Can I make arrangements for other things in my will?

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

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

You can generally write these things in ordinary language so that they can be understood.

If you are in any doubt you should see a lawyer.

If you are the parent of a child, you may wish to appoint someone to be the guardian of that child after your death. You can include this but not all appointments are effective, for example, it may not be seen as in the child's best interests. Get legal advice.

Who can witness the signing of a will?

When making your will, you must sign it in the actual presence of at least two witnesses over the age of 18. You and the witnesses should sign the will using the same pen.

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 exerted by anyone.

A beneficiary, or your spouse, or de facto partner, can be a witness to the signing of your will. However to avoid any disputes about the validity of the will this is not recommended by Legal Aid WA.

The witnesses:

- must sign each page (if there are multiple pages) and should add their complete name, address and occupation
- 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.

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 testator signed in the presence of two or more witnesses and
- the witnesses signed in the maker of the will's presence.

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.

What if my situation is complicated?

The drafting of a will becomes more complicated as more situations are covered.

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

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

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

What if I can't sign my will?

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

Can I change or cancel my will?

You can change your will as often as you like. The best way to change your will 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 formalities of a will.

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

What happens if I get married?

If you marry after you have made a will, your marriage revokes or cancels your will unless it was made in "contemplation of marriage." This means that the will shows you were planning this marriage when you made it.

There are some other situations where your will is not cancelled when you get married. If you have married after making your will you should seek legal advice about your will and consider making a new will to cover your changed circumstances.

If, when you make your will, you are about to get married, you should include a statement that:

- says the will has been made when you were planning your marriage, and
- names the person you intend to marry.

If you then marry that person your will is not revoked.

For a person who dies on or after 9 February 2008, the will is not revoked on marriage even without this statement, if there is other evidence to clearly show that the will was made when you were planning your marriage.

What happens if I separate?

If you have a will and you separate, your will is not affected. If you separate, your former partner will still get your property unless you make a new will. It is important that you make a new will after the break up of a relationship. Making a new will automatically cancel your old one.

What happens if I get divorced?

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

- you state in your will that you do not want this, or
- there is other evidence showing you did not want your will to be cancelled.

Get legal advice about this before you divorce.

If you were divorced before 9 February 2008 your will was not cancelled when you divorced. In this case you may want to consider making a new will.

Check list

Remember to:

- State your full name, address and occupation on your will
- Make sure the 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 a will
- Never erase any part of a will
- Keep your will in a safe place and make sure your executor knows where that is.

Where should I keep my will?

Your will must be kept in a safe place such as with your bank or your lawyer. You should tell your executor where your will is kept. A copy could be put with your other personal papers in a known location.

Can someone who cannot make their own will get a will?

The Supreme Court can make or change or cancel a will for someone aged 18 or over who cannot legally make a will themselves. Get legal advice in this situation.

Where can I get more information?

Legal Aid WA does not give advice on making or challenging wills. Any queries or problems relating to your will should be discussed with your lawyer or call **Legal Aid WA's Infoline on 1300 650 579** for more information or referral to an organisation that may be able to help you.

Legal Aid Offices

TELEPHONE INFOLINE: 1300 650 579 (General Enquiries)

Infoline open Monday to Friday 9.00 am to 4.00 pm
(Australian Western Standard Time) except public holidays

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National Relay Service (for hearing and speech impaired) 133 677
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Southwest Regional Office

7th Floor, Bunbury Tower,
61 Victoria Street, Bunbury, WA 6230
(08) 9721 2277

Great Southern Regional Office

Unit 3, 43-47 Duke Street, Albany, WA 6330
(08) 9892 9700

Goldfields Regional Office

Suite 3, 120 Egan Street, Kalgoorlie, WA 6430
(08) 9025 1300

Midwest & Gascoyne Regional Office

Unit 8, The Boardwalk, 273 Foreshore Drive, Geraldton, WA 6530
(08) 9921 0200

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28 Throssell Road, South Hedland, WA 6722
(08) 9172 3733

West Kimberley Regional Office

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(08) 9195 5888

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Indian Ocean Office

Administration Building, 20 Jalan Pantai,
Christmas Island, Indian Ocean, WA 6798
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This information contains a summary of the law and is correct at the date of publication. It is not legal advice. You should always seek legal advice about your individual situation. Any services referred to which are not operated by Legal Aid Western Australia are not endorsed or approved by Legal Aid Western Australia.

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Your Questions Answered



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