THE DEFINITIVE GUIDE TO WILLS AND ESTATES IN NEW SOUTH WALES

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Introduction

Where there's a Will, there's a Way

In essential terms, a Will is a written document that sets out how the Will-maker wants his/her estate divided after death.[i] It allows you to decide how your assets are distributed and to whom. For some, a Will can provide strongly desired peace of mind about who will take care of your loved ones upon your passing and what will happen when you are no longer around. For others, it is simply an effective tool to safeguard your assets. This book aims to act as a guide for our clients and readers to assist you in navigating the road of Wills and Estates; helping you to know how to properly protect your estate and family.

Without a Will, you can miss out on a lot as can your loved ones.[ii] Importantly, your Will also needs to be valid; requiring it to be executed in accordance with relevant law. Therefore, we encourage you, upon reading this book, to create your Will, power of attorney and/or enduring guardianship with us.

Note that this book is split into two respective parts to help you on your journey; Part A: Making a Will and Part B: Enacting a Will. It is in your best interest to read both sections. The information in this book is as current as of its' date of publication.

[i] 'What is a Will?', *NSW Trustee and Guardian* (Web page) <https://www.tag.nsw.gov.au/what-is-a-will.html>.
[ii] 'No Will? Why not refer it to NSW Trustee & Guardian? (Web page) <https://www.tag.nsw.gov.au/intestacy-faq.html>.

PART A: MAKING A WILL

The First Steps: Important Points to Consider When Drafting your Will

Your Will is quite probably one of the most important documents you will have in your lifetime.[iii] It is not morbid or upsetting as most people may think it to be; it allows you to gift, appoint and provide for others who are left behind once you have died. As we have discussed above, a Will outlines your testamentary intentions and notes what action you would like to be taken regarding the assets of your estate. So, why do we make Wills and how do you go about making one? The first step is to speak with your legal practitioner. At the Quinn Group, we will provide you with a Will Kit; a checklist of information to fill out and provide to us so we may draft your Will specific to your needs and desires.[iv]

It is wise to remember that a Will is a legal document and so you should always have your solicitor or legal advisor create it on your behalf. If it is not written or executed properly, your Will may be considered invalid; a pointless exercise of time and effort. Your Will needs to be in writing, signed by you and witnessed by two people.[v] Your Will must also be written clearly with no room for debate as to your wishes or intentions. These requirements are all assessed and monitored by your legal practitioner, helping to ensure the safety of your estate's future.

Why Make a Will?

Half of all Australians die without making a Will. [vi] There is no reason why you need to be one of them. If you do not make a Will, an administrator appointed by the court will use the deceased's assets to pay outstanding bills or taxes and decide the distribution of your estate based on formulas and rules; not your specific individual wishes.

A lot of people are also under the misconception that you need a lot of assets and expensive items such as property or cars, to justify the need for a Will. But in reality, everyone over the age of 18 should have a Will. If you want to leave valued or sentimental items such as artworks, antiques, letters or photographs to certain family members or friends, your Will can be used to relay all of this. You can even advise on how you wish to be buried or cremated in your Will and other funerary requests.

Marriage, Divorce and your Will

Importantly, if you marry, the Wills of you and your partner are automatically revoked. Wills automatically become void on the marriage of the testator, except where stated to be made on contemplation of marriage. To avoid any confusion, all copies of old Wills which have been revoked are best to be destroyed. It is important, therefore, when your marital status changes, that you change your Will. Notably, in NSW, separation has no impact on your Will; meaning that any assets left to your former spouse or partner would still be distributed to them if you died.

How do I determine my Estate?

As a first point to consider when making your Will, what items will make up your estate? You should add up the estimated present value of the things you own such as property (furniture, collections, home, car) and savings. Superannuation and life insurance may also be of value to your estate. You should then subtract what you owe and any debts or mortgages. The net balance of this is your estate's value.

Who will Benefit?

Anyone, from a single person to a number of people, can benefit from your estate: they are therefore called: 'beneficiaries' of your estate.

Are there Different Types of Bequests?

In general, there are three major types of bequests or gifts you can grant through your Will. These are 'specific', 'general' and 'residual'. Specific bequests are gifts of particular pieces of property such as jewellery, books or clothing. General bequests are usually sums of money made to a particular person or organisation (such as a charity). Residual bequests are gifts of what remains in the estate after the payment of all liabilities and distributions of all specific and general bequests.

What is an Executor?

In making a Will, you are required to appoint an executor. The executor is responsible for seeing that the terms of the Will are carried out; they 'execute'

your intentions. The executor of your estate will be required to comply with the various laws and rules that govern the administration of deceased estates.

Who should be my Executor?

Executors can be personally liable for any mistakes made in distributing assets to beneficiaries, so it is important to get it right. You need to appoint someone who is honest, trustworthy, business- like, and likely to outlive you. They may also need to be able to devote time needed to the task and, perhaps, for convenience, live nearby.

You will need someone who is also likely to be impartial in the event of any dispute among your beneficiaries and who can carry out other tasks appropriate to our special circumstances, for example, choosing schools for your dependent children, selecting appropriate charities of the kind nominated by you, and so on.

The main duties of an executor are:

- To be responsible for the burial or cremation of the deceased's body.
- To prove the Will (in other words to obtain Probate).
- To collect all debts owing to the estate.
- To claim any life insurance.
- If required by the terms of the Will, to convert non-cash assets into cash.
- To collect investment income.
- To lodge income tax returns.
- To pay any required income tax.
- To pay, in proper order, all debts owing by the estate.
- To protect and insure the assets of the estate.
- To administer any trusts set up under the Will.
- To pay any specific legacies.
- To distribute the remainder of the estate.

It is generally desirable to ask the proposed Executor or Executors before naming them, in order to establish their willingness to act.

Given the personal nature of an executor's responsibilities and the sensitive time in which they are required to act, it is important to consider the personal as well as practical implications of selecting your executor.

Considering our aging population with increasingly complex personal, financial and business affairs, you may consider appointing a professional such as a solicitor, or a professional trustee to be your executor.

Should I Appoint my Solicitor as my Executor?

The advantages of appointing a solicitor include:

1. **Impartiality** –the obvious advantage of being emotionally removed from the situation, this is particularly important if beneficiaries are not entitled to their gifts immediately. In this situation, the executor's obligations to the estate continue and they may be required to act in the capacity of a trustee until the gift passes.

   Impartiality is also important if a trustee is given any discretion in making distributions (for example in consideration of a beneficiary's education, health or other needs). Clearly, if one of the beneficiaries was appointed executor and trustee in this situation, the distribution of funds would easily be compromised by their personal interest in the estate.

   A solicitor executor would most likely discharge their duty with constant reference to all beneficiaries, considering their personal circumstances and needs.

2. **Professionalism, experience and knowledge** – the prospect of applying for a grant of probate and liaising with many third parties following the death of a close friend or family member may be a daunting and burdensome task for some. Negotiating the legalities and red tape to satisfy the requirements of many institutions, (particularly financial ones) can be time consuming and frustrating if it is not undertaken in the right manner. A solicitor has the experience and knowledge to undertake these efficiently within the timeframes required by law.

Furthermore, any unanticipated events (such as a claim on the estate by someone left out of your Will, or answering requisitions raised by the

Supreme Court prior to granting probate) can also be attended to immediately and directly.

