Tasmania Legal Aid

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Wills, making a will

Anyone can talk to a lawyer for free at Tasmania Legal Aid.

To get free legal information call 1300 366 611, drop into our Hobart or Launceston office (no appointment necessary) or use the Legal Talk chat function on our website. We are open Monday to Friday, 9am to 5pm.

A lawyer can listen to your story and help identify the next steps you can take.

Making a Will means you get to choose what happens to the property you own when you die.

Watch the video for an overview or read below for more information.

What is a Will?

A Will is a written document in which you state what happens to your assets after you die. Making a Will allows you to choose. It also allows you to nominate an executor, who is the person responsible for making sure your wishes are met. A person who makes a Will is called a "testator".

What happens if I die without a Will?

If you die without having made a Will, you are said to have died "intestate". If this happens, your next of kin will have to apply to the Supreme Court for Letters of Administration, which will direct them to distribute your estate as the law sets out in the Intestacy Act 2010.

If you are the next of kin of someone who has died intestate, you should seek legal advice.

Who can make a Will?

You can make a Will if you are over 18 years of age and are of "sound mind".

Being of "sound mind" means that you know that you are making a Will and understand the nature and effect of the Will. Importantly, it means that you are able to decide how you want your property dealt with when you die and that the Will accurately records this. A doctor's advice may be sought for people whose memory or mental capacity is failing.

If you are under 18 years of age you can apply to the Supreme Court to make a Will. This is not necessary for people under 18 who are also married. If you are under 18 years and are about to be married, you can make a Will in contemplation of that marriage. Your Will becomes valid when that marriage takes place.

What is required to make a Will?

The key requirements for making a valid Will are as follows:

- the Will must be in writing
- the Will must be signed by the testator at the end of the Will
- the testator's signature must be witnessed by two witnesses
- the witnesses must sign the Will in the presence of the testator and each other, and

- importantly – the witnesses cannot be a beneficiary of the Will or the testator's spouse. If they do, they will lose their entitlements under that Will.

As the formal requirements for making a valid Will must be strictly adhered to, it is recommended that you have your Will prepared by a lawyer or Trustee company.

What should be in a Will?

The Will should specify that it is your last Will and that you revoke any previous Wills. It should appoint at least one person to be your executor. Your Will canprovide for the payment of funeral expenses and any debts. It should state how you want your property distributed, either by naming the item and to whom it is given, or by giving a person a certain amount or percentage of the total value of your property. If your Will contains specific gifts, it should also state what is to happen with the rest of the estate.

Wills often include other requests such as funeral arrangements and the appointment of a guardian to look after your children if they are under 18 or still dependent on you at the time of your death. As Wills are only meant to deal with property the executor does not necessarily need to follow these directions. However, if a Court is asked to determine the residency and guardianship of any children and you Will contains this information, your wishes will be taken into account.

How do I choose someone to be my executor?

An executor is a person named in your Will to look after your estate. An executor must be over 18 years of age. It is easier if the executor lives in the same state as the testator. It is also preferable to name two executors in a Will. This will be of assistance if one executor dies or no longer wishes to act as executor. When considering people to be your executors, it is preferable to choose someone close to you, trustworthy and of a similar age. If no executor is named in your Will, the Supreme Court will appoint an administrator.

How do I change or update my Will?

Once a Will has been signed, there can be no alteration, either by crossing out or writing in new clauses. Alterations such as these will have no effect. The best way to amend or alter a Will is by doing so in a separate document called a "codicil". For a codicil to be valid it must also meet the formal requirements of making a Will. In many ways it may be easier to make an entirely new Will.

What if I get married or divorced after making my Will?

Getting married or divorced after making a Will makes important changes to how the law will treat your Will. If you make a Will and later get married, your Will is automatically revoked, or made invalid, unless you made your Will in contemplation of that marriage. If you make a Will and later get divorced, the parts of your Will which relate to your ex-spouse may be invalid.

The law relating to the impact of marriage and divorce differs across Australian States and Territories. As marriage and divorce are major life events, you should seek legal advice regarding your Will if you marry or divorce.

Could someone contest my Will?

A person may challenge your Will on a variety of grounds including that you were not of sound mind, or were unduly influenced or pressured by another person when making your Will. Wills can also be challenged if they do not meet the formal requirements for making a valid Will.

Another reason for challenging your Will is on the ground that you failed to make adequate provision for the proper maintenance and support of a dependant. If one of your dependants expected to be a beneficiary under your Will and has been left out, they may be able to make a claim under the Testator's Family Maintenance Act 1912. This is called a testator's family maintenance claim ("TFM claim"). The following people are able to bring a TFM claim: your surviving spouse or de facto; your children (including ex-nuptial, adopted and stepchildren); your parents (if you die without a spouse or children); and a divorced spouse who is receiving or entitled to receive maintenance from you at the date of your death.

If you have been left out of a family member's Will and believe you should have received a share of their estate, you should seek legal advice.

Where can I find out more?

Public Trustee

Did this answer your question?

This is written for people who live in or who are affected by the laws of Tasmania, Australia. The law changes all the time – this information is not legal advice. If you have a legal problem, you should talk to a lawyer before making a decision about what to do.