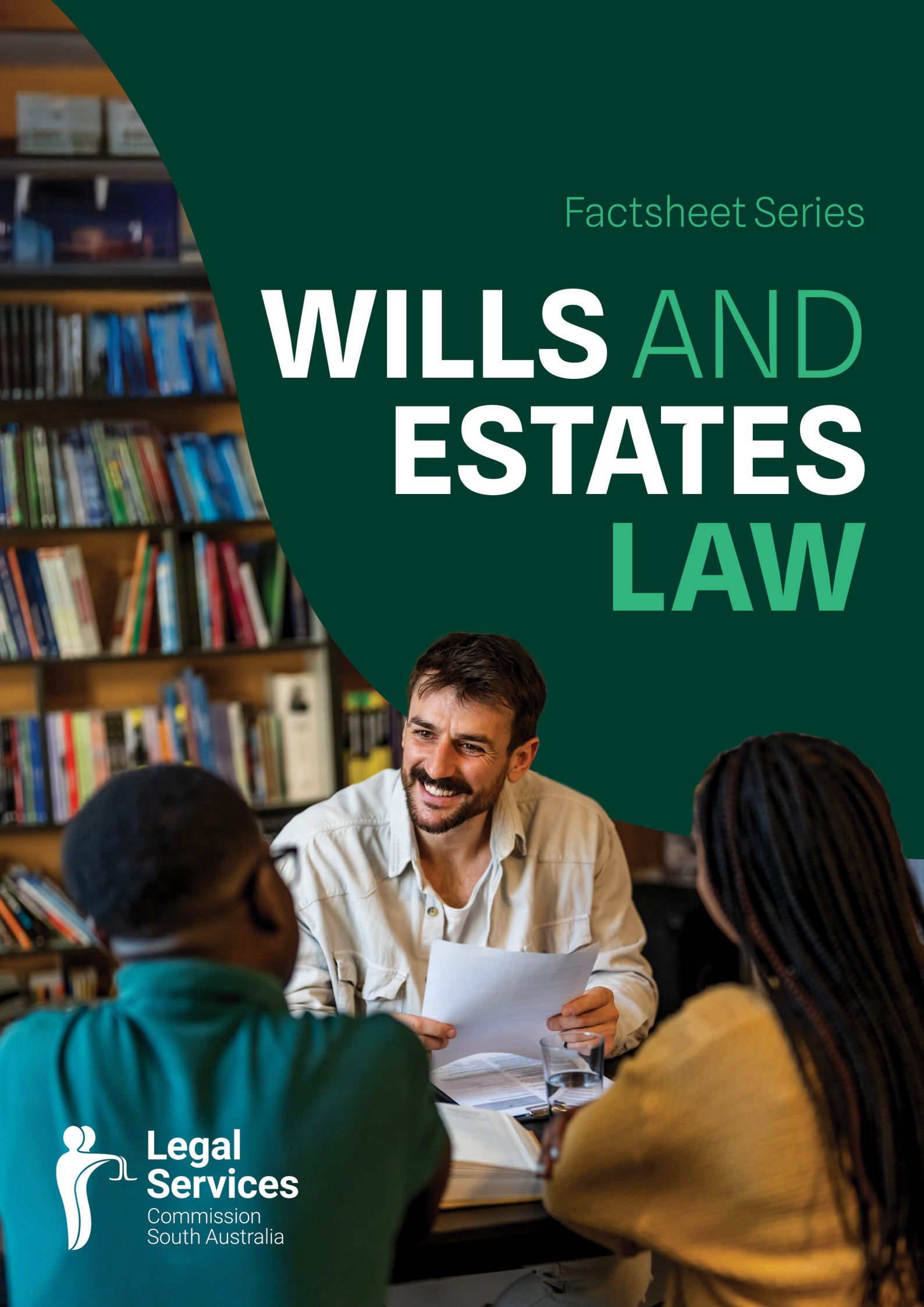
Factsheet Series

WILLS AND ESTATES LAW



Legal Services Commission South Australia

Legal Services Commission South Australia

Factsheet Series

WILLS & ESTATES LAW

This factsheet series is for anyone who is thinking about making a will in South Australia. In this series we explain what a will is, why you might benefit from making one, and what happens if you die without a valid will. We set out how to make a will in South Australia and where to get legal help.

We also explain the key roles and responsibilities of an executor and how to choose one, when you might need to change your will and how to do so, and who can view or contest (challenge) your will after you die.

Legal terms used in this series

administrator	The person who is appointed to carry out the wishes of someone who has died without an appointed executor or without a valid will
advance care directive	A document that sets out your wishes for future health care, living arrangements and end of life preferences. It may also appoint one or more persons to make medical decisions for you during periods when you do not have legal capacity
beneficiary	A person who is left something in a will, or for whose benefit property is held by a trustee or executor
binding nomination	A written direction as to where you would like your superannuation to go after you die
codicil	A separate document that adds to or changes an existing will
contest	To challenge or dispute. A person may contest your will if they believe they were unfairly left out of it
domestic partner	In relation to someone who has died, a domestic partner is a person • declared by a court to have been the partner of the deceased, or • in a registered relationship with the deceased as at the date of their death.