3. **Efficiency** – as a solicitor would be well aware of the steps required to fully discharge an executor's duty, the administration of the estate would occur more efficiently. Furthermore, as a solicitor would most likely be appointed to obtain a grant of probate, this solicitor would already have detailed knowledge of the contents of the Will and all the parties and assets involved.

4. **Liability** – an executor may be sued by one of the beneficiaries for the maladministration of the estate thereby exposing their personal assets such as property and shares to any potential legal action. A professional solicitor is protected by the cover of their professional indemnity insurance.

   It should be noted that an executor is entitled to bring a claim for commission for their work in administering the estate. Likewise, professional executors are entitled to charge for their services if there is a charging clause included in the Will.

Who will be my Child's Guardian?

The choice of a potential guardian for children is not always easy. For example, Godparents may be elderly; there may be rivalry between the in-laws; Aunts and Uncles may be struggling to bring up their own children; family and friends may be living overseas. Animosity between divorced parents may also complicate the search for a guardian angel.

Most people still choose family to act as guardians but friends are not uncommon. Sometimes people feel their family would not be able to look after kids as well as friends. Making a Will is normally the first step for parents wanting to nominate guardians, and the wording can be as simple as, "I appoint my sister Jane Smith as guardian of my children". Of course, some parents trust their families to sort out the issue of guardianship amicably, while others may choose to stipulate in their Will "not Aunt Wilma", but otherwise leave the appointment of a guardian to their family's discretion.

It is important for parents to discuss the issue with prospective guardians first, as nominated guardians do refuse frequently. In rare cases where there is no-one willing to take over the care of orphaned children, they become wards of the State and are placed in foster homes or residential care. Parents should discuss their wishes for their children's upbringing with the guardians. It is a good idea to write a memorandum and place it with the Will or with the guardian.

It is also important not to be too prescriptive. You need to trust guardians to use their discretion – if you don't have that trust then maybe they should not be guardians. However, putting a directive in a Will is not guarantee that it is going to happen. Wills need to be revised from time to time, as things can change. The guardian may develop alcoholism, for example, or elderly grandparents may no longer feel up to the job of raising young children.

A more likely occurrence is a challenge to the appointment of a guardian from an estranged or former partner. For example, if a divorced mother with custody of her children were to die, having nominated her parents as guardians, their father may decide he wants his children back. In such circumstances, her parents will be required to act jointly with the former partner unless he objects to the appointment of her parents as guardians. If this occurs, her parents may apply to the Court to obtain custody of the children.

[iii] 'The Importance of a Will' *The Law Society of New South Wales,* (Web Page) <https://www.lawsociety.com.au/for-the-public/know-your-rights/making-a-will/importance-of-a-will>

[iv] You may request our Will Kit on our website <https://www.quinns.com.au> or through emailing us at info@quinns.com.au

[v] Karen Don, *Rest Assured: A legal guide to wills, estates and funerals* (Redfern Legal Centre Publishing, 1995) 6 [4]

[vi] 'New research reveals 52 per cent of adult Australians don't have a Will' *News.com.au* (Web Page) <https://www.news.com.au/finance/money/wealth/new-research-reveals-52-per-cent-of-adult-australians-dont-have-a-will/news-story/a93f8904936956b48f7f840195413f9c>

Updating Your Will & Putting it to Good Use

Your will can be changed or updated should your circumstances or decisions change; such as your choice of executor or the birth of a child.
If it has been some years since making your will, you should check it meets your current requirements. Any of the following might prompt alterations:

- births, deaths, marriages and divorces among your family or persons named as beneficiaries;
- children growing up;
- significant increases in your total assets or liabilities;
- the purchase of life insurance or annuities;
- taking out or repaying mortgages or other loans;
- joining or leaving a superannuation scheme;
- specific or implied promises made to certain persons;
- moral responsibilities to dependants, relatives or friends;
- the formation or winding up of family companies or trusts;
- becoming a beneficiary under some other person's Will;
- the disposal of assets specifically mentioned in the Will;
- changes in tax legislation;
- the death of a proposed executor;
- the conditions attached to bequests becoming outdated, making their enforcement by an executor inappropriate or impracticable.

You may change a Will as often as you wish. Minor variations can be made by executing a further document which is called a codicil. This document requires legal formalities like those applying to the Will itself. Major variations are best effected by revoking the old Will and executing a brand new one.[vii]

Keep it in a safe place

For obvious reasons, the executed Will should always be kept in a safe place where unscrupulous people cannot tamper with it and where the executor will be able to find it without difficulty. We can keep your Will at our office in safe custody for an unlimited period of time for no charge.

It is probably most sensible to keep a copy of the Will amongst personal papers with a note explaining where the original is kept. It is also a very good idea to tell your executor where the original Will is.

What about witnesses?

Two adult witnesses are required when executing your Will. They must affix their signatures to each page in the presence of the testator.
However, persons named as beneficiaries in a Will and their spouses should not act as witnesses in respect of that document, as otherwise their bequests – although not the rest of the Will – would be void.

How do I avoid arguments over my Will?

Like it or not – some won't like it – if you leave, say, one of your children out of your Will, you are leaving the door wide open for it to be contested. Certain people have a right to make a claim. This includes your spouse, de facto, your children, a former spouse and in certain circumstances your grandchildren. (We will discuss family provision claims later in this book). This is due to Chapter 3 of the Succession Act 2006 (NSW) ("Succession Act") which was set up to correct unjust or unfair treatment of certain relations or dependants who had been left without proper provision being made for them in a Will. People specified in the Succession Act can apply to the court for a share of the estate of the deceased person, whether or not there was a Will, and whether or not they were mentioned in a Will.[viii]

Under the Act, provisions are made for a person's maintenance, education or advancement in life.[ix] A claim won't always succeed, but often it will. In some ways, it may be better to try and work out what you can leave to make them unlikely to claim, especially as the costs of defending a claim in Court often comes out of the estate.

[vii] Getting Married? You should update your will…' *The Quinn Group,* (Web Page) <https://www.quinns.com.au/blog/getting-married-you-should-update-your-will/>

[viii] 'Estate Disputes: Who is eligible to make a claim on an Estate?', *The Quinn Group,* (Web Page) <https://www.quinns.com.au/blog/legal-news/estate-disputes-who-is-eligible-to-make-a-claim-on-an-estate/>

[ix] *Succession Act 2006* (NSW) s 59 (1)

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Estate planning is an essential aspect of understanding Wills and Estates. Now that we have gauged information about Wills, it is time to look into estate planning for taxation and family futures.

Estate Planning & Tax Considerations

The Importance of Estate Planning

Estate planning is the process of arranging or structuring your personal and financial affairs while you are alive so that you are looked after in your lifetime and that when you die, your possessions and assets are distributed the way you wish. It is important because estate planning helps ensure your wishes are carried out in the most tax-effective manner; benefiting those who matter most to you.

Importantly, your estate should be reviewed regularly to allow for changes and decisions to be renewed and adjusted accordingly as time progresses. While your Will is the centrepiece of your estate planning, you can look into trusts, a power of attorney and/or a power of enduring guardianship. These instruments are beneficial tools for structuring your estate. In this chapter we will look briefly at the taxes you may need to plan around.

Tax Considerations

State and Federal death duties (under various names such as “probate duty”, “succession duty” and “estate duty”) have been abolished. Artificial estate planning strategies designed to avoid death duties are accordingly no longer needed in Australia, although the incidence of Capital Gains Tax (CGT) and ordinary income tax – should naturally be borne in mind. Of course, estate planning for non-tax reasons is still appropriate; as you will naturally want to ensure that your assets will be dealt with in a sensible manner.

