ICLC INNER CITY LEGAL CENTRE

Wills and Estate Planning

There are many good reasons for having a will no matter how small or large your estate may be. Making a will can give you peace of mind that your assets will be left to the people you choose.

WHAT IS THE SOURCE OF LAW FOR WILLS?

The *Succession Act 2006 (NSW) (the Act)* applies to all wills made on and after 1 March 2008. For wills made prior to March 2008, the *Probate & Administration Act 1898* (NSW) will apply.

WHAT IS A WILL?

A will is a formal legal document that sets out how your property is to be distributed when you die. The person making the will is either a testatrix (female) or testator (male). The property, which can be land or personal property, is called the estate.

WHY IS IT IMPORTANT TO HAVE A WILL?

Having a will is the only way to make sure your property is distributed according to your wishes. The people named in your will are called beneficiaries.

WHAT IF I DIE WITHOUT A WILL?

A person who dies without having made a will is 'intestate'. If you die intestate then your property will be distributed according to the Act.

Your property will be distributed amongst family members according to a legal formula, which is set out in the legislation. If you don't have any living eligible relatives then the State is entitled to the whole of your estate.

The State does have the discretion to provide for any dependents of the deceased or any other person the deceased might have reasonably provided for if the deceased had made a will. To make a claim, an applicant must apply to the Crown Solicitor of New South Wales.

DO I NEED A LAWYER TO DRAFT MY WILL?

No, you do not need a lawyer to draft a will. You may make a will yourself. However, it is strongly recommended that you consult with a lawyer when making a will to ensure that the will is valid and meets all legal requirements.

A will must satisfy strict legal requirements. If a will does not satisfy legal

requirements, Courts may decide the will is not valid. If the Courts decide that the will is not valid, this will affect your estate and the Court may distribute your estate to a formula that you did not intend.

The wording of wills is precise and specialised. The everyday meaning of words is not the same as their legal meaning. If you draft your own will and use words that are ambiguous, this may result in more cost and delay in the distribution of your estate, as the Supreme Court would be required to resolve the ambiguity. Having a will professionally drafted will ensure that your wishes are properly recorded and carried out.

Many lawyers will draft a will on a fixed fee basis.

WHAT ABOUT A 'WILL KIT'?

A 'do-it-yourself' will kit may well be appropriate to your circumstances and is valid if all the legal requirements are met. However, if you have more complicated or specialised needs consulting with a lawyer may be more appropriate.

WHEN IS A WILL VALID?

There are legal requirements that must be met for a will to be valid. When you make a will, you must:

1. be aged 18 or over, unless married or contemplating marriage;
2. have 'Testamentary Capacity'. This means you must:
   - understand the legal effect of the will
   - be capable of knowing what property you have to dispose of
   - be aware of the people who would normally be expected to benefit from your estate;
   - you must not be prevented by reason of mental illness or mental disease from making rational decisions concerning who will benefit from your will; and
3. distribute your own property according your wishes.

In addition:

4. the will must be in writing – it can be handwritten, typed or printed; and
5. the will must be signed by the testator and witnessed by two or more adult witnesses, in the presence of the testator (provided they are not your spouse or beneficiaries to the will).

In exceptional circumstances, The Supreme Court can approve a will for people under 18. Beneficiaries should not be witnesses of a will as this may cancel out their entitlement.

CAN I CHANGE MY WILL AND IF SO, HOW?

Yes, you can change your will as often as you like. You may change your will by either:

- having a new will drawn up, or
- making a codicil.

A codicil is a written document that is added to an earlier will. A codicil must meet

all the formal requirements of a will, and is most appropriate when making minor changes to a will.

If you need to make many changes to the will, it may be easier to just make an entirely new will. A new will automatically cancels any previous wills.

WHAT CAN I PUT IN MY WILL?

There are a variety of things you can put in your will. You can leave gifts of money and assets to individuals or groups of people. You may even leave money to charities. For example, you can:

- Make a specific gift of any property you have, like your house or car;
- Leave a gift of money that you may have;
- Appoint someone to care for children who are not yet 18 to provide for their education; and
- Request what you would like to happen at your funeral.

HOW LONG DOES A WILL LAST FOR?

A will lasts until it is revoked (cancelled). It will be revoked when:

- you create a new will; or
- you get married, unless you made the will in contemplation of your marriage.

HOW OFTEN SHOULD I UPDATE MY WILL?

Your will should be updated every time your circumstances change. These include:

- After a marriage, divorce or separation.
- After the birth of a child or grandchild.
- If a spouse or beneficiary of the will dies.
- In the event of a significant change in financial circumstances.
- The executor named in the will, having become ill, is unable to handle the responsibility, or has died.

WHERE SHOULD I KEEP MY WILL?

Your will should be kept in a safe place where nobody is able to access your will without your permission. You may choose to keep your will in a safe-deposit box or have a lawyer keep your will.

If you decide to keep your will in a safe-deposit box you must consider the people who could have access to it. Security of your will is very important. The Supreme Court of New South Wales requires a person's original will document in order to grant probate. If the will cannot be located, the Court will presume that the person did not have a will.