estate	All of the property you own when you die forms your estate. This includes real estate, cash, money held in a bank, motor vehicles, personal possessions and digital assets such as cryptocurrency and digital files. Superannuation and jointly owned property are not part of your estate.
executor	The person named in a will to carry out the wishes of a deceased person and distribute their estate
family provision order	The Supreme Court may make a family provision order if it decides that someone will not be properly provided for under a will or the law of intestacy and deserves a part, or a larger part, of a deceased person's estate
intestate / intestacy	To die intestate means to die without a valid will. The law that governs the estates of intestate persons is known as the law of intestacy
legal capacity	In the context of making a will, an adult has legal capacity if they understand the nature and effect of making a will and can communicate their wishes
letters of administration	The document that empowers a person to manage and distribute the estate of a person who died without a valid will or died with a valid will but with no executor to administer the estate
power of attorney	A document that appoints one or more persons to exercise your legal and financial powers while you are alive
probate	The official court declaration that a will is to be treated as valid and binding
registered relationship	A relationship that has been formally registered with Births, Deaths and Marriages under the South Australian Relationships Register Act

revoke / revocation	To cancel, take back or withdraw
succession	The area of law that governs wills and estates
Succession Act 2023	The new law that governs wills and estates in South Australia from 1 January 2025
Supreme Court of South Australia	The Supreme Court has exclusive jurisdiction to hear probate matters. This means it is the only court in South Australia that may grant probate or hear and determine a dispute about a will or an estate
testator	A person with legal capacity who makes a will
trust	Where a person (a trustee) holds property for the benefit of one or more persons (beneficiaries)
trustee	A person who holds trust property
will	A legal document that sets out who you want to inherit your estate (your money, possessions and property) when you die

Disclaimer

This factsheet series offers a simple guide to wills and estates law in South Australia. It is not a substitute for legal advice. In this factsheet series we explain why we recommend you seek the help of a private lawyer to make your will.

The information in this series is believed to be accurate at the time of printing. However, the law constantly changes. No responsibility will be taken for the accuracy or reliability of the information, or for any loss that may arise from an error or omission in the information.

Visit our website at www.lsc.sa.gov.au or call 1300 366 424 for free information and general advice on the law in South Australia.

Feedback

We welcome your feedback about the appearance, readability or content of this factsheet series.

Email cle@lsc.sa.gov.au or call (08) 8111 5555 and ask for the Community Legal Education Team.

02.25

Legal Services Commission South Australia

Wills and Estates Law: Factsheet 1

What is a will?

A will is a legal document that sets out who you want to inherit your **estate** (your money, possessions and property) when you die.

To be valid in South Australia, your will:

- must be **in writing**
- must be **signed** by you and **witnessed** by 2 adults (ideally 2 adults who are not named in your will, to avoid suggestions of a conflict of interest)
- must name **beneficiaries** who will inherit your property
- should name an **executor** – a representative who will carry out your wishes.

A will comes into effect after you have died.

Who can make a will?

You can make a will if you are at least **18 years of age** and you have **legal capacity**. A person younger than 18 may make a will if they are or have been married or with the permission of the Supreme Court.

Legal capacity means that you understand the nature and effect of making a will and can communicate your wishes.

No one can make a will for or on behalf of someone else. This includes a parent of a child under 18 or an adult child with disability, and a person acting on someone else's behalf under a court or tribunal order or power of attorney.

If you do not have legal capacity, the Supreme Court may make a will on your behalf in terms that reflect your likely wishes if you had capacity.

How is a will different from...?

A power of attorney

A power of attorney appoints one or more persons to manage your **legal** and **financial** affairs while you are alive.

A **general** power of attorney allows someone to act immediately, usually for a certain period (such as while you are overseas). A general power of attorney ends if you lose legal capacity.

An **enduring** power of attorney can take effect immediately or only during periods when you do not have legal capacity (for example, after a stroke).

A power of attorney has no effect after you have died.

To learn more about powers of attorney and how to make one, see our **Enduring Power of Attorney kit** (download free from www.lsc.sa.gov.au or buy a hard copy from Service SA) or call 1300 366 424.

An advance care directive

An advance care directive allows you to set out your wishes for future **health care**, **living arrangements**, and **end of life preferences**. You can also appoint one or more persons to make medical decisions for you if you lose legal capacity.

An advance care directive only has force during periods when you do not have legal capacity. It has no effect after you have died.

To learn more about advance care directives and how to make one, call 1300 366 424 or visit www.advancecaredirectives.sa.gov.au.

DID YOU KNOW?

A power of attorney and an advance care directive are often referred to together as a **living will**.

We recommend you have all 3 documents – a power of attorney, an advance care directive and a will – to safeguard your future and ensure your wishes are respected throughout your life and after you die.

Legal Services Commission South Australia

Wills and Estates Law: Factsheet 2

Why have a will?

A will is a powerful legal tool that can speak for you after you have died. By making a will, you can **give legal force to your wishes and values** and reduce uncertainty for your loved ones.

Making a will is also a good opportunity to **speak with your loved ones** about your wishes and values and theirs as well. Speaking about death can be difficult, but it is important to **plan ahead** and discuss the future while you still can. This can help your loved ones manage your affairs according to your wishes after you have died.

When should I make a will?

You can make a will as soon as you turn 18. You should think about making a will if you have

- **assets** (real estate, motor vehicles, cash or money in a bank account)
- **children**
- **strong wishes** about your **funeral**, burial or cremation
- **strong wishes** about where your **assets** will go after you die.

You should also make a will if you have family who you would prefer **not** to inherit your estate.

See **What if I die without a will?** to learn who will inherit your estate if you die without a valid will in place.

What can go in a will?

Provided it meets certain basic criteria (see **What is a will?**), a will can be as unique and creative as its maker.

