Turner Freeman

Lawyers Est. 1952

A guide to our Wills and Estates Law services

GREAT PEOPLE. GREAT RESULTS. GREAT VALUE.

Turner Freeman Lawyers have been providing everyday Australians with outstanding legal services for over 60 years.

Our dedicated team of experts are experienced in the areas of wills and estate law.

Whatever the legal process may be, the caring team at Turner Freeman Lawyers will assist you in a professional and cost effective manner.

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An Introduction to Wills and Estates Law

"In this world nothing can be said to be certain, except death and taxes."
—Benjamin Franklin

Death is an unpleasant topic but one that is as important to consider and prepare for as it is unavoidable.

We are lucky in Australia to have a well developed set of rules, laws and doctrines that provide us all with the opportunity to build wealth and provide a future for our families.

Part of the complex social system that allows this to occur is our ability to leave the assets we have accumulated during our lifetime to whom we choose in the event of our death. This is known as the doctrine of testamentary freedom, and is often unknowingly utilised by people when they prepare a testamentary document, like a valid will.

It is important to consider that as a society we have not always had the freedom to choose who we leave our estate to. Most people will be familiar with the concept that 'the first born son of a royal inherits the castle'. This is a form of forced inheritance which has its base in Roman law and the notion of filial (family) duties. In some countries, even today, people do not have the freedom to leave their estates as they wish.

A delicate balance exists between testamentary freedom and the notion that a testator should provide for their family upon their death. The expectation that a testator should provide for their family, and in particular their spouse and children, is one that is based on people's attitudes and expectations of fairness.

In NSW, we have the *Succession Act* (NSW) 2006, the *Probate and Administration Act* 1898 and other legislation that is interpreted and applied by the Supreme Court of NSW. In the application of these laws, legal precedents and judgments are delivered on important issues. Only the Supreme Court of NSW has the jurisdiction to appoint a legal personal representative of a deceased person's estate to pay debts and deal with the assets according to the will or to the law.

Whilst death is naturally a disagreeable thing to think about, it does not need to be intimidating. Usually our clients are happy and satisfied that they have made appropriate arrangements before their death, and in doing so, have achieved peace of mind that their affairs are in order.

It is important that you plan ahead whether for your death, old age and the problems with ageing. The information in this brochure, together with the skilled and experienced legal advice offered by Turner Freeman lawyers will assist you to consider and understand your options to ensure that you have made all necessary arrangements in the event of your death or incapacity.

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What is a Will?

A will is a legal document that only operates after your death to direct how your assets should be distributed. A properly drafted, up-to-date will is the only way you can be sure your assets will be dealt with and your loved ones cared for in the way you choose. Your assets might include property, cash, superannuation funds, investments, business interests, valuable items or anything else you leave behind.

In order to be considered valid, a will must comply with legal requirements including:

- that the will is in writing;
- has been signed by the person making the will in front of 2 independent and competent witnesses;
- be made by a person with testamentary capacity who knows and approves of the contents of the will;
- deal with property or appoint executors; and
- not have been revoked prior to death.

A will is able to be updated, changed or revoked (cancelled) at any time unless a contract has been entered into to make the will unable to be changed.

A person under the age of 18 years cannot make a valid will unless there are exceptional circumstances.

Sometimes, people choose to make wills at home or without the assistance of legal advice. Often, these types of documents are the cause of litigation and bitter disputes over whether the document is a will or not. It is also possible for a person to make a will that meets all of the legal requirements, but is otherwise unclear or ambiguous such that the deceased person's wishes cannot be understood or carried out.

If you die without a valid will, intestacy provisions will automatically apply. If this occurs, your estate may pass to people you do not wish to benefit, and people you do wish to benefit may miss out.

In some circumstances, informal documents can be accepted by the court as a will if it can be proved the deceased person intended the document to be their will. These types of matters are very expensive compared to the relatively small cost of preparing a valid will with a solicitor.

