



This information is general and not a substitute for legal advice. The Legal Services Commission provides free advice for most legal problems.

Contact the Legal Helpline 1300 366 424

(TTY 8463 3691) www.lsc.sa.gov.au www.lawhandbook.sa.gov.au

WHAT IS A WILL?

By making a will you are saying who you want to get your property and possessions (your 'estate') when you die.

To make a valid will:

- You must be at least 18 years of age. (Someone under 18 years can make a will if they are married or with the permission of the Supreme Court).
- It must be in writing (not verbal).
- It must be signed by you and two witnesses over the age of 18 who must be present at your signing. (It is better if the witnesses are not mentioned in any other part of the will).
- It must name an executor; this is the person who looks after your affairs when you die.
- It must detail the distribution of your estate to your beneficiaries (those people who will get your property).

WHAT SHOULD I PUT IN MY WILL?

You should take care to specify your funeral arrangements and to whom each item in your estate will be distributed. You should also explain why you have not left anything to someone who could be expected to receive something.

ASSETS IN JOINT NAMES

Even if you have a will, jointly owned assets (eg. house, car, bank accounts) go automatically to the surviving owner on your death. You cannot leave them to anyone else because legally they are not your sole property. There is another way of owning assets in both names as 'tenants in common'. If you are a tenant in common, you can leave your share to someone else in your will.

WHAT HAPPENS IF I DO NOT HAVE A WILL?

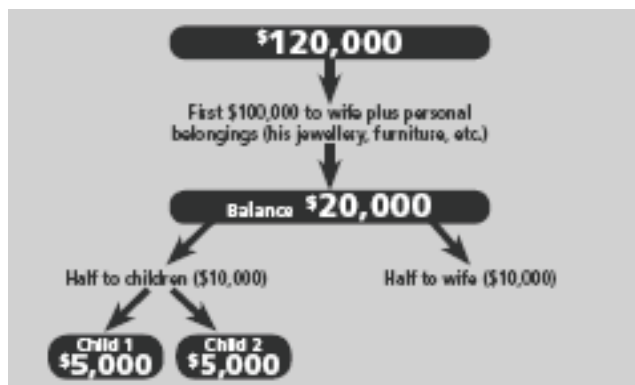
Any joint assets automatically pass to the other owner(s). Those assets in your name only are distributed according to the law of intestacy.

Some examples:

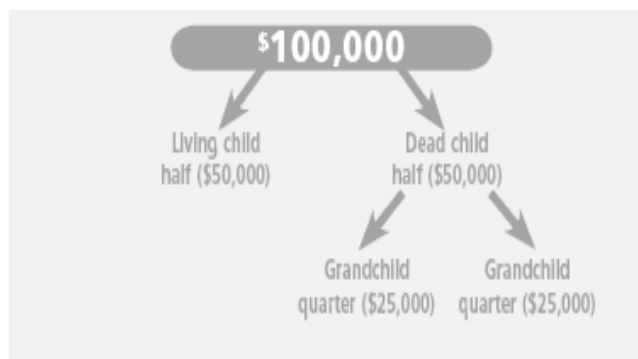
1. Wife dies leaving a husband and no children.
Everything goes to her husband.
2. Unmarried and childless person dies, leaving both parents alive.
The mother and father each get half of the estate.

3. Husband dies leaving a wife and 2 children. He had a jointly owned house and \$120,000 in the bank in his name only.

Joint assets (house) go automatically to surviving owner (wife).



4. Single mother dies leaving one child. The estate is worth \$100,000. Another child has already died leaving two children (grandchildren of deceased).



WHY IS IT BETTER TO HAVE A WILL?

If you die without a will it may be more difficult and more expensive for your family to deal with your estate. It also means that you have no control over what happens to your property. By having a will you give legal force to your wishes, making sure that your property and belongings go to the people you choose.

HOW DO I MAKE A WILL?

These people can give you advice on making a will and prepare one for you:

A Lawyer - the costs will vary depending on how difficult your will is. For a simple will the costs start at around \$100.

The Public Trustee - can prepare a will for free but you must name it as your executor, and they will charge a percentage of your estate to act as your executor.

