

Wills for people with intellectual disability

Does a person have to make a will?

No. In fact, many people choose not to make a will. The decision is a personal and private one. If the value of property a person owns is small, a signed written note of who will get it may be all that is required. If the property value is larger, it is usually better for a person to make a will so that his or her wishes are recorded and obeyed.

What happens if a person dies without making a will?

If a person does not make a will their property is distributed according to the law (called the *Succession Act 2006*). This usually means the property goes to the person's nearest relatives.

Can a person with intellectual disability make a will?

Some people with intellectual disability can make a will. At the time the will is made the will maker must:

- understand that a will deals with their property after they die;
- know in general terms what property they own;
- know the people who may have a claim on their property; and
- be able to consider and weigh the claims of the people who may have a claim.

Is evidence of capacity required?

No. A will is usually presumed valid unless and until someone challenges it. Evidence of capacity should be obtained at the time the will is made if the will is likely to be challenged on the grounds that the will-maker did not have testamentary capacity.

Any written notes, statutory declarations, or medical reports relating to testamentary capacity should be kept with the will.

Can someone else make a will for a person with intellectual disability?

No. Except by order of a court, no one can make a will for another person.

Is a solicitor required to prepare a will?

No, but a solicitor is better placed to be independent, give advice, draw the will, obtain evidence of testamentary capacity, and keep records.

How much will it cost to have a solicitor write a will?

Community Legal Centres (including IDRS) may have a policy of not doing wills. It is a good idea to contact your local community legal centre and ask. If the centre does not draft wills, it may give you initial legal advice and/or referrals to lawyers who do wills work.

The fees charged by private solicitors vary greatly. The Law Society of NSW (02) 9926 0300 will provide contact details of solicitors who prepare wills in your local area.

Alternatively, the NSW Trustee and Guardian, at July 2018, charges \$330.00 for a will. Also, some private trustee companies prepare wills.

Ask for a fixed quote for fees upfront for preparing a will. Be aware that if you appoint a public entity, or private company, or a professional person as the executor, they may charge fees to administer the estate. These fees may be substantial, and can be avoided if a relative or friends is willing to be the executor and administer the estate for no fee.

How can you find out whether a person has been left anything in a will?

The *Succession Act 2006* says that a copy of the will of a deceased person must be given to, upon request, certain persons (including family members) by the person who has possession or control of the will. The right to have a copy of the will applies even before probate. You can ask a family member, or solicitor, or any other person who has the deceased's will for a copy of it.

A copy of the will can also be obtained from the NSW Supreme Court once probate is granted.

Further Information

IDRS (Intellectual Disability Rights Service) www.idrs.org.au | Phone: (02) 9265 6300

Combined Community Legal Centres Group www.clcnsw.org.au | Phone: (02)9212 7333

Law Access NSW www.lawaccess.nsw.gov.au | Phone: 1300 888 529

Legal Aid www.legalaid.nsw.gov.au | phone: (02) 9219 5000

NSW Trustee and Guardian www.tag.nsw.gov.au | Phone: 1300 364 103

Law Society of NSW for a referral to a private solicitor www.lawsociety.com.au | Phone: (02) 9926 0300

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