You can set out your wishes about

- who you would like to administer your estate and arrange your funeral (your executor)
- who will receive your assets (real estate, money, property and possessions, including sentimental items and digital assets)
- your funeral, burial or cremation
- your preferred guardians for your children
- who will care for your pets.

DID YOU KNOW?

Funeral and burial wishes set out in your will are not binding on your executor, but a statement that you do not wish to be cremated is legally binding.

If you have strong views about your funeral, burial, or cremation, you should discuss this with your loved ones and choose an executor who will honour your wishes.

What cannot go in a will?

Jointly owned property (such as a house or bank account) automatically passes to the co-owner upon your death and cannot be left in a will.

Debts and liabilities cannot be inherited. They will be paid before the estate is distributed to beneficiaries.

Superannuation is not automatically part of your estate and is subject to the rules of your super fund. You may be able to make a binding nomination that your super be paid into your estate.

Your body is not considered property and cannot be left as such in a will. You may set out your preferences if you wish to donate your organs or donate your body to science after death.

What if I do not have a will?

Without a valid will, the **law of intestacy** will decide where your estate will go. This may or may not accord with your wishes because it may

- give your things to people who are not important to you, or
- leave out people who are important to you.

To die **intestate** means to die without a valid will. The law that governs the estates of intestate persons is known as the **law of intestacy**.

See **What if I die without a will?** for more information about who will inherit your estate.

The law of intestacy only recognises family relationships and cannot take into account friendships, community groups or charities that may matter to you.

If you die without a will, then, unless you have made other arrangements, you cannot choose who will arrange your funeral, dispose of your body, or administer your estate. Decisions may be made that do not accord with your personal, ethical, spiritual or cultural values.

It may also be more difficult for your loved ones to determine what you would have wanted. Managing your affairs may be more stressful, time-consuming and expensive than it needed to be at a time when your loved ones are grieving.

See **Making a will and getting legal help** to learn more about how to make your will and who can help you.

Legal Services Commission South Australia

Wills and Estates Law: Factsheet 3

Making a will and getting legal help

How do I make a will?

A will is an important and powerful legal document. The best way to make a will is to see a **private lawyer** with experience and expertise in preparing wills.

Why see a private lawyer?

A private lawyer can

- provide **personal, professional advice** about your circumstances and your estate
- ask questions and offer advice about **matters you may not have considered**
- draft a will with the level of complexity that **meets your needs**
- ensure your will complies with any **legal requirements**
- assess and record your **legal decision-making capacity** at the time you make your will
- check that you are acting **voluntarily**, with no pressure from anyone else.

Paying a private lawyer to prepare your will offers the best protection against someone successfully contesting (challenging) your will after you have died.

If you prepare your will yourself, and it is unclear or contains an error, this may only be discovered after you have died, and you will not be able to tell people your wishes or fix it.

Private lawyers may charge anything from $300 to $3,000 or more, depending on your needs. Some may fix a price to prepare your will along with a power of attorney and an advance care directive. You should ask for a quote before choosing a lawyer.

Your lawyer may offer to keep your will and other legal documents in a safe and secure place until they are needed. They may also record the location of your will on the Law Society's Wills Register. This may make it easier to locate your will after you have died.

Public Trustee

The Public Trustee can prepare a will for **free** for certain customers. This includes eligible concession holders and persons under administration or guardianship orders.

The Public Trustee will only prepare a will for eligible customers if it is named as **executor**. It will charge a percentage of your estate when it administers your estate. Visit www.publictrustee.sa.gov.au or call (08) 8226 9200 for more information.

Online will services

Several private agencies offer online tools to help prepare your will for a flat fee. This may involve answering questions online before a lawyer reviews your responses and a draft will.

This option may suit you if your personal circumstances and needs are simple or standard and you would prefer a cheaper option.

Online tools have limited ability to

- provide comprehensive personal advice about your estate, your assets and your needs
- assess your legal capacity or state of mind at the time you make your will.

This option may increase the risk that your will does not best reflect your wishes and may increase the risk of a successful challenge after your death.

Consumer advocacy group Choice has reviewed some of the more popular online will kits. Visit www.choice.com.au and search 'online will kits' to learn more about the benefits and risks.

Community wills days

Some organisations offer a community service where lawyers prepare simple wills for a modest fee. Upcoming sessions in your area can be found by searching online.

Community wills days offer a low cost option for straightforward matters but, like online will services, may not be appropriate for more complex circumstances.

Do-it-yourself will kits

Do-it-yourself will kits may be purchased from various locations including post offices and online, usually for less than $50.

Like online will services and community wills days, do-it-yourself kits can help you make a basic will. This may suit you if your circumstances are simple or standard and you would prefer a low cost option.

Do-it-yourself kits cannot provide personal legal advice and they cannot assess your legal capacity or state of mind at the time you make your will. They also come with the added risk that a lawyer will not review your will before it is finalised and signed. Your will may include an error or defect that may make it invalid or result in unintended consequences.

The best and safest option to secure your future is to see a private lawyer.

Who else can help?

We can! The **Legal Services Commission of South Australia** can provide free legal information and general advice about wills and estates to anyone.

Call our legal helpline on **1300 366 424** during business hours for telephone advice or to make a free 30 minute appointment.

Legal Services cannot prepare a will for you or review a draft will. For anything more than general advice, we will usually recommend that you seek personal advice from a private lawyer who specialises in wills.

Finding a private lawyer

If you do not know any private lawyers who specialise in wills and estates, ask friends, family or trusted colleagues for recommendations.

The **Law Society of South Australia** can also help connect you with a private lawyer or firm that specialises in wills and estates.

