

# Drafting your will

When drafting your will, there are a few legal necessities that must be adhered to in order to ensure it is legal. This chapter explains what these are, together with advice on choosing executors and trustees, what to think about when planning the distribution of your property and how a will should be set out, including important clauses.

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# The basics of making a will

Anyone can make a will provided that he or she is at least 18 years old and has testamentary capacity (that is, being able to appreciate the nature of the document he or she is signing, and its effect).

For your will to be valid, it must be:

- **In writing** (either handwritten or typed).
- **Signed by you.**
- **Signed in such a way** as to make absolutely clear your intention to give effect to the will. In other words, rather than signing it on the back or on the side of the will, you should sign it at the end of the writing on the final page.
- **Signed in the presence of two witnesses** (who must **not** be beneficiaries or potential beneficiaries under the will).

## YOU MUST UNDERSTAND YOU ARE MAKING A WILL

There is no clear line between a person being capable of making a will and being incapable of doing so. The definition of testamentary mental capacity requires that you understand that you are making a will, know what you own and that the will distributes your property on your death. You must also be aware of those who might have claims or an expectation of inheriting on your death.

If there is a dispute later, medical evidence would be required to prove that

this was the case (or not) at the time the will was made. The will can be made and signed in a lucid period during a psychiatric illness, although most hospitals and residential care homes have rules preventing nurses from witnessing the wills of patients. It is even possible for a person who is a patient under the Court of Protection to make a will.

It is one thing to remind an elderly parent that he or she should be making a will, but the whole process could be jeopardised if the will is written out by a main beneficiary, even if the witnesses were independent. This is because it could be suggested there had been undue influence or duress.

If the testator has good days and bad days, it is not always obvious whether some member of the family has been left out deliberately or as a result of forgetfulness.

If there are doubts about the mental capacity of a testator, the only safe way to proceed is to discuss the matter with the testator's medical adviser and for that adviser to be one of the witnesses when the will is signed. In practice it may not be as easy as that, especially where the testator is eccentric or mischievous.

## Undue influence

It is one thing to have suspicions that a testator is being influenced to make a will benefiting one person at the expense of another, but it is much harder to produce solid evidence.

Undue influence could come in the form of gentle suggestions to a vulnerable testator or by physical threat. A common, and difficult, situation can arise when one member of the family living close to an elderly parent suggests that he or she should make a will. The elderly parent then makes a will but, in gratitude for the care being provided, gives everything to the person providing the care. To avoid suggestions of undue influence, it is probably wise to persuade the person making the will to visit a solicitor alone so that instructions can be given to an independent person.

Anyone wishing to challenge the will on the grounds that the testator was threatened or improperly influenced must show that the testator was induced to make the will by force, fear or fraud or that in some other way the will was not made voluntarily. If you think you are in this position, take legal advice before attempting to challenge a will on these grounds.

Where a will divides a testator's property, say, equally between his or her three children, it is unlikely, but not impossible, that there will be a dispute. However, where the testator attempts to vary the distribution of benefit, for example, based on the number of visits each child makes to the care home where he resides, there can be a bitter legacy for that family (see page 149).

If you are an executor and you believe that the testator lacked this mental capacity when making the will, you should proceed with caution. Seek medical evidence and legal advice. It can be very difficult to distinguish the will of a person lacking testamentary capacity from that of a deeply eccentric person.

“For a will to be valid, it must be in writing and signed by you and two witnesses in the presence of each other.”



For more information about signing and witnessing a will, together with an explanation of the necessity of an attestation clause, see pages 59–60.