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What is a will?

A will is a legal document that sets out who you want to get your possessions and property (your 'estate') when you die.

To be valid in South Australia:

- It must be in writing (not verbal)
- It must be signed by you and two witnesses, over 18 years of age, 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 detail the distribution of your estate to your beneficiaries. These are the people who will get your possessions and property.
- It should name an executor. This person will be the legal representative responsible for the administration of your estate. See 'Who can be my executor?'

Who can make a will?

You can make a will if you are at least 18 years of age (or married), and you have capacity. Capacity means that you can make a will and you can understand what you are doing in making your will.

If you are under 18 years or you do not have capacity, you may still be able to make a will with the permission of the Supreme Court.

Excluded property

Any property in joint names with someone else (for example, a house, car, bank accounts) pass automatically to the co-owner and cannot be distributed through your will. You cannot leave it to anyone else because legally it is not your sole property. But if property is held as 'tenants in common', it forms part of your estate and can be dealt with in your will.

Also, superannuation and life insurance are not automatically part of your estate. These will be subject to the rules of the super fund or policy. In most cases, you can make a binding nomination that your super fund is paid to your estate and select an insurance policy that will pay to your estate.

Why should I have a will?

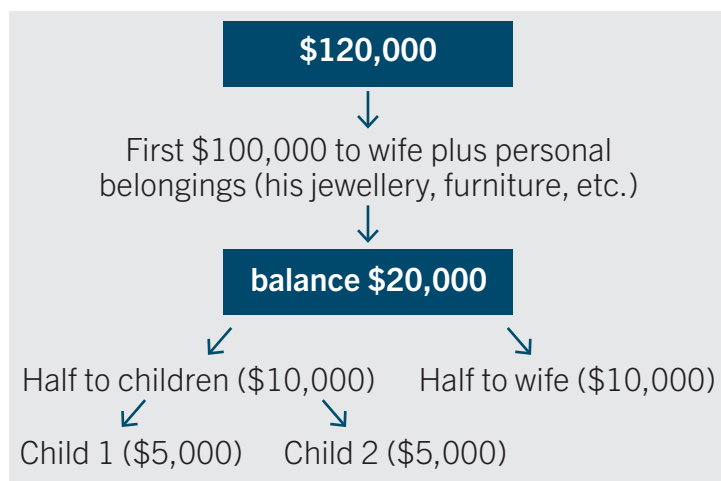
If you die without a will it may be more difficult and expensive for your family to deal with your estate. It also means that you have no control over what happens to your property. By having a will, you give legal force to your wishes, making sure that your property and belongings go to the people you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

What happens if I do not have a will?

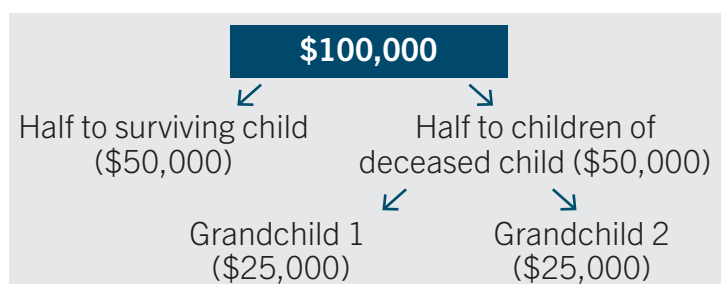
Any joint property automatically pass to the other owner(s). Property in your name only is distributed according to the law of intestacy. This law sets out how your property is distributed if you do not have a will.

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 property (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).



How do I make a will?

A private lawyer can prepare a will and give advice about your estate. For a simple will the costs start at around \$250. Prices can vary, so shop around and get quotes.

The Public Trustee can prepare a will for free for eligible customers (which includes concession card holders and those under administration or guardianship orders) but will charge a percentage of your estate to act as your executor. Private trustee companies offer services on a similar basis.

You can make your own will and do-it-yourself kits are available but keep in mind that your will is an important legal document. If your will is not properly drafted and executed there may be additional legal costs to clarify your instructions and to administer your estate. For peace of mind, it is better to have your will prepared professionally.

Who can be my executor?

An executor may be any competent adult who is at least 18 years of age. You can name a relative or friend or a professional, such as a trustee company. You can appoint more than one executor and ask that they work together to administer your estate. It is best to appoint an executor who is likely to survive your passing.

If you appoint a professional as your executor, they are entitled to charge a fee for their services. If you appoint a relative or friend as your executor, they can get assistance from a professional like a solicitor to administer the estate. Their fees will be charged against the estate.

What should I put in my will?

Your will should set out how your possessions and property are to be distributed upon your death. It can also cover your preferred funeral arrangements and express your wishes about who you would like to nominate as guardians for your minor children or children living with a disability.

You should also consider your digital property such as digital files, emails, and media accounts. Some people keep a record of their digital property including passwords and login details with their will so their executor can access their computer and accounts.

What happens when I die?

It is the executor's job to carry out any wishes as stated in your will, including any funeral arrangements. It can depend on the policy of banks, but if you leave a large amount of money, 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, mortgages, personal loans 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, mortgages, personal loans, and executor's expenses are paid before other debts. Your executor and your beneficiaries do not have to pay your debts out of their own finances. When a beneficiary dies before you and you have left them a specific gift, the gift lapses. If you do not nominate a substitute beneficiary to get that gift, then it will go to those you have named to get the rest of your property, after the specific gifts have been made.

Contesting a will

Often people wish to contest a will because they consider it to be unfair. If they contest your will, they will have to show the Court that you failed to provide for their proper maintenance. The Court will look at how much property is in the estate and how much they could receive. The Court has very wide powers to look at all the circumstances including the person's finances and their relationship with you prior to your passing.

People may also try to contest the validity of a will. They may challenge its validity if the content of the will is unclear, if you did not have capacity when you made the will, or if you were pressured by a third party to prepare the will.

The law is very complicated in this area. If a person believes they may have a claim they will need to get legal advice immediately. A claim must usually be made within 6 months of the granting of probate. The Court may give 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.

Updating my will

If you want to make small changes to your will you can make a codicil, which is a change or addition to the original document. There are legal requirements that apply to changing your will and you may need to get professional help to prepare a codicil.

If you marry or register a relationship this automatically cancels an existing will. If you divorce or end a registered relationship, any gift or power you have given to your former spouse or partner is cancelled. It is wise to get legal advice about your will if you separate, divorce, re-marry or enter a registered relationship.

If there is a significant change in your circumstances, such as with your relationships, or the birth of a child, the death of a spouse or partner, or death of an executor or beneficiary, it is best to make a whole new will. This will make your wishes clear and avoid confusion in the future.

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 holding your will.

If you make a new will, this cancels 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 find the new one.