Call **(08) 8229 0200** during business hours or access the online **See a Lawyer Referral Service** (www.seealawyer.com.au) to find a lawyer today.

Legal Services Commission South Australia

Wills and Estates Law: Factsheet 4

Choosing an executor

What is an executor?

An executor is the person you choose and name in your will to carry out your wishes after you have died.

Who can be an executor?

Any adult with **legal capacity** may be an executor. You may choose a relative, a friend or a professional. Your executor may also be a beneficiary in your will.

You may appoint **more than one** executor to work together to administer your estate. You may choose to appoint a **back-up** to act if your preferred executor is unable or unwilling to act or dies before you.

What factors should I consider?

It is best to appoint an executor who

- you **trust** to carry out your wishes
- is likely to **survive** your death
- has the time and **capacity** to manage legal and financial affairs.

Being an executor can be time-consuming and stressful. While the person you appoint does not need to formally accept, you should speak with them before you sign your will to check they understand their role and responsibilities. They should seek legal advice if they have questions or concerns.

You do not have to give your executor a copy of your will but you should let them know where it is. You may also wish to complete our End of Life Planning Checklist and Worksheet and store it with your will.

Where possible, you should speak with your loved ones about who you have appointed and why. This may help to avoid disputes down the track.

Professional services and fees

Many people do not have a friend or relative they feel comfortable appointing as their executor. There are professional services and trustee companies, including the Public Trustee, who may be appointed in these circumstances.

Professional executors will usually charge a **fee** for their services. Non-professional executors such as relatives or friends may seek help from professional services to administer your estate, such as financial advisors, accountants, and lawyers. These fees will come out of your estate.

Executors are entitled to seek reasonable payment from your estate to cover their time and any costs incurred. You may also choose to provide for this in your will by leaving your executor a gift.

Duties of an executor

The duties of an executor do not come into effect until you have died.

Being an executor may involve:

- **locating** the original version of your **will**
- allowing certain people to **view** and take copies of your will
- organising your **funeral** and burial or cremation
- applying for a certified copy of your **death certificate** from **Births, Deaths and Marriages**
- applying to the Supreme Court for **probate** or other **court orders**
- **administering your estate** by distributing your assets in accordance with your will.

Being an executor does **not** involve:

- being required to act if they are now unable or unwilling to act
- personally paying your bills, debts or liabilities if your estate does not cover them.

What if problems arise?

Court action can be taken against an executor who fails to discharge their duties. This may be where an executor

- takes no steps to administer the estate
- does not follow the directions in the will
- fails to preserve estate assets or causes loss.

The Court may make a range of orders to hold executors to account. This may require an executor to

- pay back to the estate any improper benefit obtained
- compensate anyone who has suffered loss or damage.

Court action to hold an executor to account must be started within **3 years** after becoming aware of the executor's failure to meet their duties.

Seek legal advice before taking court action. Call our **legal helpline** on **1300 366 424** for information and general advice. For personal advice and representation, contact a private lawyer that specialises in wills and estates.

If you have been named as an executor, you may wish to read the Public Trustee's online resource **I've been named as executor – where do I start?** which can be found at www.publictrustee.sa.gov.au.

Legal Services Commission South Australia

Wills and Estates Law: Factsheet 5

I have a will. Now what?

Your will remains in force from the moment it is validly signed and witnessed. It does not need to be lodged or recorded anywhere.

If a lawyer has prepared your will, they may register its location on the Law Society's Wills Register.

When to update your will

You should review your will every couple of years to check it still meets your needs and circumstances.

Some life events **automatically** revoke (cancel) your will. You will need to make a new will if you

- marry
- start a registered relationship
- divorce
- end a registered relationship

unless it is clear from your will that it was made with the change in relationship in mind.

A **registered relationship** is a relationship that has been formally registered at Births, Deaths and Marriages under the South Australian Relationships Register Act.

Some couples choose to register their relationship rather than marry to ensure their relationship is recognised by law.

You may also wish to update your will or make a new one following significant **life events** including

- a new or ended relationship
- the birth or adoption of children
- a change in circumstances of an executor or beneficiary, including relocation overseas, loss of legal capacity, or death
- a significant change in assets, such as buying or selling a house
- retirement.

If you experience a significant life event, you should contact the lawyer who prepared your will.

You can also call our **legal helpline** on **1300 366 424** for general information and advice about when your will may need updating.

How to update your will

You cannot update or change your formally executed will by simply crossing something out or adding something in.

You may make small changes to your will by making a **codicil**. A codicil is a separate document that adds to or changes an existing will.

The same legal requirements that apply to making a will apply to making a codicil. You must have **legal capacity** and it must be formally **signed** and **witnessed**. You should seek legal advice before making a codicil.

The easiest and simplest way to update your will is to **make a new one**. Making a new will automatically revokes any previous or existing wills you have made.

How to revoke (cancel) your will

You can also revoke your will by

- preparing and signing, in front of 2 witnesses, a **document** that states your intention to revoke your will
- physically **destroying it** (for example, by burning it or tearing it up)
- starting a registered relationship or marrying.

