

**A guide to
making a Will
in Victoria**



Your Will

A guide to making a Will in Victoria

This guide tells you what you need to know if you are thinking of making or changing your Will in Victoria.

It explains why you need a Will, how to go about making one, what to think about when making a Will and what happens with your Will when you die.

Find out more at...

www.victorialawfoundation.org.au

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The basics

Ever wondered what a Will is or why you should have one? This section explains the basics.

Why make a Will?

Everyone should have a Will. A Will is a legal document where you say what you want to happen to your estate when you die. If you don't have a Will, your estate may not go to the people you want it to. For more information on what happens if you don't make a Will, see 'What happens if I die without a Will?'.

What is a Will?

A Will is a legal document that says how your estate will be distributed after you die. The property that you leave when you die is known as your *estate*.

Your Will can also include your wishes about things such as who you want to care for your children after you die and your burial wishes. However, these are not legally binding.

For more information on what items to include in your Will, see 'Making a Will'.

Common terms explained

Beneficiaries are the people you leave your estate to.

Gift or **bequest** are terms used to refer to what a beneficiary receives.

Estate includes property that you own, and can include things of significant value such as a house or car, or items that are more sentimental in value such as family heirlooms.

This publication
is for people
making a Will
in Victoria



How do I make a valid Will?

Who can make a Will?

Once you turn 18, or if you marry under that age, or with court permission, you can make a Will, but you need to be able to understand what you are doing. This is known as having *testamentary capacity*.

The formal requirements of a Will

For a Will to be formally valid it must be:

- in writing
- intended to be your Will
- signed by you on each page in front of at least two witnesses
- dated at the time of signing.

When is a Will invalid?

A Will is invalid if it is made by a person who does not:

- make the Will freely and voluntarily
- have testamentary capacity
- intend to make a Will.

Overcoming problems with a Will

The court or the Registrar of Probates has power to make orders that overcome some difficulties with the way a Will has been made. But this may require your executor or family/beneficiaries to bring a case in court, which is expensive and the outcome is never certain.

Common terms explained

Dying *intestate* means dying without a Will.

The *rules of intestacy* refer to a formula set out in legislation that is applied to your estate if you die without a current Will.

Having *testamentary capacity* means a person understands the nature and effect of making a Will.

What if I die without a current Will?

If you die without a current Will the law will decide what happens to your estate. This may mean that your estate is not distributed in the way that you wish. Your estate may be distributed in accordance with an old Will. Otherwise the court will appoint an administrator to distribute your estate following legal rules known as the *rules of intestacy*. That means, your assets may go to:

- your spouse or domestic partner, children or parents, or more distant relatives, or
- if you have no relatives at all, your property will go to the State.

How is a Will different from a power of attorney?

A Will is a document that outlines what happens to your estate when you die. A power of attorney is a legal document that covers the management of your affairs while you are alive. A power of attorney is no longer valid after your death.

Tip

If you are having a Will prepared for you, consider having a power of attorney made at the same time. The Office of the Public Advocate website has more information on different types of powers of attorney and what they do.

Making a Will

When you make a Will there are many different things that you need to think about, including who will be your executor and who you want your estate to go to.

Things to think about

Before you make a Will, you need to think about:

- Do you need help making your Will?
- What assets do you own, either in your own name or with other people?
- Who will be your executor?
- Who you want to leave your estate to?
- Who might claim to have rights over your estate?
- If you have young children, who will be their guardian?
- Do you want to leave money to charity?
- Do you want to make an organ donation?
- What are your funeral and burial wishes?

Tip

Making a Will can be complicated. It is a good idea to get some professional help to ensure it is valid. The cost of having a lawyer make your Will is usually less than the cost to resolve issues with a Will that is not properly made.



Getting help to make your Will

While you can make a Will by yourself, it is a good idea to get expert help.