Preparing a valid will with a solicitor is the best way to ensure you are aware of all of your testamentary options, including:

- who you want to look after your estate and act as your executor;
- what items and assets you can leave in your will and to whom and when;
- payment of debts or liabilities;
- whether different types of testamentary trusts may be appropriate;
- guardianship of children;
- ongoing care and support of pets; and
- whether you wish to be cremated or buried.

There are other good reasons you should make your will with a solicitor, including that contemporaneous records of your wishes will be kept, the original will can be independently kept safe and secure, and people cannot tamper with the document without your knowledge. A will made with a solicitor is also not as easily challenged as a homemade or informal will.

You have spent your lifetime accumulating assets, protecting your interests and looking after your family. It is important you ensure your wishes are carried out after your death by making a valid will.

Every person should have an up-to-date and valid will. Making your will with us is quicker and easier than you might think.

Power of Attorney

Enduring Power of Attorney

An enduring power of attorney is a legal document by which you authorise a person to make financial decisions on your behalf such as:

- Taking money out of your bank account
- Paying bills
- Discussing your finances with Centrelink
- Selling or purchasing property, shares or other assets.
- Signing legal documents, leases, mortgages.

For certain transactions your power of attorney may need to be registered at the Land and Property Information NSW (LPI) and a registration fee applies.

An enduring power of attorney is essential in the event of severe incapacity such as:

- Stroke
- Dementia
- Alzheimer's
- Debilitating accident

In the event you lose capacity to manage your own financial affairs and you have NOT appointed an attorney your affairs may be frozen and an application to the Guardianship Division, NSW Civil and Administrative Tribunal (NCAT) for a financial management order may be necessary. The making of a financial management order means that all or part of your financial affairs will be subject to management under the NSW Trustee & Guardian. There is a fee for management of a person's financial affairs by NSW Trustee & Guardian.

The most important decision you must make is "who do you appoint".

The person you appoint is referred to as your attorney and must be someone you completely trust to act in your best interest.

If you appoint more than one attorney you must decide if they are to act either:

- ***jointly:*** all appointed attorneys must sign all documents; or
- ***jointly and severally***: each appointed attorney can act separately from the other attorneys.

An enduring power of attorney continues to operate even after you lose the capacity to make decisions for yourself.

Your power of attorney appointment ends on your death and your will then becomes active.

Your attorney cannot:

- Make a will for you;
- Vote for you;
- Manage your personal and lifestyle affairs;
- Consent to medical treatment.

You can cancel your power of attorney at any time but you must have the capacity to do so and you must advise your appointed attorney in writing that the power of attorney has been cancelled. This is called revoking your power of attorney. If your power of attorney document has been registered you should also register a form revoking your power of attorney.

A power of attorney does not generally confer authority to give gifts, confer a benefit to the attorneyy or upon third parties unless specifically authorized to do so. A power of attorney can be made to take effect upon the happening of certain events such as mental or physical incapacity, or upon acceptance by the attorney or at a certain time.

The power of attorney document must be signed by you, and your signature must be witnessed by a lawyer or clerk of the court. The document must also be signed by the person you are appointing as your attorney, acknowledging their acceptance to act in your best interest.

Under the *Powers of Attorney Act* 2003 people that have an interest in your assets may be protected. For example if you have left someone property under your will and you loose capacity, your attorney may need to sell your property to provide a Refundable Accommodation Bond (RAD) in a nursing home for you. Your attorney must use your assets for your benefit only, however funds that form the residue of your estate under your will are to be used firstly and the funds from the property sold can still be gifted under the will when you die.

Appointment of Enduring Guardian

An enduring guardian makes health and lifestyle decisions for you if you have lost the capacity to make those decisions for yourself.

Health decisions may include:

- Medical or dental treatment.

Lifestyle decisions may include:

- Where you live.

If you appoint more than one guardian you must decide if they are to act either:

jointly: all appointed guardians must sign all documents; or

jointly and severally: each appointed guardian can act separately from the other guardians.

The document must be signed by you and the person you appoint as your guardian in the presence of a solicitor and the solicitor must state that you appeared to understand the effect of the document.