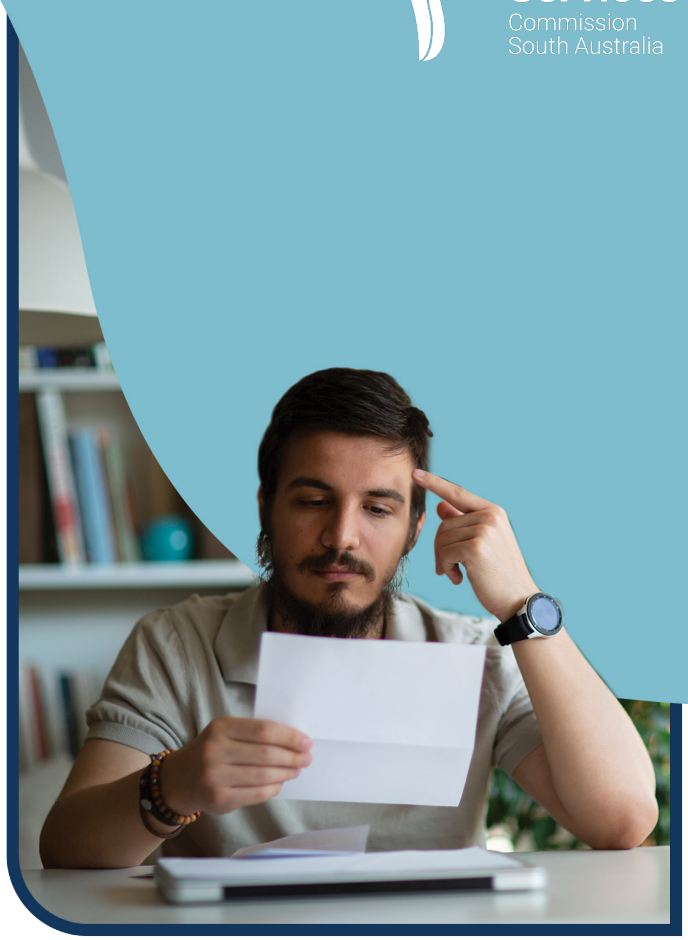
You must have **legal capacity** to revoke a will.

If you revoke your will and do not make a new one, when you die, the law of intestacy will determine who inherits your estate. Revoking a will does not restart or reactivate a previous will you may have made.
See also **Why have a will?**

Legal Services Commission South Australia

Wills and Estates Law: Factsheet 6

Who can view my will?



While you are alive

No one is legally entitled to see your will while you are alive.

If you feel comfortable to do so, **speak with your loved ones** about your wishes and your reasons for making your will in the way that you have.

You should keep your will in a safe and secure place and let your executor know where it is.

If a private lawyer has prepared your will, they will usually keep the signed original in a secure location. They cannot legally show it to anyone without your consent.

After you have died

From 1 January 2025, the following people are entitled to see your will after you have died:

- a person named in the will
- a person named in an earlier will as a beneficiary
- your surviving spouse, partner, child or stepchild
- any former spouse or partner
- your parents or guardians
- anyone who would be entitled to a share of your estate had you died without a will (see **What if I die without a will?**)
- a parent or guardian of a child who is named in the will or would be entitled to a share of your estate had you died without a will
- a person managing your estate under a guardianship or administration order immediately before your death.

A person who has access to your will (usually your lawyer or executor) must allow anyone on this list to view or take copies of your will after you have died. This also extends to a revoked will, a document purporting to be a will, a part of a will and a copy of a will.

The Supreme Court may also allow someone not on this list to view your will if satisfied that

- they may have a claim against your estate, and
- they have a proper interest in the matter, and
- viewing your will is appropriate.

Once the Supreme Court has granted probate, anyone may obtain a copy of the will through CourtSA.

Legal Services Commission South Australia

Wills and Estates Law: Factsheet 7

Who can contest my will?

You cannot stop someone contesting (challenging) your will after you have died.

Having your will professionally prepared by a lawyer will reduce the chance of a successful challenge.

A will may be contested on the basis that it is **invalid** or **unfair**.

Invalid

Someone with a legal interest in your estate may say that your will is not valid because

- you did not have **legal capacity** when you made it
- you did not **understand** the will when you signed it
- someone **pressured** you to make it
- someone else **fraudulently** signed the will or **tricked you** into signing
- it is **not your last will** and testament
- it was **legally revoked** before you died
- the content of your will is **unclear** or it does not comply with **legal requirements**.

If the Supreme Court agrees that your will is invalid, it may rectify (fix) the will or order that your estate be distributed in a particular way.

Unfair

Someone may challenge your will on the basis that it is unfair and does not properly provide for them.

While the law recognises **freedom of testation** (you are free to leave your estate to whomever you choose), the law also recognises that sometimes there is a **moral duty** to provide for certain family members.

The Supreme Court may, on application, make a **family provision order** if satisfied that your will does not adequately provide for a person's proper maintenance, education or advancement.

Family provision orders

A family provision order may be made whether or not you die with a valid will. If you have a will, the order will change how your estate is distributed.

The following people may apply to the Court for family provision:

- your **spouse** or **domestic partner** (or both)
- any **former spouse** or **domestic partner**, unless a particular type of financial agreement, entered into on or after 1 January 2025, was in force between you and your former partner
- your **child**
- your **stepchild**, if they are vulnerable due to disability, depended on you when you died, cared for you before you died, or they or their parent contributed to your estate
- a **stepchild under the age of 18**, if you were looking after them financially before you died
- your **grandchild**, if their parent (your child) died before you, or you were looking after your grandchild financially before you died
- your **parent**, if they cared for you or you cared for them before you died
- your **sibling**, if they cared for you before you died.

What the Court considers

When deciding whether to make a family provision order, the Court will consider

- **your wishes** (this is the most important factor)
- the **vulnerability** and **dependence** of the applicant
- the applicant's **contribution** to your estate
- the **character** and **conduct** of the applicant.