Capital Gains Tax

We cannot escape two things in life: death and taxes. Probably the most compelling argument against the do-it-yourself option for taxation can be summed up in three words: Capital Gains Tax. You may think you are leaving two assets of equal value to your two children, but this may not be the case. For example, you may leave one child the family home worth, say, $290,000, and the other child, a holiday home worth about the same. The problem with this would be that the family home is tax-free while the holiday home is subject to Capital Gains Tax (CGT). The second child would end up with a $44,000 CGT bill on the sale of the holiday home.

Not many people realise that the beneficiary named in your Will is not necessarily the person who will receive the benefits from your Super fund. This is covered under the beneficiary nomination that you probably provided when you joined the fund. Some people can't even remember who they nominated, so it is important to keep your Super beneficiary up to date.

This is getting complicated, and not everyone has a DIY Super fund, but if you do, and your grown- up children are members of the fund, it can be a tax-effective way to leave them the assets. This is because the assets of the superannuation fund can effectively pass to other members of the fund on your death without their value being realised, and so without Capital Gains Tax being triggered.

Income Tax (including GST)

The effect of taxation on estates can become very complex when looking at income tax. The deceased could have paid too much or even too little Income Tax and as a result, the deceased's estate might owe tax to the government, or it could be owed a tax refund. Your lawyer should usually be responsible for the lodgement of the deceased's last tax return (called a 'date of death tax return') which discharges tax liability.[x] They are responsible for ensuring that all previous tax returns of the deceased are lodged and for paying any outstanding tax, interest or penalties owed by the deceased out of the estate.

Stamp Duties and Land Taxes

Duties (otherwise termed 'stamp duties') are imposed on a range of transactions and documents in Australia. Generally, the transfer of assets from the deceased to his executor to his beneficiary is exempt from duty. However, in some circumstances, an unanticipated liability to duty may arise such as where the beneficiaries of the estate wish to rearrange the inheritance between themselves or where it is desired that a will trust be modified. Confirmation of exemption from duty should always therefore be sought from your State's Revenue or Tax office.

In relation to land tax, it is not a duty. It is not applicable on the transfer or transaction of assets. Therefore, there is no land tax payable on assets passed from the deceased to a beneficiary. However, notably, once probate is obtained, the executor is the legal owner of all land in the deceased estate and so liability for land tax can potentially fall on them. Land tax also applies to the trustee of a testamentary trust (which we will discuss in our next chapter), and to beneficiaries who have an interest in land under a trust and who inherit land.

Superannuation Death Benefits

When you pass away, the Australian Taxation Office (ATO) advises that the person who receives the pay out of your superannuation balance will determine how the benefit is treated for taxation purposes. More in depth, this means that they will analyse the factors of dependency and age to determine whether the benefit is receivable as a lump sum or income stream; and thereby determine how the superannuation death benefit is taxed. If the superannuation is passed onto a non-dependant, for example, the taxable portion of the super benefit is 15%.

International Tax

An individual's death may raise a range of international tax issues. Some of these issues are as below:

- a deceased individual who resided in Australia may have left assets to non-resident beneficiaries.
- a deceased individual who resided overseas may have beneficiaries in Australia.
- Testamentary gifts may be made to offshore charities or organisations

Estate Planning for Blended Families

Careful estate planning is essential for blended families to minimise potential conflict and ensure that intended beneficiaries are provided for.

Unfortunately, there is no “one size fits all” estate plan which can be used for blended families. Some of the mechanisms which are used in estate planning for blended families will be discussed below.

Mutual Will Agreements

A Mutual Will Agreement is a contract between two people that requires both Wills to be drafted in specified terms. This agreement will also include a term that prohibits either person from revoking or amending their Will.

This mechanism may be useful where a Will maker wishes to gift their estate to their surviving spouse during their lifetime, but also wants to ensure that their wealth passes to their children once the surviving spouse has died.

A Mutual Will Agreement does not prevent a Will from being revoked in the usual way prior to death or loss of capacity (e.g. in certain circumstances remarriage will revoke your existing Will). However, if the surviving person has breached the agreement by changing their Will, the beneficiaries who would benefit under the operation of the agreement have a right to enforce such.

Life Interest Trust

A life interest trust allows a Will maker to provide for a beneficiary (i.e. life tenant) during his or her life while preserving the capital for other beneficiaries (e.g. children) after the death of the life tenant.

A life tenant is entitled to all income generated by the trust but does not control the capital. Following the death of the life tenant, the capital is then distributed in accordance with the terms of the Will.

The life interest trust may end in a number of ways, including:

- death of the life tenant;
- the occurrence of a specified event in the Will (e.g. remarriage);
- by agreement; or
- surrender.

This mechanism is commonly used where the Will maker is concerned that his or her children may miss out on their inheritance due to the Will maker's spouse remarrying. However, due to the inflexibility of this mechanism, a discretionary trust is usually preferred in many circumstances.

Right of Residence

An alternative to a life interest is the right of residence, which is used to provide a home for a beneficiary. A few things to consider when granting a right of residence include:

- who will be responsible for paying the outgoings of the property?

- If the trustee is responsible to pay for the outgoings, is there sufficient funds set aside to meet such expenses?

- What happens if the property becomes unsuitable for the needs to the beneficiary in the future?

It is recommended that the Will provides for substitute accommodation to be acquired when the property becomes unsuitable for the beneficiary.

Testamentary Trusts

A testamentary trust is a trust established under a will, which only comes into effect once the testator dies. It is generally of a discretionary nature, whereby the trustee has absolute discretion in regards to the distribution of income and capital to the beneficiaries.

Testamentary trusts are useful where:

- the beneficiaries are working in a high risk environment and being personally liable. This may be due to being a sole trader or by the nature of their profession;
- the beneficiaries are unable to manage their own affairs due to being under 18 years of age, being a 'spend-thrift' or having an intellectual disability;
- the testator wants to keep assets within the family line.

Establishment of a testamentary trust

The testator must have a written Will that provides for a testamentary trust to be established after they pass away. Unlike inter vivos trusts (family trust established during your lifetime), the testator remains the outright owner of the assets prior to their death. It is only once the executors have completed administration of the estate that legal ownership of the assets is transferred to the trustee of the testamentary trust.[xi]

The trustee is legally obliged to deal with the assets in accordance with the terms of the testamentary trust deed. The nature of any distributions, whether income or capital, must be in line with the powers given to them under the testamentary trust. To achieve maximum benefit and flexibility from the testamentary trust it is important that the trustee have absolute discretion.

Benefits of testamentary trusts

Asset Protection

Much like discretionary inter vivos trusts, no one beneficiary has any claim on the assets of a discretionary testamentary trust. This enables protection of the testator's assets in the following circumstances:

- where a beneficiary has creditors. Since a beneficiary does not have any claim or ownership of the assets of the testamentary trust, the creditors cannot seize the testator's assets to satisfy the beneficiary's debts.

- where a beneficiary is at a high risk of becoming bankrupt. Unless a distribution is made from the discretionary testamentary, the testator's assets will not pass to the trustee in bankruptcy.

- where a beneficiary is involved in property settlement proceedings. The Family Law Courts cannot include the assets of a properly formed testamentary trust in the matrimonial pool of assets available for division.