A Private Trustee Company - will probably insist that you name it as your executor. They may charge to prepare a will and they will also charge a percentage of your estate for acting as executor. You can make your own will and do-it-yourself kits are also available. However, great care must be taken. Any mistakes may make your will worthless or delay the execution of your estate. You should seek advice because although do-it-yourself legal documents are a cheap way of making a will, it may become very costly for your family if they have to go to court to decide what you meant. For peace of mind, it is better to have your will prepared professionally.

WHO CAN BE MY EXECUTOR?

- You can name a beneficiary as your executor.
- An executor must be at least 18 years of age.
- You can name a friend or relative as your executor. If they need help they can seek the assistance of a lawyer or other professional.
- It is often a good idea to appoint joint executors.
- You can choose a lawyer to act as executor. Their cost will vary depending on how much work they must do.

A trustee company will charge a percentage of your estate (up to 6%) to be your executor. This charge does not vary according to the amount of work involved. Where the executor may need to do ongoing work, for example, as a trustee for a child or a disabled adult, a trustee company may be preferable to a lawyer. Remember when naming an executor that problems might arise if they die before you and you haven't made another will. You may choose a trustee company or someone who will be able to carry out your wishes and who you think will live longer than you.

WHAT HAPPENS WHEN I DIE?

It is the executor's job to carry out your wishes as states in your will, including any funeral arrangements you may have specified. After your death, your executor must carry out certain legal procedures. As a general rule, if you leave more than \$10,000 or if you leave land in your name only it will be necessary for your executor to apply for probate. Probate is the official court declaration that a will is to be treated as valid and binding. Your executor must pay your debts from your estate (such as funeral expenses, bills, etc.). Beneficiaries will only receive something after all the bills are paid. If you die and there is not enough money to pay all your debts, your funeral and executor's expenses are paid before other debts. Your beneficiaries do not have to pay your debts, nor does your executor. When a beneficiary dies before you and you have left them a specific gift, the gift lapses. If you did not nominate a substitute beneficiary to get that gift, then it will go to the person(s) you have named to get the rest of your property, after the specific gifts have been made.

CONTESTING A WILL

You can contest a will if the person who made the will was of unsound mind or if he or she could not freely choose what to put in their will because another person unfairly influenced them. Another reason to contest a will is if the meaning is unclear. Anyone with a possible interest in the estate can challenge a will for these reasons. Often people wish to contest a will because they consider it to be unfair.

Who can apply to challenge an unfair will?

- husband or wife (even if divorced)
- domestic partners (this can include some de facto and same sex relationships - seek legal advice)
- children (natural, adopted or step-children)
- parents
- brother or sister

If you decide to contest the will you will have to show the court that the deceased failed to provide for your proper maintenance. The court will look at how much money was in the estate and how much money you would receive. The court has very wide powers to look at all the circumstances including how well you got on with the deceased and also whether you helped look after them. Remember if the court gives you more money then others will get less. The court will have to consider these people and their entitlements in comparison to your claim. Essentially, the court will have to consider whether the deceased had a moral duty to provide for you. The law is very complicated in this area. If you believe you may have a claim you should seek legal advice as soon as possible.

HOW LONG DO I HAVE TO MAKE A CLAIM?

If you wish to claim you should act immediately and at least within six months of the granting of probate, although the court may give you an extension of time if the estate has not been completely administered.

HOW CAN I STOP SOMEONE CONTESTING MY WILL?

Have your will prepared professionally and be sure to explain all the details of your estate and your family circumstances. This should ensure that your estate is distributed according to your wishes and is protected from a challenge by another person.

WHERE DO I KEEP MY WILL?

When it is completed, you should keep your will in a safe place. You should make a record of where you keep it. Banks, insurance companies, trustee companies and lawyers can hold your will. There is usually a small charge for this. If you make a new will, this revokes any previous wills you have made. However, it is probably still a good idea to destroy the old will. This avoids confusion if the old will is found and the executor does not discover the new one.

MARRIAGES AND WILLS

If you marry this automatically revokes an existing will. If you divorce, any gift or power you have given to your former spouse is cancelled. It is wise to get legal advice about your will if you separate, divorce or re-marry.

HOW DO I CHANGE MY WILL?

If you want to make small changes to your will you can make a codicil, which is an amendment to the original document. If there is a significant change in your circumstances, such as marriage, divorce, the birth of a child, the death of a partner or death of an executor or beneficiary, it is probably best to make a whole new will. This will make your wishes absolutely clear, and avoid confusion in the future.



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