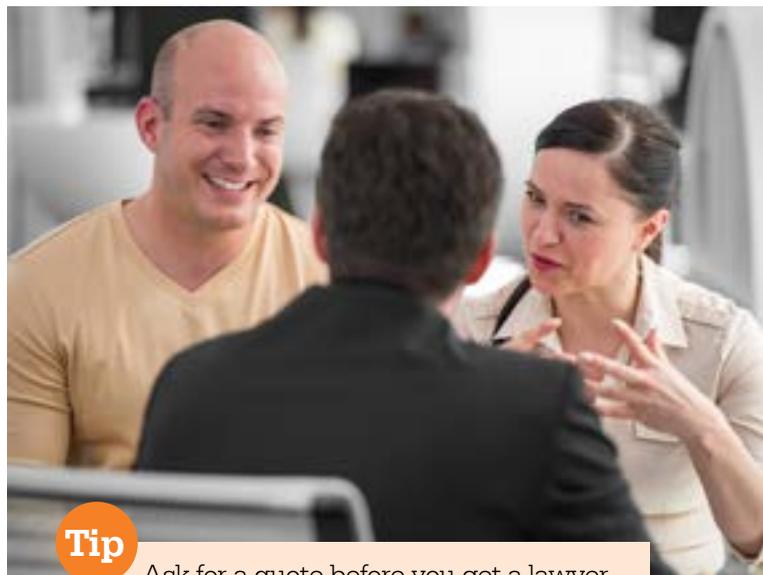
You should get expert advice if you

- Have a child or other beneficiary with special needs or disabilities.
- Have many assets, assets in another country or complicated assets.
- Want to leave someone out of your Will who may be entitled to benefit.
- Want to include a trust of any kind in your Will, or you have an interest in a family trust, private company, superannuation fund or partnership.
- Have intellectual property rights, such as patents, licences or copyright in a book, or other rights which will continue long after you die.
- Are ill, in hospital or advanced in age when you make your Will.
- Have been previously married or in a domestic relationship or you or your partner have children from previous relationships.

Using a lawyer

Most law firms can prepare a standard Will for a modest amount, but this will vary depending on your situation. A lawyer should provide you with a written quote or estimate before preparing your Will.

If you are not sure how to find a lawyer, ask for a recommendation from family or a friend, or contact the Law Institute of Victoria. The Law Institute of Victoria's referral service can help you find a local lawyer. Law firms that are members of the service offer a free 30-minute initial consultation for advice.



Tip

Ask for a quote before you get a lawyer to prepare your Will.

Using a trustee company

You can use a commercial trustee company (such as State Trustees or Equity Trustees) to make your Will. If you take this option, ask for a written quote or estimate.

Also check that they are prepared to make your Will without also being appointed as your **executor** as this will incur additional fees and commissions.

Using a DIY kit

Do it Yourself (DIY) Will kits are often sold at post offices, newsagencies and online for about \$30. Make sure you fill in the DIY kit correctly and have it properly witnessed. Otherwise your Will could be invalid or take time and money to fix.



Choosing an executor

An executor is the person or trustee company who will manage your estate after you die. Your Will names the executor, and gives them power to deal with your estate in accordance with the terms of your Will.

Your executor must follow the directions in your Will. They can't make guesses and change your directions even if they think you might have changed your mind. If they fail to act on the Will, the court or Registrar of Probates can ask them to explain. The court or Registrar of Probates can take this action themselves or when someone complains.

Who should I choose as my executor?

Your executor could be a family member, friend, lawyer or other professional, such as an accountant or trustee company.

When choosing an executor, you should consider their circumstances and skill set to decide if they are suitable.

What should I consider when choosing an executor?

- You need to make sure the person you choose to be your executor has the skills and time to do it. You should ask them if they are happy to take on the responsibility.
- Your executor needs to be someone you can trust to carry out your wishes. It is their job to take control of your estate and make sure the right people get what they should.
- The executor also needs to be able to understand basic accounting, and deal comfortably with a range of people, including banks and lawyers, and your family. Sometimes they may need to deal with disputes between beneficiaries or claims being made against your estate.
- Your executor needs to carry out their responsibilities after you die, so an executor who is much older than you, is unwell or likely to move overseas is not a good choice, especially if you have children who may not benefit for some years.
- If you appoint a professional as executor, they will need to be paid from your estate. You should refer to payment for their services in your Will.
- Sometimes an executor might need professional assistance to undertake their role. Any costs associated with such professional help will be paid out of the estate before the assets are distributed.