On your death your enduring guardianship and power of attorney appointments end, your will becomes active and your appointed executor takes over the role of carrying out the instructions stated in your will.

A doctor or dentist must have consent from your guardian to carry out minor or major medical or dental treatment on you if you have lost capacity to make the decision for yourself. However, a doctor is not required to obtain that consent if the treatment is necessary, as a matter of urgency to:

- Save your life
- Prevent serious damage to your health
- Prevent you from suffering or continuing to suffer significant pain or distress.

Your appointed guardian is entitled to medical records and information to the extent that it is necessary to assist them in carrying out their functions.

In the event you lose capacity and you have NOT appointed a guardian a member of your family or another person interested in your well-being may seek an order from the Guardianship Division, NSW Civil and Administrative Tribunal (NCAT). The Guardianship Tribunal may or may not appoint a person that you would have preferred to act as your guardian.

The appointment of an enduring guardianship commences when you lose capacity and continues until you die or the appointment is revoked. On marriage the appointment is automatically revoked unless you marry your appointed enduring guardian.

If someone has genuine concerns about your welfare and are concerned about what your enduring guardian is doing, they can apply to the Guardianship Division, NSW Civil and Administrative Tribunal (NCAT) to have the appointment reviewed. The Tribunal does not supervise enduring guardians but they can revoke or vary the appointment.

Every state and country has different laws about recognising enduring guardianship appointments. You should make enquiries if you intend to use the document in another state or country.

Your guardian cannot make decisions against your will while you still have capacity to make your own decisions.

Estate Planning

The process of planning ahead for your old age, incapacity and death is often referred to as estate planning. Effective estate planning ensures that the wealth and assets you have accumulated over your lifetime are transferred easily and tax-effectively to the people you choose.

Why you need an estate plan

A well developed estate plan will help avoid unnecessary disputes, uncertainty about how assets are to be dealt with, and assist in protecting against avoidable wastage of your estate. The cost and inconvenience of preparing an estate plan is negligible compared to the time, cost and disruption that can be caused if adequate arrangements have not been made prior to your death. Making proper arrangements can also help to alleviate some of the stress your loved ones may experience during a time that is naturally difficult and emotional.

Avoiding intestacy

If you die without a will, your estate will pass to your closest relative(s) ("next-of-kin") in accordance with the laws applicable in your State. Intestacy can be more time consuming, costly and burdensome on your surviving relatives and family because your last wishes have not been recorded anywhere.

Without a valid will, there may be a dispute about who should arrange your funeral and burial, who should administer your estate, and who is entitled to receive an interest in your assets. These issues can be particularly upsetting due to the time at which they often arise.

Extra cost and complexity is involved in dealing with an intestate estate because your next-of-kin will need to prove they are in fact the person entitled to administer your estate. Proof will also need to be provided to the court to show who should be entitled to your assets. This involves showing that investigations have been undertaken to prove there is no will, and also detailing who your relatives and beneficiaries may be. This is often done by obtaining original vital record certificates (marriage certificates, birth certificates, etc), as well as preparing additional affidavits in regards any knowledge of your living arrangements. If you have a de facto spouse, for example, your de facto is likely to have an interest in your estate pursuant to the rules of intestacy. In some cases, disputes arise about whether a person is a de facto spouse or not because there is no declaration of your wish to include or exclude them from receiving an interest in your estate.

Superannuation does not automatically form part of your estate

Under the Superannuation Industry (Supervision) Act, the trustee of a superannuation trust can pay your superannuation and any associated life insurance policy ("death benefit") from your available superannuation funds to your dependents or the legal personal representative of your estate. The trustee is provided with a broad discretion to make this decision based on information or evidence it is provided with. This means that even if you do have a will, the terms of your will may not be relevant to who receives a benefit from your superannuation funds. Therefore, in addition to drafting a will, it is important to consider making a binding death nomination to direct the superannuation trustee to pay the funds to the people you nominate.

You can make binding nominations to pay all or some of the benefits held in your superannuation fund to either your estate or to specific people. Binding death nominations also generally expire every 3 years and need to be renewed in order to remain effective.

