

Why you must make a Will

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What happens if I do not have a will?

When someone dies without a will, that person dies 'intestate'. The law of intestacy applies and your money and property will be distributed to people according to legislation, which has recently changed.

The general position is as follows

- if you have no children and leave a spouse, your spouse will receive your entire estate
- if you have children with your spouse, your spouse will receive your entire estate
- if you have children who are not your spouse's children, your spouse will receive \$451,909 (indexed at CPI) and
 - ◊ 1/2 of the balance goes to your spouse; and
 - ◊ 1/2 of the balance goes to your children equally
 - ◊ however, if your estate is less than \$451,909, your spouse will receive your entire estate.
- If you leave no spouse and no children and grandchildren, then your next of kin (e.g. parents, siblings, nephews and nieces, etc.) will stand to inherit.

Definition of 'spouse' now includes

- husband
- wife
- registered de facto partners (also known as registered domestic partners)
- de facto partners and same sex partners with whom you have been living with for at least two years
- de facto partners of less than two years but with children
- registered caring partners

In addition, there are specific provisions relating to

- people who leave multiple partners
- a spouse's right to inherit the matrimonial home

Your distant cousins may end up with your money instead of a good friend or charity

If your estate is distributed according to the laws of intestacy, and you have no close family, it may mean that a distant relative who does not know you may benefit from your estate, whereas you may wish your closest friend who has been good to you, or even a charity, to benefit instead.

Same sex and de facto couples

If you do not have a will, your partner will only receive something from your estate if you have been together for at least two years (see definition of 'spouse' above), or if you have a child together, otherwise, s/he will be left out. You must make a will if you wish to leave something to your partner.

Separated from your spouse but not legally divorced?

If you do not have a will, the law of intestacy applies and if you are still legally married to your spouse, s/he will be entitled to your estate as mentioned above.

If you die leaving a legally married spouse and a de facto partner, legislation sets out a formula for distribution of your property.

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One side of the family may end up with all your assets

If you and your spouse own the family home as 'joint proprietors', or operate a joint bank account, when one person dies, the other person becomes the sole owner.

If both of you die in an accident and it cannot be determined who died first, the law deems the older person to have died first. This means that the family home and bank accounts will become the property of the younger person.

If the younger person does not have a will, and has no children, then that younger person's next of kin (e.g. your mother/father-in-law or brother/sister-in-law) may end up with your family home and money.

Tax savings

Your family may be able to reduce tax payable on assets from your estate if you have set up a testamentary trust in your will. This is particularly important if your intended beneficiary earns a high income and already pays considerable tax. You need to consult your tax advisor whether this will be of benefit in your circumstances.

Generally, if you have set up a testamentary trust in your will, it may benefit your family after your death if you have young children. It may also benefit your adult children in their asset protection plan against creditors or against a divorce.

Second marriage and children from a previous marriage

More and more people are getting married for the second time or entering into domestic relationships. If both of you have children from previous relationships, having a will that clearly sets out how your estate (particularly items of sentimental value or household goods) is to be distributed can save your partner and children a lot of stress and anguish in their time of grief.

Your children's needs

You can make special provisions in your will to look after spendthrift adult children who may spend all their inheritance if received in a lump sum. Special provision can also be made in your will to make sure that any disabled children will be financially looked after.