Tip

Ask your executor if they are willing to take on the job.

Why it's a good idea to appoint more than one executor

Even though you trust your executor, it can be good to have two people who can keep track of what is going on and make sure the right thing is done. You are allowed up to four executors, but this is not usually recommended.

If you choose to appoint more than one executor, make sure they can work together. If you appoint one executor, it is a good idea to appoint an alternate person in case your first person can't (or won't) take on the role after you die.

For more information on your executor's role, see 'What happens to my Will after I die?'

Your assets and debts

Before you start thinking about to whom your estate will go after you die (your beneficiaries), you need a detailed list of all your assets and debts. This should include:

- all assets in your own name (house, land, car, shares, bank accounts, cash, jewellery, sentimental items and anything else of value)
- any assets you own with someone else
- any assets you own that someone else might claim they have rights over
- any business interests (partnerships, private companies, sole trader businesses, equipment)
- any assets that might be coming to you in the future (superannuation, compensation, royalty payments)
- any debts you have (large debts such as personal loans or mortgages, and smaller debts such as rates that occur regularly).



Common terms explained

If you own real estate with someone else, you need to know whether you own it as **joint tenants** or as **tenants in common**. This will be stated in the Certificate of Title.

Most couples purchase real estate as joint tenants. However, there can be more than two joint tenants who own a property.

Joint tenant

If you are a joint tenant, your share of the property will automatically go to the other joint tenant(s) when you die.

Tenant in common

If you are a tenant in common, you can pass on your share in the property in your Will.

What can I include in my Will?

You can include:

- assets in your name only
- assets that you own as a *tenant in common*.

You cannot include:

- assets held in trusts
- your share of assets owned as a joint tenant
- annuities you are receiving (regular payments of income)
- regular compensation or support payments
- superannuation (in some cases).

Get advice to see if you can include:

- assets with mortgages or other securities over them (who will pay out the debt?)
- overseas property
- assets on leases or hire purchase
- shares in companies (names and structures might change)
- business assets (are there other partners?)
- life insurance (has someone been nominated in the policy to get the payout?)
- superannuation benefits.

Life insurance and superannuation

Your life insurance and superannuation may not be part of your estate, as where they go when you die is determined by arrangements in place with your insurer or superannuation fund. Sometimes these are paid directly to a dependant; sometimes they can be paid to your estate.

Common terms explained

Mirror Wills

A *mirror Will* is a Will that reflects the contents of another Will. Couples often make mirror Wills with the intention that each Will has the same effect, no matter who dies first. For example, they leave their estate to each other, and after they have both died to children in equal parts. A mirror Will can be changed at any stage including after the death of one of the Will-makers.

Mutual Wills

A *mutual Will* is an agreement you enter into with another Will-maker that neither of you will change your Will after certain events, such as after the first Will-maker dies or loses capacity.

This kind of Will might be useful where there are children from multiple relationships. It allows you to make a binding promise such as: *If you die first and leave me your estate, when I die, I will leave my estate to your children and my children equally.*

Mutual Wills are legally complex, and you should get professional advice if you want to make such a Will. It takes the form of a contract that is not easy to change once signed.

Tip

You cannot have a joint Will or one Will for two people.

Your beneficiaries

Who is legally entitled to benefit from my estate?

You are expected to look after your dependants in your Will if they need your help and you have the resources. Dependants could include people like your partner or children, even if they are adults. If you don't include these people, they may be able to challenge or contest your Will.

If their claim on your estate succeeds, the court will make an order giving some of your estate to that person. It doesn't matter what wording you use in your Will, you can't get around this if the court decides it is appropriate. Some of the costs of such claims may be paid out of your estate.

If there is a person you would like to exclude from your Will, it is a good idea to leave a letter to your executor explaining why you have chosen to leave that person out. Seek professional advice.