Modern society is becoming more complex, so planning ahead is vital. Make sure you get the right advice for your situation.

Estate Planning Continued

More control

Without adequate estate planning, your estate may be left to an unintended recipient. For example, if a person without a spouse or children dies intestate, it is likely the person's parents would receive the whole of the estate. This is an automatic operation of law that applies irrespective of whether that person had any contact with their parents, or whether they had a disruptive relationship.

In your will, you can also make your wishes known about where you want to be buried, whether you wish to make any organs available for donation or who you would like to be guardian of your minor children. As our society develops, people are also identifying other wishes to include in their wills including the continued operation or closure of social media accounts and the ongoing care of pets and animals.

Minimise the effect of taxes on your estate

Careful planning with your solicitor and a qualified tax accountant may allow you to minimise, delay or avoid certain tax consequences upon the distribution of your estate and/or superannuation funds. For example, certain categories of people can receive a superannuation death benefit tax free.

Certain types of testamentary trusts can also allow any income earned by an estate to be split or applied with a discretion to allow a more tax effective model of distribution to be adopted.

Peace of mind

The feeling of relief and satisfaction that your affairs are in order and that things will be taken care of properly and with minimal disruption after your death cannot be underestimated. Knowing that you have done all you can to ease the difficult time after your death for your loved ones is worth the unsavoury task of considering your death and the impact it will have. Adequate estate planning prevents disputes and avoids unnecessary litigation particularly when experienced and qualified advice has been obtained.

Important things to consider

There are many factors to consider when planning for the disposal of all of the assets you currently own, and those that you may or may not have on the date of your death. Our experienced solicitors can help you consider your options, as often, people are not aware of all of the matters they should consider and how they can achieve their wishes.

When arranging your affairs, you should consider the following matters and what legal devices may allow your wishes to be carried out:

- Who will administer your estate and ensure your wishes are carried out?
- What assets and liabilities might you have when you die?
- What assets can you leave in your will, and what other arrangements may need to be made?
- Do you have an up to date and valid will? Does your will make specific gifts, grant life interests or rights of residence?
- Do you have effective enduring guardian and enduring power of attorney documents prepared to allow your interests to be protected prior to death?
- Should you consider creating a trust now or in your will, including special disability trusts, special needs protective trusts, discretionary trusts controlled by your executor or beneficiaries, or a charitable trust?
- How will any superannuation be paid out? Have you made binding death benefit nominations or adequately directed your self managed super fund trustee?
- Have you considered the tax consequences for your wishes?
- Have you adequately considered guardianship and the ongoing care of a spouse or dependents, including minor children?

Every person and family is different, and no one plan will suit each situation. It is vital that you discuss your wishes with an experienced estate planner to ensure your estate can be effectively managed and distributed after your death.

Probate and Administration

What is Probate?

Probate applies where a person dies leaving a will and owning assets that need to be dealt with under the will. This includes property solely in the deceased person's name and, in some cases, property owned jointly with others.

Once a death certificate has been issued and the deceased's assets identified and valued, the executor named in the will applies to the Supreme Court of NSW for a grant of probate of the will. The executor is required to advertise their intention to apply and call for any creditors 14 days before making the application. The application is then lodged in the registry of the court. Evidence is given by affidavit. The application provides proof of death, that the will is the deceased's last will and has been made according to law, and that there are assets in NSW and the beneficiaries entitled to them.

Once satisfied, the court grants probate of the will in the form of a sealed document. This document is the legal authority for the executor to deal with the assets of estate. The executor's duties are then to realise the assets, pay the deceased's debts and distribute the estate according to the will.

What is Administration?

Administration applies where a person dies intestate – without a will – and leaving assets in NSW. It follows basically the same procedure as for probate except that the application is made by the deceased person's next of kin. Where a person dies intestate, their estate is shared by their next-of-kin according to government legislation. The applicant applies to the Supreme Court of NSW for administration of the estate. In the absence of a will, the applicant must prove their entitlement as next-of-kin. This is done by certificates of birth, death and marriage. Once satisfied, the court grants letters of administration for the estate which is the legal authority for the applicant to deal with the estate. Again, their responsibility is to realise the deceased's assets, pay any debts and distribute the estate according to the laws of intestacy.

