



Why have a Will?

- A Will is a document that allows your assets to be distributed according to your wishes after you die
- It also enables you to choose the person (executor) who will ensure your wishes are met

A Will is probably one of the most important legal documents that most people will sign during their lifetime so it's important to get it right. This information sheet outlines some of the things you need to consider.

What is a Will?

A Will determines, among other things, the following:

- who is to be in charge of the administration of the estate (the executor)
- how the estate is to be distributed, and
- any other specific directions that you may want to leave (for example, distribution of personal items such as heirlooms and wishes about your funeral).

Writing a Will can help avoid uncertainty and dispute after you die.

What if I don't have a Will?

If you die without a Will, you die intestate. In this situation your estate is distributed in accordance with a Government formula that is inflexible.

This often creates problems that include:

- absence of an executor to administer the estate. This means that no one has the immediate authority to take control of your estate and deal with your assets and liabilities. Disputes can arise about who should apply to be appointed as Administrator of the estate.
- uncertainty about the distribution of the estate. Your estate may be distributed to unintended beneficiaries in accordance with the Government formula.
- you lose the ability to deal specifically with the distribution of your personal chattels (such as family heirlooms or items of sentimental importance).
- disputes between family members because of uncertainty.

The requirements for making a Will

A Will is a legal document. There are requirements that will ensure that the Will is valid. They are:

- the Will must be signed by the Will maker and two adult witnesses on the bottom of each page and on the back page.
- the Will maker and the witnesses should all use the same pen (this is the best evidence that all three people were present at the same time).
- the Will should be dated.

If a Will doesn't comply with all of these requirements it may be held to be invalid and the Will maker will die intestate (without a Will).

What about homemade Wills?

While 'Do it Yourself' Wills are quite common and seem easy to prepare, they often result in difficulties. The most common problems are:

- the Will attempts to give away assets that the Will maker doesn't own (eg an interest in a jointly held property or an asset held in a trust or super fund).
- the Will fails to give away the whole estate leaving a partial intestacy.
- the Will doesn't comply with all the legal formalities.
- the Will maker's handwriting is illegible.
- the Will contains ambiguities.

You should seek legal advice in the preparation of your Will.

Appointing an executor

Your Will will nominate an executor. Your executor is responsible for administering your estate.

Their main duties are:

- arranging your funeral
- ensuring that your assets are insured and protected
- working out what your assets and liabilities are
- applying for probate of the Will where necessary
- making sure all your debts are paid, including tax
- distributing your estate as set out in your Will
- defending the Will against any challenges.

Who should I appoint as my executor?

Because the job of executor can be time consuming and complex, you should appoint one or more people who are prepared to take on the job and who you trust to carry out your wishes. This might be:

- a family member or close friend
- a professional adviser
- a trustee company, or
- a combination of the above.

Special requests

You can provide instructions in your Will relating to matters such as:

- funeral arrangements
- disposal of your body, and
- the format and content of your funeral.

If you don't want to put this information in your Will you can write it down separately and give it to your executor. This will make their job much easier.

Appointment of guardian for minor children

You can specify in your Will who you want to take responsibility for children should they be young when you die.

It is the guardian's job to make the important life decisions for the children while they are under eighteen years of age.

You can also provide some instructions for the guardian about the types of decisions you want them to make.

The appointment of a guardian can be complex because you often have to balance sensitive family relationships.

Can my Will be challenged?

As a Will maker you can give your assets to whoever you choose. However, you should be aware that if you exclude a child or a spouse from the Will then there is a good chance that the Will will be challenged.

You should always get advice if you are planning to exclude a close family member because if your Will is challenged the value of the estate may be reduced by legal fees as a result.

If you have good reasons for excluding someone it's a good idea to write down the reasons why and store this document with your Will.

What is probate?

Obtaining probate of a Will refers to the process of applying to the Court for an order that the Will is valid and that the executor has the authority to start collecting the assets of the estate.

A probate application is made to the Supreme Court by the executor of the Will. As part of the application the executor is required to disclose to the Court a full summary of the assets and liabilities of the estate.

Not every Will needs probate. It will depend on what assets are in the estate. You will always need probate if the deceased was the sole owner of real estate or had large share holdings or bank accounts.

What about my superannuation?

Your superannuation and any life insurance attached to it is not automatically part of your estate.

During your lifetime your member balance is held on your behalf by the trustee of your super fund.

At your death, the trustee then needs to work out where to pay the benefits (eg directly to one of your dependents or to your estate). The trustee's decision will depend on whether you have made a beneficiary nomination. Nominations are either binding or non-binding.

Binding nomination allows you to direct the trustee to pay your benefits to a particular person. The trustee has no discretion. These are usually valid for three years and need to be updated.

Non-binding nomination is merely an expression of a wish and is not binding on the trustee.

You should deal with your superannuation when you do your Will.

Where to get help

- Your doctor
- Legal adviser
- Musculoskeletal Australia
www.msk.org.au
MSK Help Line: 1800 263 265

How we can help

Call our MSK Help Line and speak to our nurses.
Phone 1800 263 265 or email helpline@msk.org.au.

We can help you find out more about:

- arthritis and musculoskeletal conditions
- ways to live well with these conditions
- managing your pain
- upcoming webinars, seminars and other events.

More to explore

- Australian Government - Wills and Powers of Attorney
www.australia.gov.au/information-and-services/family-and-community/wills-and-powers-of-attorney

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