Things to consider when giving assets

- Whether you are likely to still own the asset upon your death.
- Should you consider dividing your estate into percentage lots rather than as fixed amounts? This can work well if the value of your estate might vary.
- If you are leaving fixed amounts of cash, will your estate have enough value to cover those amounts?
- What debts are there likely to be in your estate? For example, if you leave a property to someone in your Will, do you want the property to go to the beneficiary debt-free? Or do they have to pay out the mortgage or other debt on the asset?
- Do any of your beneficiaries have special needs and be likely to need assistance after you die?



Your children

If you have children under 18, you can include a clause in your Will to appoint a legal guardian if both parents have died. If the person agrees to be guardian, your wishes will probably be accepted, but they can always be challenged in the Federal Circuit Court or the Family Court.

Your funeral and burial wishes

You can state your funeral and burial/cremation wishes in your Will, but they are currently not legally binding. This means that under Victorian law, your executor does not have to carry out your wishes.

Choosing an executor that you can trust to carry out your wishes will help ensure that your funeral and burial/cremation wishes are followed, as your executor is responsible for organising this.

If you do include such directions, you should talk to your family and tell them what your wishes are, as a Will is often read after the funeral. See 'Choosing an executor'.

Once your Will has been signed

This section covers where to keep your Will, who needs to see it, and updating your Will.

Where should I keep my Will?

You should store your original Will securely. You have several choices for safekeeping:

- You can deposit your Will with the Registrar of the Supreme Court. A fee is payable for this service, and you or your solicitor must attend the Probate Office in person to deposit the Will.
- Most lawyers offer a safe deposit service for Wills and powers of attorney. Check if there will be a charge.
- State Trustees operates a Victorian Will Bank. This is a safe place to store your Will or your powers of attorney. The service is free, but a fee applies if you withdraw the documents.
- You can deposit your Will and other papers in a bank safe deposit box, but you need to consider how your executor will get access to it after your death.
- You can also use your own secure safe at home.

Tip

Get a copy of your Will and any other documents such as powers of attorney before you deposit the originals for safekeeping.



Who needs access to my Will?

Before you die, you are the only person who needs to see your Will. It is for you to decide if you want to show your Will to anyone else.

Practical tips

- Leave a letter for your executor with a copy of your Will telling them where your original Will is stored.
- If you have appointed a guardian for your children, leave a letter for that person setting out any firm wishes that you have, with a copy of your Will.
- If you have included wishes about organ donation or your funeral/burial/cremation, talk to your executor and family at the time of making your Will.
- If you are concerned that there may be any issues your executor needs to deal with after you die, consider leaving a letter setting out your wishes with your Will. It is not binding but may help your executor.

Note that any letters left with your Will are not binding, but may provide guidance to your family/executor as to your wishes.

Keeping track of your Will

It is important to let your executor know where your original Will is stored so they can access it when you die. Review your Will regularly and check that you know where it is.

If you deposited your Will with a law firm, and they have changed names or closed, generally any documents they hold will have been handed over to another law firm.

Tip

The Law Institute of Victoria's online legal archives service can help you find a Will deposited with a law firm that has closed or changed name for a fee.



Updating or changing your Will

It is important to keep your Will up-to-date. Once you've made a Will, don't put it away and forget about it. Make sure you update it whenever your circumstances change, such as through marriage, separation, divorce or the birth of a child.

When should I review my Will?

You should review your Will if:

- your family relationships change (marriage, separation, divorce, remarriage, children become adults)
- your family members change (deaths, births of children or grandchildren, adoption, stepchildren)
- your family assets change (purchase or sale of real estate, changes in your level of wealth)
- your executors or guardians die or become unavailable
- anything happens to a beneficiary (injury, death or bankruptcy).



What happens if I don't update my Will?

If your circumstances change, there may be gaps in your Will. If that happens the *rules of intestacy* will apply, which means any assets not dealt with by your Will are distributed according to the law, which may be different from what you want.

How do I update or change my Will?

You should get professional advice before you update or change your Will.

Large changes – making a new Will

If you want to make many changes to your Will, or the changes are complicated, you should make a new Will.

