

# WILLS

The *Wills Act 1970* sets out the formal requirements for making a Will in Western Australia.

To view the *Wills Act 1970* go to:

[https://www.legislation.wa.gov.au/legislation/statutes.nsf/main\\_mrtitle\\_1081\\_homepage.html](https://www.legislation.wa.gov.au/legislation/statutes.nsf/main_mrtitle_1081_homepage.html)

## A Will

A Will is an important document that you sign to ensure that after your death, your property is distributed according to your wishes. It is a legal document which sets out what you want to happen to your assets and property after your die (your Estate), and who you want to carry out your wishes after you die (your Executor).

### What can be included in a Will?

A Will can include:

- How you want your property (like a home, car, money, shares, jewellery or other items of significant or sentimental value) to be distributed
- Whether you want to be buried or cremated
- Whether you would like to donate your organs (you may also consider including this in an Enduring Power of Guardianship as decisions may need to be made about organ donation before anyone can read your Will)
- If someone can live in your home after you die and if they are a different person to whom you are giving your home
- If you want to absolve anyone from paying back debts owed to you

### When should a Will be made?

You can make a Will whenever you want and can alter it at any time, provided you are aged 18 or older and you have 'testamentary capacity'. This means you are of sound mind, you understand what a Will is and its effect and you can communicate what you want to include in it and why.

It is important you are acting of your own free will and not under undue influence or duress when making your Will.

## How do you make a Will?

You can make a Will by:

- Seeing a lawyer who can help you draft a Will
- Writing a Will yourself
- Buying a Will kit which can be purchased from Australia Post
- Using the Public Trustee (see the next section)

There are certain requirements that you must follow to ensure that your Will is valid and enforceable.

If you are unsure about these requirements, asking a lawyer for assistance will help ensure you get it right. It is recommended to seek legal advice to ensure a Will is correctly drawn-up.

A Will is a complex document. If there is a mistake, it may not be enforceable (it can be challenged) and can lead to delays and disputes.

## What is an 'Executor' of a Will?

An 'Executor' of a Will is the person who is tasked with carrying out your wishes as stated in the Will when they pass away. It is vital the 'Executor' knows where the Will is stored.

### Duties of an 'Executor' include:

- Organising your funeral and burial
- Applying for Probate if required
- Managing the estate and accounting for all assets (including all monies)
- Collecting the assets of the estate, paying any debts and taxes and distributing assets according to the Will
- Looking after the financial well-being of any minor beneficiaries (aged under 18)

## For the appointment of an 'Executor' what should be considered?

### Questions to consider

1. Is the chosen person willing and able to carry out the duties of an 'Executor' (these duties can be difficult, complicated and time consuming)?
2. Will the person be able to engage legal or other professional help (for example, lawyers, accountants and real estate agents)?
3. Is the person aware that they could become personally liable for actions they take as the 'Executor'?

## Who can be appointed as an 'Executor' of a Will?

An 'Executor' of a Will can be anyone who is over the age of 18 who is trusted to carry-out the duties of this role. You can appoint more than one person as your 'Executor' but, if you do, you will need to make it clear whether they are to act together or as substitutes.

## Appointing the Public Trustee as an 'Independent Executor'

You may decide to appoint the Public Trustee to act as 'Executor'. People choose the Public Trustee as the 'Executor' to spare family or friends from carrying out the demanding responsibilities of an 'Executor'.

You may not have anyone who is trusted to take on the role of 'Executor'. If there is conflict between family members, it may be appropriate to appoint the Public Trustee to manage the process.

The Public Trustee is experienced in estate administration with in-house estate managers, accountants and solicitors and recruits external experts when required. There is a fee involved if the Public Trustee is chosen to manage the process.

## What 'Assets' are not considered part of the 'Estate' of a Will?

Some 'Assets' may be dealt with outside of the Will. These include:

- 'Assets' owned jointly as joint tenants with another person, such as property, shares or a bank account. These generally automatically pass to the surviving joint tenants, and so will not form part of the Estate.
- Superannuation and life insurance policies if a beneficiary for a policy has been nominated. If beneficiaries have not been nominated, these policies can be considered an 'Asset' and distributed in a Will depending on the rules of the particular superannuation fund or insurer.
- Property held in a trust

**If you are unsure or unclear then it is a good idea to seek legal advice.**

## What preparations are required when meeting for legal advice regarding a Will?

### Prepare the following for your meeting

- A list of all the people in the immediate family, including the full name/s, correct contact information, the familial relationship and the ages of all children, including stepchildren
- Details of the person to be appointed as 'Executor' of the Will, including their full name and address
- The full names and addresses of any people or organisations who will receive bequests (gifts of property, etc.) from your estate (these will be your 'Beneficiaries')
- A list of all 'Assets' such as, property, vehicles, investments and items of significant or sentimental value, as well as any 'Liabilities'
- Details of any superannuation and insurance policies and any nominated beneficiaries of the policies

## What are the formal requirements for making a Will?

One of the essential requirements for making a Will is that there must be two (2) witnesses aged over 18, present at the same time, to witness the signature of the 'Testator', the person making the Will. These witnesses should not be a beneficiary nor a spouse or de facto partner of a beneficiary in the Will. It is a good idea for everyone to use the same pen when signing.

There are many other formal requirements, therefore it is recommended you seek independent legal advice.

## What are the consequences of dying without a Will?

If a person dies without a valid Will this is referred to as 'Dying Intestate'.

If you die without a Will, the law will decide what happens to your assets and property and who it is given to, which may not always align with what you wish.

When a person dies intestate, section 14 of the *Administration Act 1903* (WA) sets out how the deceased estate is divided among family members. Because this is enshrined by law, no one will have any authority or power to deviate from the provisions of the *Administration Act*.

If you die without a Will, anyone over the age of 18 who is entitled to a share of the estate can apply for 'letters of administration' to the Probate Office of the Supreme Court of Western Australia. This can be complex and may require the services of a lawyer. If there is no one to apply for letters of administration, the Court can appoint another person or body as Administrator of the Estate.