For most estates the probate or administration process takes about 10 to 12 weeks but this can vary significantly depending on the nature of the assets of the estate and complexity of the will or establishing who are the deceased's next-of-kin.

We can assist you with:

- Advice on your rights and responsibilities as an executor of a will or administrator of an estate
- Obtaining grant of probate or letters of administration
- Advice on administration of an estate and distribution of assets
- Dealing with estate debts and taxation issues
- Administration of estate trusts
- Advice on your rights and duties as executor/ administrator where a claim is made against the estate for family provision or a challenge to the will

Turner Freeman have specialist lawyers in wills and estates who can provide you with clear advice in these matters. Contact Turner Freeman today on 13 43 63 if you have any further questions about probate and administration.

We can advise you on all aspects of your rights and duties as an executor or administrator of an deceased person's estate.

Frequently Asked Questions for Executors

What is an Executor and what do they do?

An executor is a person named in the last valid will to look after the deceased person's assets and interests after death. An executor is also referred to as the legal personal representative of the estate. An executor has certain duties and responsibilities as well as legal rights to 'stand in the shoes' of the deceased.

In general terms, an executor is required to:

- arrange for the burial, cremation or disposal of the body;
- secure all assets and keep them protected until they are distributed;
- collect and pay any debts owed to or from the estate;
- carry out the terms of the will including distributing the assets to the intended beneficiaries.

How do you locate someone's last will?

Often, people have made wills with their solicitor and it is an easy task to identify and locate the last valid will. In some cases, however, it is unclear where a will might be held, or whether a will was ever made.

Conducting a search of personal papers, checking with solicitors in the local area, contacting the NSW Trustee and Guardian and asking banks you know might have been used may also help locate a will. It is always a good idea to keep an eye out for informal, draft or incomplete wills.

Who looks after a deceased person's affairs after their death, including funeral and burial arrangements?

It is the executor's responsibility to arrange for the disposal of the body and any associated funeral and burial arrangements. The final decision about when and how the body is to be disposed of is made by the executor, but it is expected the executor will work with the deceased's family and friends to make the funeral arrangements.

If there is no will and no executor, who arranges the burial or cremation?

Disputes can arise where it is not clear who should be responsible for making burial arrangements and securing estate assets. Unless certain cultural, religious or spiritual considerations apply, the usual approach is that the person with the highest right of administration to the deceased's estate will have burial rights. This will usually be any surviving spouse (including de facto), one or more of the deceased's next of kin, or a fit and proper person subject to an order of the Supreme Court of NSW. If the deceased is a minor child, the court may favour the parent with the closest bond with the child.

What happens if someone had powers of attorney?

An appointment of a power of attorney ceases to operate as at the date of death as the legal rights and powers of the deceased pass to the executor. Even if there is no executor, the appointment of the attorney still ceases to operate.

Can I be reimbursed for funeral expenses?

A person who expends money for the burial of another has a right to recover those monies from the estate. The amount of money that can be recovered, however, will depend upon what is reasonable having regard to the circumstances of the deceased and the available estate. Extravagant funeral costs cannot be recovered in full. Often, there will be funds available in an estate to pay the burial and funeral costs.

The cost of the erecting of a reasonable headstone is able to be reimbursed, but memorial costs are not ordinarily considered funeral expenses.

Do assets get frozen after death?

Bank accounts and other interests held only in the deceased person's name are effectively frozen once the organisation is aware of the death. It is the executor's responsibility to advise the organisations the deceased had contact with of the death. Generally, only amounts sufficient to pay for funeral, burial and probate costs will be released by a bank until a grant of probate has been obtained, or the bank is satisfied probate is not required. If any assets are used or dealt with without proper authorisation or legal rights, the person who dealt with the asset may be liable to account to the estate for it.