Flexibility of distributing income

Much like inter vivos discretionary trusts, a testamentary trust is flexible to meet the changing circumstances of beneficiaries over the lifetime of the trust.

Testamentary trusts can give the trustee absolute discretion to distribute income and capital to beneficiaries in the most tax effective manner.

The trustee's discretion is important where:

- there is significant disparity in the taxable income of the various beneficiaries. Streaming money in a tax effective manner enables optimum allocation of income and capital. The trustee can elect to make larger distributions to lower income earners or to support a beneficiary with a disability. This can change on a yearly basis.

- A beneficiary seeks to qualify for or maintain a youth allowance or an age, disability or sole parent pension. The trustee can make distributions taking into consideration the specific income and asset thresholds of the above allowances.

Income Splitting – minor beneficiaries

In an inter vivos trust any income above $416 distributed to an individual under 18 years will be taxed at the top marginal rate. Testamentary trusts have a significant advantage. Pursuant to section 102AG of the Income Tax

Assessment Act 1936 (Cth) any income distributed from a trust established from a Will is classified as “excepted trust income”. This enables income distributed to minor beneficiaries to be taxed at normal adult tax rates, with access to the tax-free threshold.

From a taxation perspective, testamentary trusts allow significant tax savings by enabling streaming to minor beneficiaries. In the 2019-2020 income tax year, approximately $18,200 can be distributed to a minor from a testamentary trust free of tax. These funds can be invested towards their education, maintenance or advancement.

Keeping assets within the family line

Testamentary trusts can be structured to ensure that the surviving spouse is properly looked after but ultimately only the beneficiaries of the trust benefit from the testator’s assets. Without a testamentary trust, a surviving spouse who re-marries can make a will which reflects their new relationship and excludes the testator’s children from the benefit of the testator’s assets. This is of particular concern where there is a child with a disability who may require significant financial support throughout their life.

A testamentary trust provides a testator comfort knowing that their surviving spouse will be properly looked after during their lifetime, with the residue of the testator’s assets passing on to the testator’s children to benefit for their lifetime. A surviving spouse’s level of control over the testamentary trust can be further restricted by appointing an independent third person such as a professional advisor as a trustee of the testamentary trust.

Taxation

There are no stamp duty or Capital Gains Tax (CGT) implications on the transfer of property from an estate to a testamentary trust. This is contrary to inter vivos trusts where both stamp duty and CGT are payable on the transfer of property from the transferor to the trust.

However, the trustee of a testamentary or an inter vivos trust are required to distribute the trust’s income by the end of each financial year or pay tax at the highest marginal rate on the accumulated income.

Issues to consider

Testamentary trusts have ongoing accounting, administrative and financial planning fees which needs to be weighed up against any benefits. A testator should seek legal and accounting advice on whether their circumstances warrant establishing a testamentary trust.

Factors which should be carefully considered include:

- Is there a significant pool of assets?
- Can the assets be invested to generate reasonable income per year for the estate?
- Are there beneficiaries who because of their age or intellectual disability may be unable to manage money?
- Are there beneficiaries that have a high-risk profile?

A properly structured testamentary trust gives a testator significant level of control over their estate planning to enable the distribution of income and assets over generations. It also provides flexibility, tax benefits and asset protection. However, it is important to first seek advice on whether your circumstances allow you and your family to benefit from a testamentary trust.

Other considerations that can be involved are as below, each with their respective advantages and disadvantages.

- Right of residence
- Life estate
- Portable or flexible life estate
- Mutual Wills
- Division of Property

Power of Attorney

A Power of Attorney is a legal instrument by which one person (called the Principal) confers upon another (called the Attorney) the authority to perform certain acts on his or her behalf. You are able to give your Attorney the power to make decisions or to do anything with your property and finances that you could do yourself – with or without limitation.

Some of the purposes that you can assign a Power of Attorney for include:

- The collection of debts
- Voting at meetings
- Operation of your bank account
- Management of your investments
- Paying bills

The problem with an "ordinary" Power of Attorney is that they lapse when the Principal loses capacity (e.g. coma, dementia or Alzheimer's disease) leaving the Attorney in an exposed position. For example, if the Attorney sold assets on the Principal's behalf, he or she could be held accountable if the Power of Attorney has lapsed.

Enduring Power of Attorney

To overcome this problem there is another type of Power of Attorney called an Enduring Power of Attorney. An Enduring Power of Attorney is valid (unless revoked) until the maker passes away. Then and only then does your Will become relevant.

Everyone who owns land, has a bank account, or who owns any other assets of some worth in their sole name, should execute an Enduring Power of Attorney.

However, you do not have to lose the ability to do things for yourself to take advantage of a Power of Attorney. If you are intending to travel interstate or overseas, the person that you appoint as your Attorney can do as much or as little for you as you need them to do while you are away. You can authorise your Attorney to operate one bank account only or to deal on your behalf with one particular property that you own. Or, you can authorise your Attorney to deal with all of your assets.

Can I limit the scope of an Enduring Power of Attorney?

Yes. Some Principals require that the Enduring Power of Attorney only take effect after a doctor has confirmed a loss of capacity, and others require that the medical certificate be reviewed and renewed every 6 months.
It is often advisable to provide in an Enduring Power of Attorney for substitute Attorneys (for example, in the case of a husband and wife being injured in an accident).

What happens if I don't have a Power of Attorney?

If someone loses mental capacity and doesn't have an Enduring Power of Attorney, The NSW Public Guardian can be appointed to take control of all that person's affairs and assets.

Whilst the NSW Public Guardian does take care of an afflicted person's affairs, it is at considerable cost to the person and is done very impersonally. There have been actual instances where only a matter of days after a person was placed in the Government's care, all locks on that person's house were changed and the children of the afflicted person were denied access to their parent's home – they were not even able to take fresh clothes to their parent.

When a Government agency takes over, any amount of money required for the afflicted person for any purpose can only be obtained after a formal application to the agency is submitted and approved. Something as simple as, say, a need for $2 - $3 for a toothbrush must go through this cumbersome and costly procedure. To arrange the making of an Enduring Power of Attorney is a very

simple procedure and should, in most cases, be done with expert legal assistance. You must provide the full name, occupation and address of the person or people that you wish to appoint as your Attorney. And, you must specify how much or how little power and authority you wish to give to your Attorney.

Enduring Guardianship

An enduring guardian occupies a similar role to an attorney with enduring power, but generally has wider powers than an attorney. It is one way of planning for your own future. If you lose the mental capacity to make your own decisions, an enduring guardian can make personal decisions on your behalf, to decide any or all of the following:

- The place you are to live (such as a specific nursing home, or your own home)
- The health care you are to receive
- The other types of personal services that you are to receive
- The medical or dental treatment to be carried out on you

An enduring guardian cannot consent to anything unlawful and cannot attend to certain things, including but not limited to:

- Make a will for you
- Vote on your behalf
- Manage your finances
- Override your objections (if any) to medical treatment.

To appoint an enduring guardian, you must sign a form of appointment. You can appoint one or more enduring guardians with the same functions on the same form. If you wish to appoint two or more enduring guardians with different functions, you need to complete separate forms. These forms do not need to

be lodged with any agency or office as there is no register of people who have appointed an enduring guardian.

The enduring guardianship document is an important legal instrument, and the original should be kept in a safe place. It's important that the appointed guardian has a copy, and a certified copy where possible.