The NSW Trustee & Guardian's 'Will Safe' provides a secure place to store your Will documents and is easy to access when required. For further information about Will Safe, contact the NSW Trustee & Guardian on 1300 364 103.

CAN ANYONE CHALLENGE MY WILL?

Yes, although you are entitled to give your property to whomever you choose, it is possible for friends or relatives who believe they have not been sufficiently provided for to contest your will.

Section 57 of the Act allows only the following people to contest a will:

- a spouse of the testator, whether they were a partner at the time of death, or a former partner;
- a de facto partner;
- a child, or grandchild of the testator;
- a person who was at any particular time, totally or partly dependent on the testator and had a close personal relationship with them at the time of their death.

Anyone wanting to challenge the will must make an application to the Supreme Court and prove that they deserve a share or a greater share of the estate because of their financial need, and because there was an obligation on the testator to provide for their maintenance, education or advancement in life.

WHAT IS A PROBATE?

Probate is the document issued by the Supreme Court confirming the validity of a will and empowering the executors named in the Will to carry out the wishes of the testator.
An executor may apply for probate through a solicitor, trustee company or the NSW Trustee and Guardian.

The Supreme Court website has information on probate:
http://www.supremecourt.justice.nsw.gov.au/Pages/sco2_probate/sco2_probate.aspx

IS THERE A TIME LIMIT FOR MAKING AN APPLICATION TO THE SUPREME COURT FOR A GRANT OF PROBATE?

Yes, the executor has 12 months from the testator's death in which to identify the testator's assets and liabilities so that the estate may be properly distributed.

WHAT IS THE ROLE OF THE EXECUTOR?

The executor is the person or persons appointed by the testator to manage the estate. The executor must obtain authority to deal with the estate. Authority is obtained by applying to the Supreme Court for a grant of probate.

Duties of the Executor include such things as:

- collecting assets of the deceased;
- paying all debts of the deceased;
- notifying all beneficiaries named in the will; and
- distributing property as set out in the deceased's will.

WHO SHOULD BE MY EXECUTOR?

When making your will you have the freedom to choose anyone you wish to be the executor. The executor has an important role in managing your estate, so you

should choose them carefully. You should appoint someone who you know and trust. You should also discuss the appointment with the person you choose to make executor to ensure they understand what the role entails and if they agree to it.

There is the option to appoint the **NSW Trustee and Guardian** as your executor although certain fees and charges will be applied according to the value of your assets. An advantage of appointing NSWTAG as executor is that they are an agency, and therefore cannot die or become incapable of performing their duties in the way that a person can.

WHAT IF I CHOOSE TO HAVE MORE THAN ONE EXECUTOR?

You may choose to have more than one executor. In instances where there are several executors, each executor represents the testator and therefore the acts of one executor will bind all the others.

CAN I INCLUDE DIRECTIONS FOR MY FUNERAL IN MY WILL?

Yes, you may insert a clause about your funeral arrangements but it is important to note that such a clause is only a request and no person is obliged to carry out that request.

WHAT IF I'M IN A SAME SEX RELATIONSHIP?

You have the freedom to leave property to anyone you choose, including a same-sex partner. If when making your will you do not make proper provision for same-sex partners then they may make a claim on your estate provided that they are an 'eligible person' under section 57 of the *Succession Act 2006*. An eligible person is:

a) a person who was the wife or husband of the deceased person at the time of the deceased person's death;
b) a person with whom the deceased person was living in a de facto relationship at the time of the deceased person's death;
c) a child of the deceased person;
d) a former wife or husband of the deceased person;
e) a person:

i. who was, at any particular time, wholly or partly dependent on the deceased person;
ii. who is a grandchild of the deceased person or was, at that particular time or at any other time, a member of the household of which the deceased person was a member; and

a person with whom the deceased person was living in a close personal relationship at the time of the deceased person's death.

WHAT IS A DE FACTO RELATIONSHIP?

Section 4(1) of the *Property (Relationships) Act 1984* defines a de facto relationship as a relationship between two adult persons:

- (a) who live together as a couple, and
- (b) who are not married to one another or related by family.

WHAT ABOUT SUPERANNUATION?

Superannuation does not form part of your estate and therefore cannot be distributed by your will. How your superannuation benefit is distributed will depend on the rules of your superannuation fund.

Generally, most funds allow you to nominate who receives your superannuation through completing a binding nomination. The nomination must be to a dependent (within the meaning of the *Superannuation Industry (Supervision) Act 1993 (Cth))* and valid at the time of your death. If you do not nominate a beneficiary, your superannuation fund will determine who receives your benefit based on the fund's rules. You should ensure you are aware of these rules and how to make a binding nomination.

There may also be taxation implications for the recipients of your superannuation benefit. As this is a complex area of the law, we strongly suggest you seek legal advice.

Disclaimer: *This information is current to 25 August 2021 and reflects the law in New South Wales. It is general information and is no substitute for legal advice tailored to your particular circumstances. For assistance, contact the ICLC on 9332 1966.*