Jointly held assets are not generally frozen as the surviving joint tenant will often be entitled to the whole of the interest after the other tenant has died.

Do executors get paid?

Generally, an executor can only charge the estate for their time if the will specifically allows it or the executor is a professional who is entitled to charge for their expenditure or a corporate trustee. An executor can apply to the court for the payment of commission even if the will does not specifically allow it, but if the executor is also a beneficiary, commission is not often granted.

Do deceased estates have to pay tax?

In many instances, an estate will earn an income, even if it is only a small amount from interest earned from a bank account. An executor is liable to investigate and determine whether a tax return should be lodged for a deceased estate. This should be undertaken with a qualified accountant and they can assist apply for a tax file number for the estate from the Australian Tax Office.

Are wishes or directions about funerals in a will legally binding?

Generally, the wishes expressed in a will by a deceased person about funeral plans are not legally binding on the executor. The executor is responsible for making the decisions regarding the disposal of a body. This is because, legally speaking, the deceased no longer has an interest in their body after their death.

Importantly, however, it is a criminal offence to cremate a person against their written direction (Rule 77, Public Health Regulation (NSW) 2012). It is often a good idea to check the deceased's last will and private papers to ensure no such direction has been left before cremation takes place.

What is a death certificate?

In NSW, after someone dies, a death certificate is issued by the Registry of Births Deaths and Marriages. This document is proof of the deceased's death and is often ordered by a funeral director. The executor should hold the original death certificate as it may be required to be produced frequently in the early stages of searching for a will and when securing estate assets.

Is there a 'reading of the will'?

There is no legal requirement for the will to be read aloud to beneficiaries or the family. The idea of 'reading the will' is thought to originate from lawyers reading the will to people that may not have been able to read themselves. It is not a common practice in NSW.

Who can ask to see the will?

A will only operates after death. There is no legal requirement to produce a will to any person until after death. After death, however, a person who has possession or control of a will of a deceased person must allow any of the following to inspect or be given copies of the will (at their own expense):

- any person named or referred to in the will, or an earlier will, whether as a beneficiary or not,
- a surviving spouse or de facto partner (including same sex),
- children, parents or guardians,
- any person who would be entitled to a share of the estate if they had died without a will,
- any parent or guardian of a minor referred to in the will or who would be entitled to a share of the estate if the deceased had died without a will,
- any person (including a creditor) who has or may have a claim at law or in equity against the estate,
- any person committed with the management of the deceased person's estate immediately before death,
- an attorney under an enduring power of attorney made by the deceased.

How long does it take to get probate?

An application should be made to the court within 6 months of the date of death. Sometimes it can take longer to investigate and identify estate assets and liabilities.

Once an application has been made to the court, it will generally take a few weeks before the application will be processed and returned. Often, the time taken will depend on complexities and court workloads.

What if the estate has more debts than assets?

If the estate is at risk of having more debts than assets, you should consult a lawyer without delay. In some cases, the estate may be insolvent and creditors will need to be paid before any distributions can be made to beneficiaries. Certain rules of priority need to be followed so it is important you obtain legal advice to ensure you do not create personal liabilities for yourself.

Contesting a Will

There are several ways in which the courts can review a deceased person's will.

A challenge may be made to the will itself. It can be alleged that although a person has made a will, they did not have the capacity to make it or did not understand what they signed, actually said or meant.

The test as to whether a person has capacity to make a will is determined by the court according to the following matters;

- The will maker must understand what a will is;
- They must know what their assets are;
- They must recognise the persons in their life who they should consider providing for; and
- Must not be suffering from any delusions.

Provided these criteria are met, the person has legal capacity to make a will. The fact that they may be ill or even have some mental disorder may not necessarily mean they lack capacity. It is sufficient that they fulfil the test at the time they give instructions to make the will.

Claims are also brought against wills where it is alleged the will maker did not know or understand the will they signed or what it meant. This can arise where they are unable to read, do not speak English, misunderstand what the will means, or are so ill or disabled that they don't fully comprehend what they are signing. These are called knowledge and approval cases.