Business Succession Planning

Should you pass away whilst owning or operating a business, it is also important to consider if you would like your business to continue on after you. It can therefore be a good idea to have a business succession plan. This should include details of: your ideal successor, the type (partial or full succession), timeframe, key personnel changes, legal considerations, financial considerations and your communication strategy. You should also note whether you want the business sold or if you would like it to pass down through your family.

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[x] Miranda Stewart and Michael Flynn, *Death and Taxes: Tax-effective Estate Planning* (Thomson Reuters, 6th ed, 2014) 70 [2]

[xi] 'Inter-vivos trusts', *Australian Executor Trustees Limited,* (Web Page) <https://www.aetlimited.com.au/trustee-services/for-you-and-your-family/supporting-pages/inter-vivos-trusts>

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We have reached the end of Part A and will now examine
Part B: Enacting a Will.

PART B: ENACTING A WILL

When a loved one has died, it can be difficult in your grief to know what to do or how to respond. If you are an executor of the estate, the steps on the following flow chart will be discussed; guiding you in what to do.

Step 1: Locate the Will & Make Funeral Arrangements

Preliminary conference with family and business associates

Advise beneficiaries and ascertain immediate needs of the family

Step 2: Protect Assets

Protect business interests, insure all property, collect valuables and income, keep surplus funds invested.

Step 3: Determine assets and debts, prepare statement thereof

Personal effects, securities, cash, business interests, real estate, debts due, property out of state, debts owing.

Step 4: Obtain grant of probate and attend to legal formalities

Step 5: Distribute Estate in accordance with the Will

Locating the Will

What if you can't find the original will?

Having a formal document outlining your testamentary intentions is a very serious matter. Without a formal will, you can risk having your estate distributed in a way that does not align with your intentions. But what happens if you or the person who has passed away has a formal will…and you just can't find it?

An original will is the will that a person executes, witnessed in many instances by their legal practitioner. This will should -and is often- kept in secure place; such as a safe custody facility, so it may be easily located upon the testator's death. When an original will is lost or misplaced, administering an estate becomes increasingly costly, time-consuming and complex. Other than aimlessly searching for the original will, there are several options to locate it methodically.

The first method involves public trustees. These are state-based government departments that handle issues relating to testamentary trusts, wills, estates and guardianship. It is a good idea to begin the search for an original will by contacting the relevant public trustee of the state where the testator resided. Some state's public trustees have storage facilities and databases, with facilities to store original wills. People may also consult public trustees when drafting a will and so, contacting the public trustee can assist in locating if there is a will at all.

Law societies are the next channel of information. Your solicitor should contact the law society of the relevant state for a wills' register. If there is no register for that state, the lawyer can place an advertisement seeking the location of the will from other practitioners.

The Supreme Court of New South Wales is another avenue to explore. Under the Succession Act, the Registrar of the Probate Court of NSW is authorised to hold original wills deposited there for safekeeping. If you lose an original will, you can retrieve it from the Registry by following a procedure, given that you are entitled to do so.

Finally, bank deposit boxes are another location option. Traditionally, deposit box storage services allowed banks to hold original wills at the testator's branch.

Notably, if the testator is still alive, has lost their original will and cannot find it, it is always best practice to make a new one. This is vital as a photocopy or copy of the original Will is not always admitted to probate; putting the quality of your family's future and your assets at risk. Your new will overrides any previous testamentary intentions made in any other wills and shall remove any doubts come administration of the estate as to which will is the most current and relevant.

Informal Wills: Worth the Risk?

A Will, as has been explored in recent court cases, can be informal. While not considered to be as solid and reliable as a formal will, we will briefly explore what constitutes an informal will and how they are created; asking, is it worth the risk?

The matter of *Sultanova v Bolgarow* (2019) heard in the Victorian Supreme Court, showed one way an informal will can be made. Prior to her death, the deceased, Nina Elzow was having a will prepared by her solicitor. The draft will was finalised and a summary provided to Nina so that she could execute it. She told her solicitor that the will was in the exact form she wanted, however, Nina held off on executing her will as her solicitor was not available to attend to her. As she did not want to deal with any of the solicitor's delegates, Nina ultimately passed away without executing her new will. The Court determined that the issue in the matter was whether Nina's unexecuted will was her final will and testament, or whether her previous executed will should take its' place. In the matter, this unexecuted will became Nina's 'informal will', so to speak. The court held that the law does not restrict informal wills from being held as a person's final testamentary intention. Essentially, if the facts of a case show that a person intended to adopt a document as their will, even if it is yet to be executed, it can be conceded as the person's informal will.

While the above case showcases a relatively positive outcome in relation to informal wills, it is vital not to be tricked into false security. There are significant risks and detriments to having an informal will that typically outweigh this positive end. The psychological and financial expense of attending court to decide the will's validity can be straining on your loved ones when you pass.

A formal, executed Will can abolish this stress and avoid the costly legal exercise. The reason being, there is much room to debate an informal will's legal validity compared to a formal Will. Your estate inevitably will be distributed this way should you have no formal Wills and should your informal will be deemed inadmissible or invalid. Having a formalised will can also minimise costs incurred by your estate as quite often it will reduce grounds for the contesting of your final intentions by providing clarity in your wishes.

No Will? No Way?

When there is no will, the estate is distributed according to the Succession Act, commonly known as the intestacy rules. It is still preferable to make a will and decide on your own beneficiaries rather than allow the intestacy rules to decide for you.

The statutory order basically divides eligible relatives (those who are entitled to inherit the estate of a deceased person who died without a will) into two parts – spouses and other relatives. If the deceased is an Indigenous person, the statutory order is subject to exclusion or modification by a distribution order under the Succession Act.

Definition of spouse

A spouse is a person who was married to the deceased immediately before the death or who was a party to a domestic partnership immediately before the intestate's death.

If the deceased leaves a spouse and children, but the children are not the spouse's children, the spouse is entitled to:

- the deceased's personal effects;
- a statutory legacy of $350,000 plus interest if legacy not paid within one year of date of death;
- one half of the remainder (if any).

Spousal Entitlements to an Estate

Under the *Succession Act* a spouse is entitled to the whole of an estate if their spouse died intestate (without a will). However, this is provided that there are no children to deal with. If an intestate spouse left behind children that were not those of the other spouse, the surviving spouse is entitled to only the personal effects of the deceased, their statutory legacy and one half of the remainder of the estate.

Multiple Spouses

If there are multiple spouses and no children, the estate is to be distributed in shares determined in accordance with the law.

The Role of: The Executor

Arranging the funeral is usually left to the executor of the will and they can access the deceased person's assets to pay for the funeral costs. In relation to the deceased's body, it is 'owned' by the executor or the next of kin if there is no will or no executor appointed.

As we have mentioned, an executor is responsible for:

- finding the will
- arranging for disposal of the body
- getting the death certificate from the NSW Registry of Births, Deaths and Marriages
- ascertaining the deceased's assets and liabilities
- assessing the value of the deceased's assets
- obtaining Probate if required
- paying the deceased's debts, income tax, duties and funeral expenses
- distributing the assets according to the terms of the will.

A Grant of Probate can only be made if there is a will. However, often the family does not know whether the deceased left a will or where it can be found. If you cannot find a will in the deceased's personal papers, check with their bank or solicitor, or the NSW Trustee & Guardian (in NSW).

