

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. It should not be assumed that a person with an intellectual disability does not wish to make a will. It may be that no-one has ever explained to the person what a will is.

What happens if a person dies without making a will?

The person's property goes to the person's nearest relatives. It is only if there are no near relatives that the property goes to the government.

Can a person with an intellectual disability make a will?

Many people with intellectual disability can make a will. In order to make a will, the willmaker must have "Testamentary Capacity" which means that the willmaker:

- knows that a will is a paper that says what happens to your property after you die.
- knows in general terms what property s/he owns.
- is able to consider the "moral claims" of possible beneficiaries for inclusion in the will.

In addition, the willmaker must know and approve the contents of the will.

Is evidence of capacity required?

A formal assessment of capacity is not required to make a will. However, if someone

is unhappy about the distribution of assets under the will, that person may challenge the will on the grounds that the willmaker did not have sufficient capacity.

When deciding whether or not evidence of capacity should be obtained the following factors should be considered:

- the willmaker's own views
- the level of the person's disability
- the likely value of the estate, and
- the likelihood of a later challenge to the will.



'I would really like my will to be written in plain language'

If it is felt that evidence of capacity is required and the person is willing to see a psychologist, this should be arranged. A statutory declaration should be obtained from the person verifying the capacity of the willmaker. The statutory declaration should be kept with the will.

If the person is unwilling to see a psychologist, it might be possible to obtain evidence of capacity from other sources, for example, a support worker who has been involved with

the person for a long time and is present when the person gives instructions for the drafting of the will or when the will is explained and signed.

Even if there is doubt about the willmaker's capacity, the willmaker should still make a will if s/he wants to do so. A will is usually presumed valid unless and until someone challenges it.

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

No. No-one can make a will for another person. Guardians, trustees, parents and people under a power of attorney have no power to make a will on another's behalf.

Is a solicitor required to prepare a will?

A will does not need to be drafted by a solicitor. A will must comply with certain formal requirements and it is advisable to have any will prepared by a person who is familiar with these requirements. If the estate is large or the willmaker's instructions complex, legal advice should be sought.

Where the willmaker has intellectual disability, it is also advisable to have the will prepared by a person with some experience in intellectual disability so that they are more likely to be able to explain about wills and understand the person's instructions. In particular, the will should be uncomplicated and in plain language.

Comprehensive notes should be kept by the person preparing the will and these notes should stay with the will. In addition, because some people with intellectual disability may be easily influenced by others, it is recommended that someone unrelated to the willmaker take instructions and prepare the will.

This reduces the possibility of allegations that the will or part of it is invalid because someone has improperly influenced the willmaker's decision.

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

Some community legal centres will draft wills for free if the willmaker can not afford a solicitor and wishes to make a simple will. Contact your local community legal centre to see if they provide this service.

The fees charged by private solicitors to draft wills varies greatly. Make sure you understand what fees will be charged before you ask anyone to prepare a will.

The Law Society or the Intellectual Disability Rights Service may be able to give you the names of solicitors in your local area. Alternatively, the Public Trustee and some private trustee companies will draft wills for no or only a nominal fee if they are named as the executor under the will. They will then charge a fee to administer the estate when the willmaker dies.

Where can I get further information?

- **Questions of Rights: A guide to the law and rights of people with an intellectual disability, 2nd edition.**

Available from the Intellectual Disability Rights Service.

- **When I'm gone - A guide to wills for parents of people with intellectual disability.**

This book aims to provide parents with the full range of options available to them in estate planning so they are better placed to fully and properly instruct a solicitor in drafting their wills.

- **Community Legal Centres** - for information about the legal centre closest to you phone the Combined Community Legal Centres Group 02 9318 2355

- **Law Access PH 1300 888 529**

- **Intellectual Disability Rights Service**
2c 199 Regent Street Redfern NSW 2016
PH 02 9318 0144 (Sydney)
1800 66 66 11 (Freecall)
Legal Advice available between 2.00 - 5.00 weekdays.

www.idrs.org.au

Sept 2004