

What makes a Will valid in NSW?

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A Will is one of the most important legal documents you can create during your lifetime. It ensures your assets go where you want them to and gives your family clear guidance when the time comes. But for your Will to comply with the formal legal requirements and be considered a valid Will, it must meet specific conditions.

5 primary steps for a valid Will

1. Your Will must be in writing

A valid Will must be in writing, which can include handwritten, typed or printed. Verbal wishes, even if clearly expressed, don't meet the legal test to be considered a formal (or valid) Will. It is important to commit your wishes to a formal written document.

While handwritten Wills are technically valid, they often create problems of their own. The writing may be unclear, or difficult to read or understand. To avoid this risk, it is best to have your Will professionally prepared, printed and executed (signed) to ensure clarity and compliance with the legal requirements.

1. You must have testamentary capacity

When you make your will, you need to have what is known as "testamentary capacity" to make the Will. This means you must be of sound mind and capable of understanding what you are doing and the implications of what you are doing.

This generally means you must:

- understand the nature and effect of the Will (which is to know what a Will is and what it does);
- know the nature of the assets that you own. You do not necessarily need to know all assets in detail, or the exact value of the assets, but you must have a broad understanding of the assets owned;
- understand who might reasonably expect to receive something from your estate. This includes close family members or others who may have a family provision claim against the estate (i.e. contesting or challenging the Will), such as spouses, children or other financial dependents, even if you do not intend to leave anything to them;
- make the Will voluntarily and be free from undue influence or any delusion. You must be capable of making rational, independent decisions about how to distribute your estate.

These principles come from a case from the 19th century, but are still relevant today.

If there is any doubt about your testamentary capacity, medical evidence or legal advice may help to support the validity of your Will.

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Everyone's circumstances are different, and if there is any question about someone's legal capacity to make a Will, the Court will consider the full picture. It is not just a medical issue, though it may be influenced by medical evidence. The Court would look at a range of issues.

Ultimately, testamentary capacity is assessed on the balance of the available evidence, which can include medical opinions, witness accounts, and the surrounding circumstances at the time the Will was made.

1. You must sign the Will

Your Will must be signed by you, the person making the Will (known as the testator). Usually, this is done at the end of the Will and at the bottom of each page of the Will, to avoid disputes about tampering or later changes. It must clearly show that you intend the document to operate as your Will.

If you are physically unable to sign, another person may be able to sign on your behalf, but this must be done in strict accordance with legal requirements and with clear evidence of intent.

1. The Will must be signed in front of two witnesses

Two witnesses must watch you sign your Will, and they must also sign the Will in your presence and in the presence of each other.

The witnesses:

- should be over 18 years of age; and
- should not be beneficiaries under the Will (or married to beneficiaries), otherwise any gift to them could be void.

It is important that all signatures occur at the same time.

1. It must be made without pressure or influence

The Will must be made freely and voluntarily. If someone exerts pressure or undue influence over you to benefit from your Will, this can later be grounds to challenge its validity after death.

What if my Will is declared an informal Will?

If a Will does not strictly comply with the formal requirements for making a Will, then the Court still has the power to declare it valid as an informal Will. This would require a separate Court application and evidence that the document was intended to be your final Will, and would need to consider the circumstances and evidence behind the document.

This process is often more time-consuming, costly, and can create uncertainty for your loved ones. It is not guaranteed and can create delays. Where possible, it is always better to get it right the first time.

The importance of a properly prepared and executed Will

A well-prepared, properly executed Will is one of the most effective ways to protect your wishes and avoid disputes. It gives your executor clear authority and helps your family know what you intended.

The best way to ensure your Will is legally valid is to seek advice from an experienced Wills and estate lawyer.

Need help with your Will?

We're here to assist with tailored estate planning solutions. We provide advice on:

- testamentary capacity;
- options for a standard Will vs Testamentary Trust Will;
- mitigate the potential of family provision claims; and
- any other estate planning requirements.

Contact us today to arrange a confidential discussion with one of our experienced lawyers.

Contacting E&A Lawyers

For more information or to arrange a consultation with a lawyer, you can call or email us.

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