A family provision order may also be sought when a person dies intestate (without a valid will), if someone believes they will not be properly provided for under the law of intestacy.

See **What if I die without a will?** to learn more about the law of intestacy.

Time limits

Generally an application for a family provision order must be made **within 6 months** of the grant of probate or administration. Applicants should seek legal advice before applying to the Court.

Fees and costs

A person who applies to the Supreme Court to challenge a will or seek family provision will usually need to pay a **court fee**. This can be waived (not enforced) in some circumstances. If the fee is charged, it may or may not be paid back from the estate when the court matter is finished.

The Court has discretion to order that **legal costs** incurred by the applicant or other parties be paid out of the estate or by individual parties. Parties may need to cover their own costs and, if their claim fails, they may be ordered to pay the legal costs of other parties.

To that end, the Supreme Court may order a party to pay an amount to the Court (known as **security for costs**) if the Court believes their application for a family provision order may lack merit or if a party will not negotiate with other family members.

Legal Services Commission South Australia

Wills and Estates Law: Factsheet 8

What if I die without a will?

If you die without a valid will, the **law of intestacy** will decide where your estate goes. This factsheet explains who will inherit your estate, which will depend on the nature of your family relationships.

If you have a partner

If you are married or in a domestic partnership, but you do not have children, the whole of your estate will go to your **partner**.

If you have a partner and children – estates worth $120,000 or less

If you have a spouse or domestic partner and at least one child, and your estate is worth $120,000 or less, the whole of your estate will go to your **partner**.

If you have a partner and children – estates worth more than $120,000

If you have a spouse or domestic partner and at least one child, and your estate is worth more than $120,000:

- your **partner** will get $120,000 plus half of the balance of your estate
- your **children** will get the other half of the balance of your estate in equal parts.

Your partner will also inherit your personal property including sentimental items and any motor vehicles you own.

If you have children but no partner

If you have children but no spouse or domestic partner, your estate will be shared equally among your **children**.

If you have grandchildren but no children or partner

If all your children have died before you but you have grandchildren, your estate will be shared equally among your **grandchildren**.

If you have children and grandchildren but no partner

If you had more than one child but a child has died, leaving a child or children (your **grandchildren**), then your estate will be shared equally among your surviving **children**, with the portions that would have gone to your deceased child or children going instead to their children in equal shares.

DID YOU KNOW?

Under the law of intestacy, **children** includes adult and minor children and any adopted children, but does **not** include **stepchildren**.

Stepchildren may be able to apply for a family provision order. See **Who can contest my will?**

If you do not have a partner or children or grandchildren

If you die without a partner or children, the law of intestacy sets out the order in which your other relatives may inherit your estate:

- if both your **parents** are still alive, your estate will go to them in equal shares
  - if only one **parent** is alive, they will receive the whole of your estate
- if your parents have died, your estate will be shared among any living **siblings** (such as sisters and brothers, and including half-siblings) you have
  - if a sibling has died but left **children**, those children (your nieces or nephews) will get in equal shares the portion of your estate the deceased sibling would have received
  - if **all** of your siblings have died, but left **children**, those children will receive equal shares of your estate as if they were your own children
- if you have no living parents, siblings or children of siblings, your estate will go to any living **grandparents** you have in equal shares
- if you have no living parents, siblings, children of siblings or grandparents, your estate will be shared among any living **siblings of your parents** (such as uncles or aunts) in equal shares
  - if one or more of your parents' siblings has died but left children (your **first cousins**), they will get in equal shares the portion of your estate their deceased parent would have received
- if you have no living parents, siblings, children of siblings, grandparents, siblings of your parents or first cousins, but your **first cousins** left **children**, they will be entitled to the portion that would have gone to their grandparent in equal shares.

If you have no living relatives

If you have no living relatives that fall within the listed categories and you die without a will, the whole of your estate will go to the **Government**.

Things to consider if you do not have a will

The law of intestacy may be changed if someone applies to the Supreme Court for a family provision order. See **Who can contest my will?** for the categories of relatives who may apply for family provision and what the Court will consider.

You may wish to consider the following questions if you do not currently have a will:

- Will your loved ones be looked after if you die unexpectedly?
- What if you and your partner die at the same time?
- Would you prefer your children or other beneficiaries to inherit your estate when they are older than 18 (such as when they turn 25)?
- Is there likely to be a claim for family provision against your estate?
- How will the Supreme Court know what your wishes are in the absence of a will?
- If you have no living relatives, would you prefer your estate to go to the Government or to a friend, charity or organisation of your choice?

If any of these questions cause you concern, you should seek legal advice.

Having a will prepared by a wills and estates lawyer is the best way to give legal force to your wishes and values. You can ensure your loved ones are provided for and reduce the chance of a successful family provision claim by someone you would prefer not to inherit a part of your estate.

Legal Services Commission South Australia

Wills and Estates Law: Factsheet 9

The new Succession Act

On 1 January 2025, wills and estates law in South Australia changed.

The **Succession Act 2023** replaced 3 separate laws that previously set out

- how to make a valid will
- how an estate is distributed after death, with or without a will
- how a relative of a person who has died may seek part of an estate where they believe they will not be properly provided for.

The Succession Act aims to modernise and improve the law. Many changes are based on recommendations from independent reviews conducted by the South Australian Law Reform Institute.

Importantly, much of the law has not changed. If you already have a valid will, you do not need to make a new one under the new law.

It is a good idea to review your will every few years to check it still meets your needs. See **I have a will. Now what?** for more information.