Small changes – using a codicil

You can make small changes to your Will with a *codicil*. A codicil is a separate document that is kept with your Will and read alongside it. A codicil must refer to your Will and be clear that its purpose is to change your Will, not replace your Will. However, it is usually easier to make a new Will.

Traps to avoid with your original signed Will:

- Do not make any hand written changes.
- Do not pin anything to it, not even a codicil setting out changes.
- Do not unstaple it.

What should I do once I have updated my Will?

It must be clear that your updated Will is your most recent Will.

- Mark your old Will as having been cancelled.
- Make sure the new Will includes a clause cancelling any earlier Wills.
- If you have given your executor a copy of your Will in the past, make sure they have a copy of the new or updated Will and know where to find the original.

I'm being pressured to change my Will. What should I do?

If you are feeling pressured about any aspect of your Will, you should get independent help.

For example, sometimes an elderly or vulnerable person is pressured to change their Will to benefit some family members instead of others. Do not give in to the pressure.

If you are in this situation, help is available from Seniors Rights Victoria. If a lawyer is preparing your Will, you should see the lawyer alone, away from family members or other beneficiaries. See 'Where to get help and information'.

What happens to your Will after you die?

This section covers your executor's role, when your Will can be challenged and how to reduce the likelihood of that happening.

First steps

After you die, your Will comes into effect. First, your executor must find your original signed Will. If your Will is held by a lawyer or a trustee company, your executor lets them know you have died and will generally need to provide evidence of the death (such as by producing the death certificate) to obtain the original Will. It is recommended that executors obtain professional advice as to their responsibilities.

What does my executor need to do?

An executor's role begins after you have died. Before doing anything with your property, your executor may need to **prove** the Will. Some assets cannot be released unless this has been done. That means proving to the court or Registrar of Probates that the Will is your last valid Will. The process is called **applying for probate**. For more information on applying for probate visit the Supreme Court of Victoria website.



Does my executor have to apply for probate?

- The executor may not need to obtain a grant of probate if there is no real estate and only assets of modest value in the estate (e.g. under \$100,000).
- Even if the executor doesn't have to get a grant of probate, it can be a sensible thing to do. It makes sure a person's Will is their final and correct Will, and it closes off their legal affairs with less chance of later challenge.

What happens after probate?

The executor or person handling the probate should contact each beneficiary to let them know what has been left to them and when the estate is likely to be distributed.

Beneficiaries are entitled to see a copy of your Will. The executor then starts the process of administering the estate. The grant of probate gives the executor power to take control of your assets and follow the instructions in your Will.

Challenging or contesting a Will

When can my Will be challenged or contested?

When you make a Will, you expect your wishes to be carried out. However, any Will can be challenged either because there is an allegation that the Will is not valid (for example it was made when you lacked testamentary capacity, or it was made because of undue influence from someone), or because a dependant has not been properly provided for. See 'Your beneficiaries'.

A court case can be very expensive and some costs may come out of the estate.

To minimise the risk of your Will being challenged:

- Seek professional advice.
- State your wishes very clearly in your Will.
- Correctly describe everyone mentioned in your Will and spell their names correctly.
- Correctly describe every asset mentioned in your Will.
- Sign your Will and have it properly witnessed.
- If you have a medical condition that affects your capacity or understanding, or you are an older person, you could also get a doctor's certificate to show that when you made your Will you had testamentary capacity.
- Take into account your family. Are there any complicated or difficult relationships? Have you left out a person who might challenge or contest your Will?
- Ensure you update your Will to reflect your current personal circumstances. Are ex-partners still provided for contrary to your current wishes?
- Ensure that you are not pressured in the process of making your Will. If you feel pressured seek independent help.
- Consider discussing your wishes in your Will with your family, so they know what to expect.

Tip

If someone challenges or contests your Will and agreement cannot be reached, either informally or through mediation, a formal hearing by the County or Supreme Court will decide how your Will should be applied.

Some important things to consider

This section covers how your Will may be affected by life changes such as divorce, separation and marriage.

Divorce, separation and marriage

How do separation and divorce affect my Will?

If you separate or divorce, it is important to update your Will to reflect the changes in your circumstances.