Probate

Probate is an order from the Supreme Court stating that the will has been proved to be the last valid will of the deceased and allowing an executor to collect and distribute the estate in accordance with the terms of the will.

Probate will always be necessary if the deceased died owning real estate except if it is owned as joint tenants.

Applying for a Grant of Probate

You can apply for a Grant of Probate yourself (although that is not recommended except for the simplest of estates), or through:

- a solicitor
- a trustee company

Publishing an online Probate Notice

A notice announcing that you are applying for Probate has to be published on the Supreme Court's website at least 14 days before the application is made. The reason for this notice is to give anyone who knows of another Will, creditors, or others with an interest in the estate an opportunity to submit their claims. Before January 2013, notices were advertised in newspapers but this is no longer sufficient. The cost at the time of writing was $47 payable by credit card. The online notice of application for Probate and instructions on how to register and file forms is available from the NSW Online Registry for courts and tribunals.

Executor Frequently Asked Questions

Can I Renounce my Role as Executor?

While people may see it as a compliment to appoint a friend or relative as executor they often fail to consider that what they are asking is a huge task for someone who may be grieving and distressed. Being an executor even for simple estates can take a considerable amount of time. The skills required can also be very difficult for an executor who does not have relevant experience in law, accounting, business management or finance. As executor you may be liable for your management of the estate.

Just because you have been nominated as the executor doesn't mean you have to accept.[xii] Taking on the responsibility may not be the right thing for you and it is unlikely that the person who nominated you would have wanted to put you in a stressful situation.

If you have been named as the executor of a Will you are under no legal obligation to accept the appointment. Should you not wish to act as executor

then you can ‘renounce probate’ and renounce the role of executor, leaving an independent professional executor such as Quinn Lawyers open to take your place and apply to be an executor. Once probate has been granted to you, it is more difficult to renounce because of ‘intermeddling’. Best practice is to renounce executorship as soon as you are aware and do not wish to be an executor. Renouncing can be done after Probate by following a procedure set out in the Probate and Administration Act 1898, which allows for the appointment of NSW Trustee & Guardian or a trustee company to be replacement executor or administrator, however, this is a trying process.

Do I Need Probate?

Banks and other asset holders such as share registries and superannuation funds often require probate before releasing or transferring assets. This may depend on the value of the assets, as some may be prepared to release lower value amounts without a grant of probate. Requirements vary between asset holders.
A grant of probate will be necessary if real estate is owned in the deceased’s sole name or as a tenant in common with someone else. If the deceased owned an asset as a joint tenant with another person that asset automatically passes to the surviving joint tenant(s) and a grant of probate would not be required for that asset.
It is strongly recommended that an executor obtains legal advice before proceeding to deal with an estate because they can be personally liable in some circumstances. Including, for example, if a debt is not properly accounted for or if assets are not properly distributed to beneficiaries.

Who May Contest the Will?

After a grant is made the Will becomes a document of public record and a copy is available from the Supreme Court to any person upon payment of the appropriate fee. While a person is entitled to leave their assets to anyone they wish there are a number of grounds on which the distribution of a person’s estate can be challenged:

Validity of the Will

- On the grounds that the testator (person who wrote the Will) did not have the legal capacity to make the Will
- The testator may have been subjected to undue influence by a third party
- The Will does not comply with formal legal requirements, for example it may not be signed by the testator in the presence of two more witnesses
- Fraud i.e. someone forged the Will

Construction

What do the terms in the Will mean? The Will may be poorly worded or ambiguous. An application may be made seeking the assistance of the Court in the interpretation or construction of the Will.

Legal Advice under Chapter 3 of the Succession Act 2006

Family or people in a close relationship with the deceased persons or dependents who believe they have not been adequately provided for are entitled to contest the Will. Those who can contest the Will are not restricted to spouse and children. Claimants can include a de facto partner, any other dependents or a former spouse of the deceased. Complicated family structures such as blended families and second marriages may increase the likelihood of a Will being contested.

Challenges to a Will can be costly and delay the process of estate administration.

Will Rights

Often people ask us to assist in accessing a copy of a Will of a deceased relative when the holder of the Will is refusing to provide it. In NSW, section 54 of the Succession Act 2006 details those who are legally able to inspect the Will of the deceased. If you are a beneficiary under the Will, then you may also seek a copy of the Inventory of assets and liabilities.

The Role of: The Doctor

When someone has passed away, a doctor must be called to pronounce the person dead and if the cause of death is known, issue a medical certificate. Once this certificate is issued, the family should call a funeral director of their choice to remove the deceased's body to a funeral home and prepare the body for the funeral. If the person died in a hospital, the deceased will be kept in the hospital's morgue until a funeral director is notified.

The Role of: The Police

Where a doctor cannot issue a certificate, the doctor must notify the police who then refer the matter to the coroner. The deceased person is identified to police by someone who knew them and a coronial post mortem is performed to determine the cause of death. When this cause of death is established, a medical certificate of death can be issued.

Keeping the Body at Home

Some familial traditions may dictate the body be kept in their home until the funeral. To do this, the funeral director should be contacted to ensure that all health regulations are met and that the body is appropriately transported.

The Process

1 Registering the Death

Within a month of the death, it needs to be registered with the Registrar of Births, Deaths and Marriages (BDM). The next of kin or funeral director should provide personal details of the deceased to the Registrar for this to occur properly. If there is no next of kin, anyone with the accurate information is encouraged to come forward to report the death. Similarly, if there is no one to arrange the funeral, someone who knew the person is sought after and appointed if they are willing.

2 Obtaining a Death Certificate

A death certificate is issued by BDM for a fee and applications for it are lodged via Service NSW in the state of New South Wales. The Funeral Director usually can organise this all for a fee. The Registrar advises what information is required to issue a death certificate.

3 Organ Donation

The Human Tissue Act 1983 (NSW) allows the removal of tissue (including organs) from a deceased person who had consented to this or expressed a wish for it or expressed no objections to donation before they died, and the senior available next of kin gives their consent.

3a Organ Donor Register

A person who wishes to be an organ donor needs to register with the Australian Organ Donor Register (Donatelife). This can be done online.

3b Advising next of kin

Anyone who wishes to donate organs should let their family know of their decision. However, family can still veto and override this request. Donation will not proceed in the presence of strong and sustained family objection despite all information having been given to them.

3c The practicalities of organ donation

Except for the cornea of the eye, for organs and tissue to be suitable for transplant, the donor needs to have died in hospital after being on a life support system.