Key changes

New right to inspect a will

Until 1 January 2025, there was no legal right to see the will of a person who had died until after the grant of probate. The Succession Act creates a **new right to inspect the will of a deceased person**, given to those with a proper interest in the will.

See **Who can view my will?** to learn more.

Changes to claims for family provision

There are significant changes to the **circumstances** in which certain **categories** of persons may apply to the Supreme Court for family provision. The circumstances in which a stepchild may seek provision have **broadened**, while new **restrictions** apply to former spouses and partners, grandchildren, siblings and parents seeking a portion, or a greater portion, of a deceased's estate.

The law now includes a **list of factors** the Supreme Court must consider when deciding whether to make a family provision order. This list makes it clear that the **wishes of the deceased person** are the **most important factor**.

See **Who can contest my will?** for more information about family provision claims.

More distant relatives may inherit

A further degree of relatives may inherit the estate of someone who has died without a valid will: **children of first cousins**. This will only occur where a deceased person had no living partner, children, parents, siblings or other close family at the time of their death.

This change is in response to feedback that people usually prefer their estate to go to distant relatives rather than to the Government.

Changes affecting executors and administrators

The Supreme Court has been given new powers to **hold executors and administrators to account** in relation to the administration of estates.

This includes

- the power to make an executor or administrator give an **undertaking** (promise) to the Court
- the power to make an executor or administrator who has failed to perform their duties pay money to **compensate** someone who has suffered loss as a result.

Other key changes

The payment made to a **surviving spouse** or **partner** of a person who has died **intestate** (without a valid will) has increased from $100,000 to $120,000. This applies to anyone who dies intestate on or after 1 January 2025.

The law now makes it clear that a **separated spouse** or **partner** of a deceased person is **not** entitled to the deceased's estate if a valid financial agreement (within the meaning of the Family Law Act 1975), entered into on or after 1 January 2025, was in force between them just before the deceased's death.

A person or entity (such as a bank) who holds up to **$15,000** in cash or personal property for a deceased person may now **pay it directly** to their surviving spouse, partner or child **without a grant of probate** or administration. This is intended to allow the transfer of small amounts to immediate family quicker than it may take following a grant of probate.

The law now clarifies that when 2 people die and it is not clear who died first, the younger of the 2 is taken to have outlived the elder by 1 day.

The law now states that when 2 people die together who jointly own property, they will be taken to have owned property as tenants in common. This means that their share in the property will pass to those entitled to inherit, rather than to the younger of the 2.

The Succession Act applies to all new and existing wills in South Australia and all Supreme Court estate matters from 1 January 2025.

Supreme Court proceedings that started before 1 January 2025 will continue under the previous law.

If you have any questions or concerns about how these changes affect you, contact the lawyer who prepared your will, or **call our legal helpline** on **1300 366 424** during business hours for free information and advice.

Legal Services Commission South Australia

Wills and Estates Law: Factsheet 10

Frequently Asked Questions

I've made a will. Where do I lodge it?

Your will does not need to be lodged or registered anywhere while you are alive.

You should keep your will in a safe and secure place and let your executor or someone you trust know where it is.

If a lawyer has prepared your will, they may offer to keep your will and other legal documents in a safe and secure place until they are needed.

Your lawyer may also record the location of your will on the Law Society's Wills Register. This may make it easier to locate your will after you have died.

I have changed my name and moved house. Do I need to update or remake my will?

No. As long as the will was validly made and you are clearly identifiable, you do not need to remake your will if you change your legal name or change address.

The only exception is where you have changed your name following marriage or divorce. You will need to make a new will unless it is clear that you made your will with the change in relationship in mind.

See **I have a will. Now what?** for more information.

Someone named in my will has changed their name. Do I need to update or remake my will?

No. As long as the details of the person named in your will were correct at the time the will was made, and they are clearly identifiable, you do not need to update your will.

Of course, if someone named in your will has changed their name or may be difficult to locate or contact, you may wish to keep current contact information with your will so that your executor can more easily locate them after you have died.

How can I stop my will being contested?

You cannot stop someone contesting (challenging) your will after you have died. Having your will professionally prepared by a wills and estates lawyer will reduce the chance of a successful challenge.

A wills and estates lawyer can also give you legal advice about your options while you are alive if you have specific concerns that your will may be challenged after you die.

You may wish to explain in your will why you have chosen to distribute your estate in the way that you have. In the event of a court challenge, this will help the court understand your wishes, which is the most important factor in such disputes.

How can I stop my ex making a claim on my estate?

There is no way to prevent someone from applying to the Supreme Court for a family provision order. Having a valid will professionally prepared by a lawyer will reduce the chance of an ex-partner successfully making a claim against your estate.

If you have specific concerns, consider explaining your wishes and the reasons for your decisions in your will. You may also wish to explain why you have not left any of your estate to your ex-partner, and the nature of your current relationship with them.

In a family provision claim, this will give the Court confidence that it understands your wishes, which is the most important factor when making a family provision order.

From 1 January 2025, a former spouse or former domestic partner of a deceased person may not apply for family provision if a valid financial agreement (within the meaning of the Family Law Act 1975), entered into on or after 1 January 2025, was in force between them just before the deceased's death.

See **Who can contest my will?** for more information about family provision claims.

I have found a copy of my parent's will but cannot locate the original. Can I rely on the copy?

It is the executor's responsibility to find the original version of the will after the testator's (will-maker's) death. If they cannot find the original, they should consider contacting the deceased's family and friends and any professionals the deceased may have seen, such as lawyers and accountants. They should also contact the Law Society of South Australia, the Supreme Court of South Australia and the Public Trustee, as they may hold the original or know where it is.