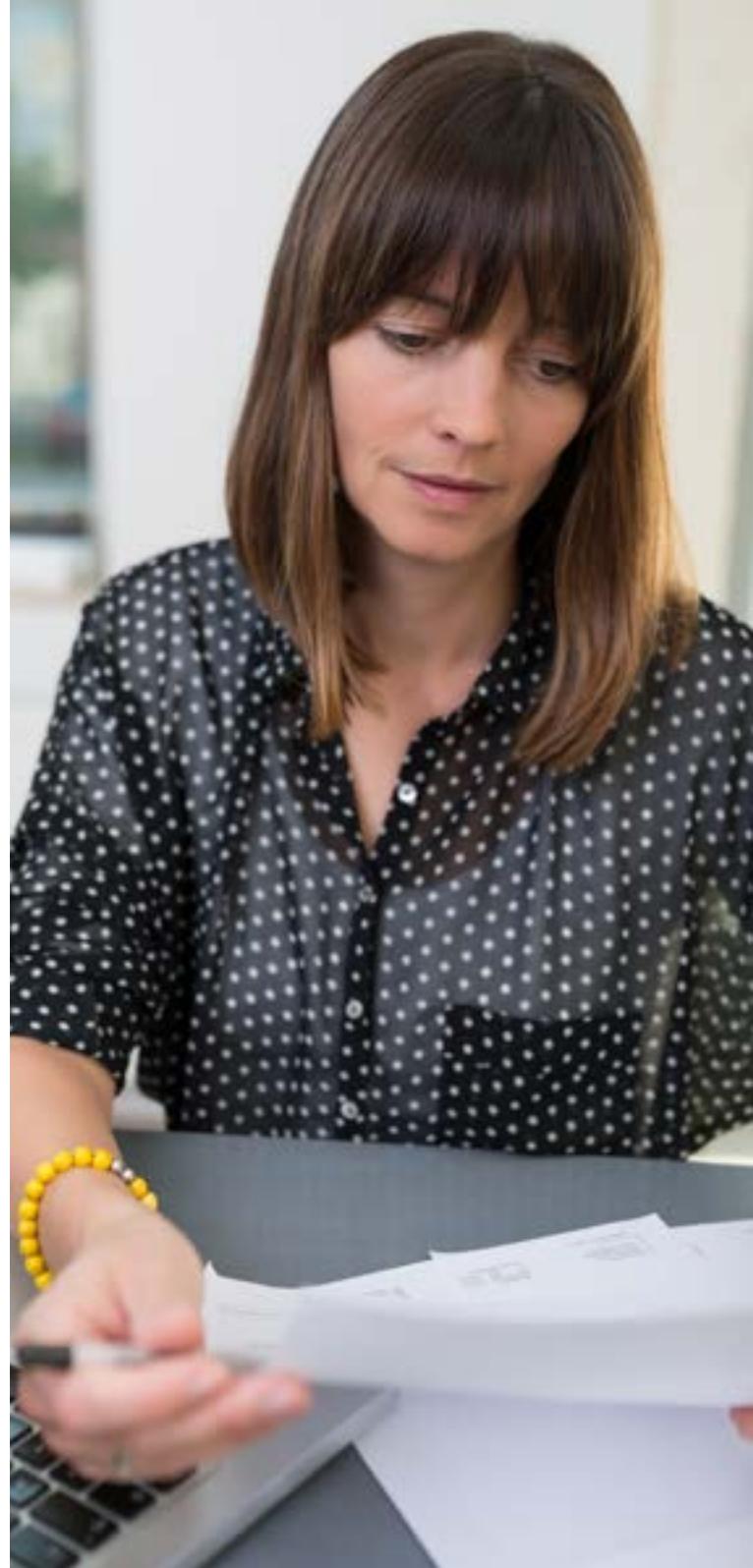
If you separate, this has no effect on your Will. If you left your estate to your ex-partner in your Will, they will still get those assets unless you make a new Will.

If you get divorced, this will cancel anything you left to your ex-partner in your Will, unless it is clear from your Will that you still want them to get the assets.