Funeral Arrangements

Making funeral arrangements is a sombre, emotional task. There are several things you need to consider when making plans, including the deceased's wishes. Common components or considerations when making funeral arrangements are compiling information for the obituary, choosing a funeral home, deciding on the type of disposition (burial, cremation etc.), selecting the casket or cremation container, selecting the grave marker and inscriptions,

selecting a location for the service, choosing musicians, choosing pallbearers, deciding on the ceremony and selecting the florist. When you are grieving however, these can be harrowing and hard tasks to carry out to your best potential. In our exercise kit, 'To Those That I Love', you can help your loved ones in the future for when you aren't around; giving them the tools and information they need for your funeral arrangements.[xiii]

Faiths and Funerals

Notably, dependant on your religion, there may be different funerary practices or ways to treat your body once you have passed on. Below, we have tabled these practices for your reference.[xiv]

Faith	Burial	Cremation	Water Burial
Buddhism	Yes – allowed	Yes - allowed	Yes
Christianity	Yes– allowed	Not encouraged but permitted.	Not often used.
Islam	Yes– allowed	No- not allowed	No – not allowed.
Hinduism	No- not allowed	Yes - allowed	No – not allowed.
Judaism	Yes– allowed	No- not allowed	No – not allowed.
Sikhism	No- not allowed	Yes- allowed	Yes - allowed

[xii] 'Can a nominated Executor refuse the job as executor of a Will?', *The Quinn Group* (Web Page) , <https://www.quinns.com.au/blog/consumer-news/can-a-nominated-executor-refuse-the-job-as-executor-of-a-will/>

[xiii] You can access our exercise booklet, 'To Those That I Love' by emailing us at info@quinns.com.au or visiting our website <https://www.quinns.com.au>

[xiv] 'Death / Funeral Rituals in World Religions', *Religion Media Centre* (Web Page), <https://religionmediacentre.org.uk/factsheets/death-funeral-rituals-in-world-religions/>

Protecting the Assets

Notably, a beneficiary does not own property of the estate or 'assets' until the executor distributes the estate. After probate or letters of administration, the executor or administrator must collect the debts of the estate, pay any debts such as income tax and distribute the rest of the estate in accordance with either the terms of the Will or the intestacy rules.
Part of the grant of probate and the letters of administration is the creation of the Inventory of Property (schedule of assets). Importantly, the bank or organisation holding the assets of the deceased must ensure the asset is in the inventory before dealing with it. If it is not and the organisation requires formal administration of the asset, the beneficiary may be liable for the asset and any issues arising.

Types of Assets

Personal Goods

There are no special requirements for distributing personal goods.

Bank Accounts

Joint name bank accounts generally pass automatically to the joint party on the death of the other account holder. A small balance account in the deceased person's name may be released without the bank requiring probate or letters of administration. The bank may require: the Will, the death certificate or consent from the deceased person's family. This account is sometimes used to pay the funeral costs. Where there is formal administration, the only documents required by the bank to release the funds should be, probate or letters of administration; and a withdrawal form.

Other personal property

For assets such as shares or money deposited with institutions other than banks, you will need to ask what documentation is required.

Real Property

Where the deceased lived or held property with another person jointly, a Notice of Death is required to transfer the asset to the surviving owner. For other real property held in sole tenancy or as tenants in common, a Transmission Application, via the online portal is required. You will require your solicitor or conveyancer to lodge and prepare these documents; we at the Quinn Group can do this on your behalf.

Life Insurance

Many life insurance policies mature on the holder's death. The company that issued the policy should be contacted regarding their requirements for the release of funds.

Superannuation

Most superannuation funds are established through a trust deed. Most funds provide that on a member's death, a benefit is payable to the member's dependants. The trustee of the fund has a discretion to decide who will qualify as a dependant (subject to the rules of the fund and legislation). For same sex couples, for example, this may prove more difficult should they not be married.

Cars

Cars belonging to the deceased person should be either sold or formally transferred to the beneficiary. No stamp duty is payable on the car should it be transferred to a beneficiary in the estate.

Paying Debts

Funeral expenses and other debts need to be paid by the administrator or executor of an estate.

Funeral Costs

The majority of banks will allow funds to be withdrawn from the estate to pay the person's funeral expenses before formal administration is obtained by way of cheque to the funeral director.

Insolvent Estates

If an estate is deemed insolvent; that is, its' liabilities and debts outweigh its' assets, the estate may need to be made bankrupt and these debts paid through any properties held by the estate.

An estate is made bankrupt much like a person is. When the estate is administered by a trustee in bankruptcy, the executor or administrator has no role to play. Some assets can notably be protected from being utilised to pay outstanding debts; these are life insurance and superannuation. Unless a contrary intention is expressed in the Will, the proceeds of any life insurance policy are protected from payment of estate debts except for funeral and testamentary expenses and may be distributed by the executor in accordance with a Will or the intestacy rules. Superannuation benefits under some government funds are protected by legislation, and the protection cannot be revoked by a Will.

Distributing the Assets

The existence of the Will and the nature of the estate are two factors on which the distribution of the estate's assets is dependant. If there is not a Will, the administrator should distribute the assets in accordance with the rules of intestacy. If there is a Will, the executor should distribute the assets according to the Will's instructions. If there is no dispute of the Will, this may go ahead, if there is however, the executor should wait for distribution to avoid personal liability for the assets distributed and their values. It is important that the executor prepare a statement of account with details of all funds received and expenses paid. A list of what each beneficiary has received is also useful for dispute situations that may arise.

No beneficiary has a right to any assets of the estate until the executor distributes it. This causes problems if the major beneficiary is a spouse with no income other than from the Will-maker (the same difficulty arises if the person died without a Will). In such cases, the spouse can: apply for a pension or seek a loan, using the estate as security.

The Probate and Administration Act allows the executor or administrator to make a payment to a beneficiary who will be entitled to all or part of the estate if the beneficiary was wholly or substantially dependent on the deceased person and has survived the deceased person by 30 days. This is why your solicitor is not engaged until after the 30 day period after the deceased person has died.

Trustees

In a Will, a person is appointed as either an executor or a trustee. There are different functions between the two positions. The trustee takes over once the executor protects and distributes the assets. Where the terms of the Will create continuing duties, such as supporting and maintaining children or administering a sum of money or property for someone's benefit, these duties are carried out by the trustee. An administrator can become a trustee if funds have to be retained until children reach the age of 18.

The trustee is bound and governed by the Trustee Act 1925 (NSW) and the Will. Under this Act, Trustees have the obligation to exercise care, diligence and skill that a 'prudent person would exercise in managing the affairs of other people'. They must act in the best interests of all present and future beneficiaries of the trust, invest trust funds in investments that are not speculative or hazardous, act impartially toward the beneficiaries and take advice.

Trustees have the fiduciary duty to act in good faith and honestly. The Trustee Act allows a trustee to invest in a form of investment unless forbidden by the Will. The trustee's role is a 'big deal' so to speak. An estate's trustee with ongoing duties, such as a life estate or an estate with beneficiaries under 18, should seek legal and financial advice; both of which we at the Quinn Group, can provide.

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Contesting a Will - Testamentary Disputes

An important change which came about under the Succession Act sets out the persons entitled to inspect the Will of a deceased person.
Previously, a copy of the Will of the deceased person could not be obtained without the consent of the executor, until Probate had been granted, which was often refused. Now, there is a list of entitled persons including:

- a person named in the Will,
- whether as a beneficiary or not;
- a person referred to in an earlier Will as a beneficiary;
- the surviving spouse, including de facto and same sex;
- and a person who would be entitled to the estate if the deceased had died without a Will.

There are several ways of contesting a Will. Each requires legal advice and are detailed as questioning the Will's validity, clarity and consistency.

The Will's Validity

If a Will was not the last Will made by the testator, they lacked the mental capacity to create a Will or the testator was unduly influenced, the Will's validity can be put into question. If a person who has helped someone to draw up a Will also stands to gain a great deal from it (e.g. a relative or lawyer who is also a beneficiary), that person may have to prove to the court that there was no trickery and no pressure, force or fear involved in the making of the Will. Flattery and persuasion by someone who stands to gain from a Will is not unlawful as such, but when it becomes a force that overpowers the judgment and wishes of the Will-maker, the court may find it to be a form of undue influence.