If the original cannot be located, the Supreme Court may, in limited circumstances, permit a copy to be used. This should not be relied upon.

I am power of attorney for my mother. Can I continue to pay bills after she has died?

A power of attorney has no effect after the person who made it has died.

The powers of an executor are different to those under a power of attorney. It does not matter that a testator may have appointed the same person as their power of attorney and executor. After a testator has died, an executor may only authorise certain payments out of the estate, such as funeral expenses.

Seek legal advice before organising the payment of a deceased person's bills.

How much does it cost to make a will?

Private lawyers may charge anything from $300 to $3,000 or more, depending on your situation and needs.

See **Making a will and getting legal help** for information about the different options and likely cost.

Do I need to change or update my will?

Certain life events will automatically revoke (cancel) your will, such as marriage. You should also review your will every few years or following a significant life event.

See **I have a will. Now what?** for more information.

I am in a new relationship but I am still married. What will happen if I die without a will?

Usually if you die without a valid will and you are married or in a domestic relationship, your estate will go to your spouse or partner (with a portion going to any children you may have, depending on the size of your estate). See **What if I die without a will?** for more detail.

If, however, you die with **both** a spouse and a domestic partner, they will each receive an equal share of the property that would have gone to them had you only had a single spouse or partner.

If your spouse and partner cannot agree on the division of personal goods, sentimental items or vehicles, the administrator may sell them and share the proceeds equally between your spouse and partner.

If your spouse or domestic partner believe they should receive a greater portion of your estate, they may apply to the Supreme Court. The Court will order that your estate be distributed in a just and equitable way.

To receive a portion of your estate, your new partner must meet the definition of a **domestic partner**. This may require a court declaration as to the nature of your relationship.

If you are in a new relationship, you should consider making a will or review your existing will to consider whether it still meets your needs and circumstances.

What if I don't want to inherit money or property?

You do not have to accept a gift under a will or an inheritance under the law of intestacy. There are many reasons why you may wish to refuse an inheritance. You may be estranged from the deceased person, you may be concerned about tax or other financial consequences, or you may otherwise feel strongly against accepting the gift.

You must follow certain steps if you wish to disclaim (refuse) your inheritance. You should be sure you fully understand the legal and other consequences for you and your family, and any impact the gift may have on government benefits you may be receiving.

Seek legal advice from a private lawyer or call our legal helpline on **1300 366 424** as soon as possible.

I'm young. Can't I just wait to make a will when I am older?

You can make a will as soon as you turn 18. While you are less likely to become ill or die when you are young, you simply cannot predict if or when something might happen to you.

Making a will while you are young and have legal decision-making capacity is the best way to ensure your wishes have legal force. This is particularly important if you have strong wishes about your funeral, burial or cremation, and who will inherit your estate. A will can also make things simpler for your loved ones if you die unexpectedly.

Remember – you can (and should) update and remake your will as you age and your circumstances change.

I don't have many assets. Is it still worth making a will?

Yes. Your estate includes not only real estate, but also cash, money held in a bank, motor vehicles, personal possessions and sentimental items, and digital assets.

As well as setting out who will inherit your estate after you die, your will can also include your wishes about your funeral, burial or cremation, guardians for any children under the age of 18, donation of your organs or body to science, and who will care for your pets.

If you do not have a will, you cannot control who will make some of these important decisions or where any of your assets will go. See **Why have a will?** and **What if I die without a will?** for more information.

What if there is no executor?

A will may lack an executor because

- an executor was never appointed
- the executor has died or lost legal capacity
- the executor is no longer willing or able to act and has renounced (refused) their appointment.

In this situation, the Supreme Court may appoint an administrator to follow the directions in the will and distribute the estate. This may be a beneficiary under the will, the Public Trustee, or a private trustee company.

What if there is a question about my legal capacity to make a will?

A question may be raised about your legal capacity to make a will if you are of advanced age or if you have been diagnosed with an illness or injury that impacts your communication or cognitive ability.

If you wish to make a will but have concerns that it may be challenged, it may be useful to ask a doctor or a specialist to assess and record your cognitive ability at a point in time.

Having your will prepared by a wills and estates lawyer offers the best protection against a successful challenge to your will. Your lawyer will consider your legal capacity and will only proceed if they feel confident you have legal capacity to make a will.

If you are assessed as lacking legal decision-making capacity, the Supreme Court may be able to make a will on your behalf. The Court will only proceed if it is sure that the proposed will reflects the will you would have made if you had legal capacity.

Seek legal advice from a private lawyer if your capacity may be in doubt and you wish to make a will.

I heard someone wrote their will on the back of a cereal box. Is that valid?

To be valid in South Australia, a will must generally be in writing (not spoken), be signed by the testator and witnessed by 2 adults, and name beneficiaries who will inherit the testator's property. It should also name an executor who will carry out the testator's wishes.

A will that complies with these legal requirements will be accepted as valid even if it is written on a cereal box or other unconventional format.

A will that fails to meet the above requirements may be accepted by the Supreme Court in some situations. The Court must be satisfied that the will clearly sets out the wishes of the testator, and that there are no other issues with the will (see **Who can contest my will?** for other reasons a will may be invalid).

There may be additional costs involved in applying to the Court in relation to an unconventional will and there is no guarantee that the Court will accept the will as valid. It is safest to have your will formally prepared by a lawyer who specialises in wills and estates.