To be able to challenge a will in either of these cases you must have a legal interest in the outcome. It is sufficient if you are a beneficiary in a will affected by the will under challenge or next-of-kin if there is no will but if you don't have an interest you can't challenge.

Cases where a will is challenged for want of capacity or for lack of knowledge and approval are very technical and can be very expensive in terms of legal costs and disbursements. By their nature expensive expert evidence is necessary. There can be adverse personal costs consequences for an unsuccessful party. Anyone contemplating such a challenge should be fully aware of what is involved and the likely prospects of success.

If you are considering such a claim, Turner Freeman have specialist lawyers who can advise you:

- Whether you are entitled to bring a case to challenge the validity of a will;
- The consequences of a challenge to the will;
- The procedure of your case;
- The likely cost to you; and
- The possible outcome of such a claim and your exposure to adverse legal costs orders.

Can I challenge a will? Talk to our lawyers about your rights.

Defending a Will

It can sometimes happen that after a person has died, their will may come under challenge. Challenges can take several forms but the principal ones are

- A challenge to the validity of the will itself or
- A challenge as to what a will actually means
- A challenge to the provisions of the will under Family Provision Legislation.

Of these the last is by far the most frequent.

If you are the executor or one of the executors of the will you will most likely be directly involved in any court proceedings.

Except in cases where it is unclear what the will means, once you accept appointment as an executor it is your duty to uphold the will.

Where the challenge is to the validity of the will itself, it will be the grant of probate of the will that is contested. If you are an appointed executor, you must apply for probate of the will. If a challenge comes it will be your task to present whatever evidence you have to support the will. The court will ultimately decide whether the will is valid or not. Where an appointed executor may be concerned that such a challenge may be forthcoming, application can be made to the court for a grant of probate in Solemn Form. Most probates are granted in common from which can later be set aside. A grant in solemn form cannot.

If the meaning of the will is contested, the executors obtain a grant of probate in the usual way from the probate division of the Supreme Court. The case is then referred to the Equity Division to construe the will as to its true meaning. Provided that the problem with meaning has come about through the action of the will maker, the court will order the costs of these proceedings out of the estate. All parties who have an interest in the outcome of the case can participate. Once determined the executor proceeds to administer the estate as interpreted by the court. However, if you are aware that there is clearly a mistake in the will, at the same time as applying for probate or, within a year of the death, ask the court to rectify the will so that it properly reflects what the will maker intended. Whilst all parties interested in the outcome are notified, unless there is a contest, the court will rectify the will. This will save the very considerable legal costs of a construction suit. Legal costs will generally come out of the estate.

Where the claim is for family provision the general duty of the executor is to uphold the terms of the will. Even though the claim is for provision out of the estate, the executor becomes the defendant as the representative of the estate. As defendant, the court rules prescribe certain evidence and documentation that the executor must provide. Frequently the executor has no direct knowledge of the assertions of the plaintiff. If however, the executor is personally aware of the facts and circumstances of the plaintiff relevant to the claim, they must put this evidence before the court. The executor is also under a duty to place any other relevant evidence that can be obtained from other witnesses before the court. All family provision cases must go to mediation before being heard by a judge. The executor is entitled, on legal advice, to settle a claim and have the court orders made to finish the case. Many cases are settled at mediation. If this is unsuccessful, a judge will hear the case and decide the outcome. Unless there are extraordinary circumstances, the executors legal costs are paid in full out of the estate.

Remember, we can help you in what can be very difficult circumstances. Once a claim is made against an estate and you are the executor or one of them, it is important that you are fully advised of your rights and duties as you will be personally involved in the claim.

Turner Freeman can advise you in these matters and assist you throughout the course of the claim.

If you are an executor, it is important that you are fully advised of your rights and duties as you will be personally involved in the claim.

Family Provision Claims

Have you been left out of a will or not been adequately provided for?

You may be entitled to make a claim against an estate if the person who died did not leave you anything in his or her will or if the gift to you is not adequate for your proper maintenance, education or advancement in life.

Who can make a claim?