The Will's Clarity

If a Will is not clear, the courts may determine what was meant by the testator. For example, if there were two people named, 'Olivia' in the family and the

testator in the Will has merely written, ‘I leave to Olivia…’ the courts may need to determine who is meant to receive the gift.

The Will’s Consistency

The common law power of the courts to remedy a mistake in a Will is severely limited, in contrast to the remedies available for matters involving living people. However, the Succession Act gives the court the power to rectify a Will if it fails to express the Will-maker’s intentions or a clerical error was made in the making of the Will.

Family Provision Claims

A family provision claim is an application to the Supreme Court of New South Wales for a share or a larger share from the estate of a deceased person. You can make a family provision claim if you:

- are an 'eligible person', and
- have been left out of a will, or
- did not receive what you thought you were entitled to receive.

A family provision claim must be filed with the court within 12 months of the date of death (where the deceased person died on or after 1 March 2009). It is not necessary to obtain a grant of Probate or a grant of Letters of Administration before making an application for family provision.
In this type of claim, the court examines the needs of the applicant and the deceased’s ability to meet those needs. This is done through asking two questions: has the applicant been left out of the will without adequate ‘provision’ for maintenance, education and advancement in life, and what adequate provision should be made out of the estate if this is proven.

Who is eligible to make a family provision claim?

A family provision claim can only be made by an 'eligible person'.
An 'eligible person' includes:

- the wife or husband of the deceased
- a person who was living in a de facto relationship with the deceased (including same sex couples)
- a child of the deceased (including an adopted child)
- a former wife or husband of the deceased
- a person who was, at any particular time, wholly (entirely) or partly dependent on the deceased, and who is a grandchild of the deceased or was at that particular time a member of the same household as the deceased
- a person with whom the deceased was living in a close personal relationship at the time of the deceased person's death.

What will the court consider?

Before making an order, the court will consider the following:

- the relationship between the applicant and the deceased person
- any obligations or responsibilities owed by the deceased person to the applicant
- the value and location of the deceased person's estate
- the financial circumstances of the applicant, including their current and future financial needs
- whether the applicant is financially supported by another person
- whether the applicant has any physical, intellectual or mental disabilities
- the applicant's age
- any contribution made by the applicant to increase the value of the estate
- whether the deceased person has already provided for the applicant during their lifetime or from the estate
- whether the deceased person provided maintenance, support or assistance to the applicant
- whether any other person is responsible to support the applicant
- the applicant's character
- any applicable customary law if the deceased was Aboriginal or Torres Strait Islander
- any other claims on the estate
- any other matter the court may consider as relevant.

How to make a claim

An application for family provision is made by filing a summons together with an affidavit in the Supreme Court of New South Wales.

When an Order can be Made by the Court

There are no guaranteed rules or outlines to how a family provision claim Will proceed or the length of time it will take to play out. The attitude and willingness of the parties to negotiate will often determine this.
The cost of the application for a family provision claim, if a successful claim, is taken from the estate. Legal costs can also be paid out of the estate of the deceased, but there are maximum payments that can be utilised, as enabled by regulation.

Some testators may, while they are still alive, dispose of their assets to prevent eligible persons from accessing their assets once they pass on. To overcome this, the courts can make orders against the notional estate of the deceased. The notional estate includes assets that the deceased person had owned but disposed of for less than market value.

Notional Estates (NSW)

What is it?

A notional estate is comprised of assets that did not belong directly to the deceased at the time of death which, as a result of a relevant property transaction, were transferred to another person or a trust without full valuable consideration being given to the deceased.

When can it be Granted?

If there are insufficient assets in the deceased estate to satisfy a family provision order, the Supreme Court has the discretion to make a notional estate order. A notional estate order can designate particular property that was once held by the deceased and is now particular property being held outside of the deceased's estate, or assets that do not directly form part of the deceased estate at the time of his or her death, to satisfy an eligible person's claim on an estate.

Assets that could form part of a Notional Estate Order

The Supreme Court has the power to make a notional estate order in respect of an estate that is affected by property transactions made before or after the deceased death, and in particular property transfers made with the intention of diminishing the size of a deceased's estate. The following are types of assets that could form part of a deceased's notional estate:

1. The deceased's share of any property held as a joint tenant before the deceased's death.
2. Superannuation fund death benefits;
3. Company interests;
4. Estate assets that have been distributed;
5. Family Trust interests;
6. Life Insurance death benefits;
7. Inheritance contracts;
8. Donatio Mortis Causa, which are gifts and/or transfer of assets made without full valuable consideration by the deceased in contemplation of death.

Costs

An administrator or executor are not required to use a lawyer, but even for the simplest of estates, it is recommended to gain legal advice. A lawyer must charge fees in accordance with the Legal Fees and Costs Board for work carried out relating to the application for the grant of Probate or Letters of Administration. Notably, courts will only allow reasonable legal costs to be paid from an estate. There is a difference between contested and non-contested estates and the costs incurred.

For 'non-contentious' matters, the cost of obtaining a grant of probate or letters of administration will depend on the gross value of the estate. GST can be charged in addition to the fixed costs amount. The fixed costs in such applications cover the following legal services:

1 Instructions on obtaining a grant of probate or letters of administration or a resealing;
2 Attendance to specific details of assets as supplied by an executor;
3 Preparation of court documents;
4 Attendance on executor to execute;
5 Lodging documents;
6 Perusing the grant and advising the executor.'

Normally, the professional costs incurred are paid out of the estate.
For contentious matters costs are not regulated; they are in the discretion of the court. The general rule in contested probate litigation is that costs follow the event (the "General Rule"). However, there are two exceptions to this rule as below:

1 If the testator has been the cause of the litigation, the costs of the unsuccessful opposing party, may be paid out of the estate.

Exception 1 applies if the litigation was caused by the testator due to the confusion resulting from the state the deceased left their Will in and if the testator's behaviour raised doubts as to their testamentary capacity.

2 If the circumstances led to an investigation in regards to the document being proven, each party will pay their own costs.

The second exception applies if there are reasonable grounds to question either the capacity of the testator or the execution of the Will, or to put forward an allegation of fraud or undue influence.

Conclusion

We have now explored wills, estates and what to do when someone passes on. Should you require any further help and advice, the Quinn Group is here for you. We can handle your family provision claim, help you create your Will and act as the executor of your estate.

Glossary of Terms

Assets	Any property, right or equitable/legal interest that has financial value and can be used for payment of the owner's debts.
Enduring Guardian	Someone you appoint to make lifestyle, health and medical decisions for you when you are not capable of doing this for yourself.
Estate	All the possessions, property and assets owned by a person, especially at death.
Executed	To perform, carry out, to sign. Usually in the context of having executed a Will.
Executor	A person or institution appointed by a testator to carry out the terms of their Will.
Letters of Administration	A court order made by the Supreme Court which allows the administrator (the person who is appointed by the court) to distribute the assets of the deceased who died without a valid will (intestate), and left assets.
Power of Attorney	The authority to act for another person in specified or all legal or financial matters.
Probate	The official 'proving' of the Will, granted by the Supreme Court.
Testamentary Trust	A trust that arises upon the death of the testator and is specified in their Will.
Testator	The Will-maker.
Will	A Will is a legal document that expresses a person's wishes as to how their property is to be distributed and managed after their death and the person they wish to manage the property until the final distribution.

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