

## FACT SHEET

### PLANNING AHEAD: WILLS

#### What is a Will?

A Will is a legal document stating how you want your property to be divided after you pass away. The person making the Will is called the **Testator**.

All of the property owned by the Testator at the time of their death, is called the **Estate**. For example, house, land, car, bank accounts, jewellery, clothes, household goods, shares.

A person or organisation (e.g. a charity) who is to receive a gift or benefit under the Will is called a **Beneficiary**.

A person or organisation (e.g., NSW Trustee and Guardian) appointed by the Testator to carry out the directions in their Will is called the **Executor**.

#### How do I make a valid Will?

To make sure that your Will is legal (valid):

1. It must be in writing;
2. You must understand what you are doing, i.e. have capacity;
3. It must be clear that you intend for the document to be your Will;
4. You must sign the Will in the presence of two witnesses;
5. Witnesses must sign the Will in front of you and each other.

#### What if a person dies without a valid Will?

If a person dies without a valid will, it means they have died **intestate**.

In such cases, their property will be divided according to a formula outlined by the law. Who and how much each person receives by applying the formula, depends upon the category of relatives and how many there are at the time of death of the Testator.

#### Example 1

The deceased leaves behind his wife (second marriage) and his child from his first marriage. His estate will be divided as follows:

- a. His wife will get:
  - his personal effects (for example, clothes, photos, car);
  - a minimum value of the estate, called a *statutory legacy*. Currently this is about \$476,000; and

- half the remainder of the estate.

b. The remaining half of the estate will go to his child from his first marriage.

### **Example 2**

The deceased leaves behind children but no spouse. The children are entitled to equal shares of the estate. This includes adopted children, but not step children. If a child of the deceased has already died leaving children (grandchildren of the deceased), those grandchildren are entitled to their parent's share.

Therefore, where there is no will, who and how much they receive, will not be known until the person's death. This can result in a situation that the deceased may not have wanted to happen.

### **What if my document does not meet all the requirements for a valid Will?**

This type of document is usually called an 'informal Will'.

An informal Will may still be valid if the Court believes that you intended for that document to be treated as your Will.

A later document that does not meet all of the legal requirements can also be valid if the court believes that by this document, you intended to change or cancel your previous Will.

An example is a document made urgently in hospital, where the person making the document signed it but no one witnessed them doing so.

There is no guarantee that a court will decide that an informal Will is valid. Each case is different. Also, going to court can be very expensive. It is always best to make a Will that meets all the requirements for a valid Will.

### **What if I change my mind?**

You can cancel (revoke) your Will at any time before you die **and** while you still have capacity. A Will may be cancelled in a number of ways, including by making a new Will or dealing with your Will in a way that clearly shows you want to cancel it, for example, you burn it or tear it up.

Marriage also cancels a will. Divorce does not cancel a will, but can cancel certain things in a Will.

You should also review your Will if there has been a significant change in your circumstances, as this may affect how the Will operates. For example, if you marry, divorce, if you have left particular property to someone who has died.

### **What about do-it-yourself Will kits?**

Do-it-yourself will kits may seem easy to complete and may be a cost effective option, however, they usually are basic and may not satisfactorily address all the requirements of your situation.

A Will that is unclear may cause disputes and require your executor or beneficiaries to apply to a court for orders to interpret it. This can cause long delays and can be very expensive.

Also, if a gift fails, that property may be distributed according to the intestate formula. This can result in part of your estate going to someone you did not intend to receive it.

### Where should I keep my Will?

You should keep your Will in a safe place where nobody can access it without your permission. For example, a safe-deposit box or have your lawyer keep it. The NSW Trustee and Guardian can also store your Will in their 'Will Safe' facility.

You should tell your Executor where your original Will is kept and how to access it. The Supreme Court of New South Wales requires a person's original Will document in order to grant probate. Probate is a court order declaring that the Will is valid and authorises the Executor to distribute the estate. If the will cannot be located, the Court will presume that the person did not have a Will.

### Get legal advice

There are many things to consider when making a Will. It is always best to get legal advice before you make or change your Will.

### Who can help – legal services?

1. [South West Sydney Legal Centre](#) (click [here](#) for our current free telephone legal advice times)
2. [Senior Rights Service](#) 1800 424 079
3. [NSW Trustee and Guardian](#) 02 8688 2600
4. Contact the [Law Society of NSW Solicitor Referral Service](#) on 02 9926 0300 for help to find a private lawyer