

What is an informal Will?

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An Informal Will is a document that doesn't strictly satisfy the legal requirements for a valid Will under the *Wills Act (*Vic) 1997 ('the Act'); the legislation governing Wills in Victoria. For example, if a Will has not been properly executed, it may present problems at the time probate is applied for. In some circumstances, however, an Informal Will may be admitted to probate by the Supreme Court even if it doesn't meet the strict legal requirements.

What is a Will?

A Will is a legal document that clearly expresses your wishes after you die. You can learn more about Wills here.

A "**valid**" Will is one that has been properly executed according to the legislative requirements set out in the Act. In Victoria, for a Will to be properly executed and valid it must be:

1. in writing and signed by you (the Will-maker/*testator*);
2. intended to be your Will;
3. signed by you on each page in front of at least two authorised witnesses who are present at the same time; and
4. dated at the time of signing.

These formal requirements are in place to ensure that your Will reflects your true testamentary wishes and is not the result of fraud, undue influence or impaired testamentary capacity. If a person does not make a Will freely and voluntarily, does not have testamentary capacity, or does not intend to make a Will, then the Will is invalid.

What is an informal Will?

An Informal Will is a document purporting to be a person's last Will, but which does not comply with the strict formal requirements set out above. A Grant of Probate may still, however, be issued by the Supreme Court in certain circumstances.

Can you obtain probate of an Informal Will?

Admitting an Informal Will to probate is more involved and, in many cases, more complex than admitting a Will which complies with the above elements. This is due to uncertainty surrounding the validity of the document.

A Grant of Probate of a Will is an order of the Supreme Court of Victoria and acts as proof that the person named as executor is the person entitled to transfer or distribute the assets of the estate. Generally, asset holders, such as a bank, will not release the Will-maker's assets until a Grant of Probate is produced.

An executor can still make an application to obtain probate of an Informal Will that is not properly executed, and the Supreme Court of Victoria has the power to dispense with some of the strict legal requirements and under certain conditions.

However, each application for probate of an Informal Will rests on its own facts. For probate to be granted of an Informal Will, the person applying for probate must establish the following three requirements:

1. There must be a 'document';
2. The document must record the testamentary intentions of the deceased; and
3. The document must have been intended by the deceased to be his or her Will.

1. What is the definition of a document?

The definition of a 'document' in Victoria is broad and can include a document in writing, a photograph, a video or audiotape, or anything that is marked by words, figures, letters or symbols which are capable of carrying a definite meaning.

For example, in ***Estate DM Edwards, Treacy v Edwards* (2000) NSWLR 739**, an audiotape was held to be a 'document' and was admitted to probate as an Informal Will.

2. Does the document record testamentary intentions?

The document must record what the Will-maker wants to happen to his or her property when they die.

Informal Will documents may fail to meet this requirement if the language used does not clearly dispose of the Will-maker's property. The language must be clear and definitive, not merely a statement of wishes.

3. Was the document intended by the Will-maker to be his or her Will?

Generally, the key issue is whether a person intended the document to be a testamentary document. The executor or person applying for a grant of the Informal Will must prove that the document was intended to be the Will-maker's final Will, not merely that it is consistent with the deceased's testamentary intentions.

Examples of Invalid Informal Wills

Re Will and Estate of Flanagan (dec'd) [2021] VSC 649

In the 2021 case of ***Re WILL AND ESTATE OF FLANAGAN (dec'd)* [2021] VSC 649**, the Will-maker left a sealed envelope with the word 'Will' appearing in the Will-makers handwriting. In the envelope was a document titled 'Last Will and Testament.' The document did not comply with the formal requirements of a Will. It was signed by the Will-maker but it was not witnessed. The plaintiff was appointed as the sole executor of the Will and sought a Grant of Probate of the document from the Court as an Informal Will. The Court decided that the document was intended to be the Will-maker's Will and admitted the Will to probate on the following grounds:

1. The Will-maker did not have any previous Wills;
2. The document was in a sealed envelope with the word 'Will' written on the front.
3. The language of the document was evidently intended to be testamentary;
4. It was not known whether the Will-maker was aware of the formal requirement to have his Will witnessed; and
5. There was no evidence that any undue influence was exerted on the Will-maker in making the document, nor was there anything which suggested that he intended it to be anything other than his wishes in relation to the distribution of assets after his death.

Re White; Montgomery &Anor v Taylor [2018] VSC 16

In ***Re White; Montgomery &Anor v Taylor* [2018] VSC 16**, the Will-maker had typed up an Informal Will on a computer before taking his own life. The Will appointed the deceased's sister, brother-in-law, and de facto partner as executors. The deceased's sister and brother-in-law sought a Grant of Probate of the Informal Will. However, the deceased's de facto partner opposed the application, arguing that the deceased did not intend for the document to be his Will and that he lacked testamentary capacity at the time it was created. The Court accepted the document as an Informal Will on the following basis:

1. The document referenced the Will-makers final wishes and was titled 'Will and Testament';
2. The document was made only hours before the Will-maker took his life; and

3. The document was easily located and saved in a folder which included a letter to the deceased's solicitor alerting him to the Informal Will.

The Court also noted that suicide alone does not prove mental illness or testamentary incapacity, and held that a rationally and methodically considered document prior to suicide could be admitted to probate.

How do I avoid making an Informal Will?

While the examples above show that an Informal Will may be accepted by the Court, applications for a Grant of Probate of an Informal Will can be expensive, delay the administration of the estate by many years, and have uncertain outcomes.

If you want to make a valid Will, it is prudent to seek legal advice so as not to overlook important legal requirements in the preparation and signing of your Will.

Likewise, if you find a document that you believe is an Informal Will and you are the nominated executor in that Will, it is important to seek legal advice about whether an application for a Grant of Probate should be made.

We can advise you on whether to make an application for probate of an informal Will if you are nominated as an executor in it.

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