If you marry, this generally cancels your Will unless you make the Will intending it to continue after you marry.

Tip

If you are in a defacto or domestic relationship that ends, this will not cancel your Will.



Family issues to think about

Family conflict about Wills is common. To help avoid conflict and challenges to your Will it is important to get proper advice and make sure you have met all the legal requirements. It is a good idea to write a letter to be kept with your Will explaining your reasons for making the Will as you have. You could talk to your family about it if you feel comfortable.

Some things to consider:

- What might change? The more detail in your Will, the more likely gaps will appear over time. For example, beneficiaries might die, and your assets could change.
- What share will each beneficiary receive? For example, will all children receive equal shares, or each grandchild the same sum?
- Do you need to explain why you do not want to provide for someone or why you want to leave more to someone else?
- Might someone claim the Will isn't valid? For example that the Will was forged, that you lacked capacity, that you were pressured to change your Will or that the property in your Will wasn't fully owned by you?

Tip

Don't cut family members out of a Will without getting advice.

Including every child

If you have a child who was born outside marriage or an adopted child they will be included in your Will if you leave assets to 'my children'.

If you have stepchildren and/or grandchildren, you should make it clear whether you intend for them to benefit or not.

If you have cared for foster children, you may wish to include them in your Will. Unless the child was formally adopted, they will not be automatically included unless you specifically name them.

If you have a child through a surrogacy arrangement, it is particularly important to get legal advice before making a Will, as the child can be left without support if they are not clearly named in your Will.

Changes in circumstances

It's important to keep your Will up-to-date. Don't put off reviewing and updating your Will, even if you are going through a difficult time.

Review your Will whenever there is a significant change in your life, such as if:

- you separate from your spouse or domestic partner
- you remarry or enter a new long-term relationship
- you have another child
- you buy or sell a significant asset
- your financial circumstances change.

Make sure your Will fits your current circumstances.

Where to get help to make a Will

Making a Will can be complex. These professional services and resources can help you make your Will.

Professional services (lawyers and commercial providers)

Private lawyers

You can find a lawyer through suggestions of family or friends or the Law Institute of Victoria (LIV) referral service.

[(03) 9607 9550

0 www.liv.asn.au

0 www.findyourlawyer.com.au
(referral service)

State Trustees

State Trustees is a state-owned company, regulated by the Victorian Government, which specialises in legal and financial services including Wills. Ask about any cost that might be incurred by your estate after you die if using such service.

[(03) 9667 6444

[1300 138 672 (outside Melbourne)

0 www.statetrustees.com.au

Government and not-for-profit services

The Probate Office

The Supreme Court is the only Victorian Court that deals with the validity of Wills. The Probate Office, where the executor goes to prove the Will, is part of the court, and Wills can be deposited there for a small fee.

[(03) 9603 9300 (Option 1)

0 www.supremecourt.vic.gov.au/home/forms+fees+and+services/Wills+and+probate/

Seniors Rights Victoria

For seniors experiencing family pressure, Seniors Rights Victoria has information, specialist advice and advocacy services.

[1300 368 821 (confidential help line)

0 seniorsrights.org.au

Advance Care Planning Australia

A source of health care planning advice with a step-by-step guide on how to do an advance care plan.

[1300 208 582

0 advancecareplanning.org.au/

Everyday-Law

An information source and directory of free or low-cost legal help in Victoria.

0 www.everyday-law.org.au/

The Office of the Public Advocate

This site has detailed information about powers of attorney and a Take Control Kit for all forms and instructions for powers of attorney in Victoria.

[1300 309 337 (advice service)

0 www.publicadvocate.vic.gov.au/

Other

The Supreme Court and State Trustees websites (above) also have information about processes and fees.

The LIV library runs an online legal archive service that can supply details of law firms that have changed their name or no longer exist. It is available to members of the profession and the community for a fee.



“For the law to work for all members of the Victorian community, it needs to be less intimidating. We educate the legal sector on the importance of plain language communication, as a way of improving Victorians’ perception and understanding of the law.”

Joh Kirby

Plain language expert

Accurate at June 2017

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