Section 57 of the *Succession Act NSW* defines who may make a claim. The following are 'eligible persons' to make a claim:

- The husband or wife of the deceased at the time of the deceased person's death
- A de facto partner of the deceased at the time of the deceased person's death
- A child of the deceased (including an adopted child)
- A former husband or wife of the deceased
- A person who was at any particular time wholly or partly dependent on the deceased and, at any time, lived with the deceased
- A grandchild who was wholly or partly dependent on the deceased
- A person with whom the deceased was living in a close personal relationship at the time of the deceased person's death

How long do I have to make a claim?

An application for a family provision order must be commenced in the Supreme Court of New South Wales within 12 months of the date of death of the person.

It is important to obtain legal advice as soon as possible so that an estate is not distributed prior to resolution of the claim.

Do I have to go to court?

Not all matters proceed to court. Often matters can be resolved by negotiation through lawyers or at an informal settlement conference.

Even if an application is commenced in the Supreme Court of New South Wales it may be settled by mediation. Very few matters proceed to a final hearing.

What factors are taken into consideration in a family provision claim?

The court has a wide discretion when deciding whether to make a family provision order i.e. all factors and circumstances of the parties are taken into account. The court must consider:

- The will of the deceased (including any statutory declaration or letter setting out the deceased person's wishes);
- Whether adequate provision was made for the person making the claim;
- Moral obligations to the person making the claim;
- The nature and value of the estate;
- Future needs of the beneficiaries and person/s making the claim; and
- Financial circumstances of all parties.

Are you an executor?

If you are an executor of an estate and someone makes a family provision claim against the estate you must seek legal advice. We can help you defend the claim, the costs of which will generally be paid from the estate.

It is important to obtain legal advice as soon as possible so that an estate is not distributed prior to resolution of the claim.

Importance of Experienced Legal Advice

Wills and estates, as an area of law, combines many different legal principles and issues from across the legal landscape including family law, equity, trusts, property and contracts. These principles apply to everyone whether they know it or not.

To adapt a quote from Pericles, "just because you do not take an interest in the law, that doesn't mean the law won't take an interest in you". It is therefore important that experienced legal advice is obtained in order to ensure issues and unintended complications do not arise unexpectedly.

Notional estate is an example of an issue that can arise and which may affect how a deceased estate is dealt with in a dispute about a will. In NSW, the Supreme Court can order that assets or interests disposed of up to 3 years prior to a person's death can be brought back into the deceased estate for the purposes of making family provision orders. There are limitations and conditions on these powers, however, which include that the person who disposed of the asset must have done (or failed to do) something which resulted in property being held by another person without full value being paid.

Similarly, there are sometimes unintended consequences when enduring attorneys sell assets on behalf of an incapable person. In some circumstances, the sale of an asset may affect how an estate is distributed particularly if the asset was specifically gifted to someone in a will. The general 'rule of ademption' is that a gift of a specific item of property to a person in a will fails if that item is no longer held or owned by the deceased on their date of death. To address this particular issue and to save these types of gifts, ss22 and 23 of the *Powers of Attorney Act (NSW)* 2003 came into force on 16 February 2004. This legislation provides that any person who is named as a beneficiary in a will has the same interest in any funds or property arising from the sale, mortgage, charge or disposition of the property, just as if the enduring attorney had not dealt with it.

One of the difficulties associated with the *Powers of Attorney Act* is that it only applies to instruments made and executed after the act came into force. This can present problems and gifts may be unable to be saved if an enduring attorney document was made prior to 16 February 2004. This can result in a person's wishes not being carried out, and because they are incapable, they have no opportunity to fix the problem.

Disputes about who should be appointed as a power of attorney, and what powers they should have, often arise in the context of other complex issues. Such issues can include the appropriate management and administration of property, protection orders, court-authorised wills, investigations into the validity of documents and evaluations of fit and proper persons. Combined with mental illness, incapacities and lengthy family histories, these types of disputes are often costly and difficult to resolve.

It is important to keep your legal documents up to date and to engage with your solicitor regularly so that the likelihood of problems arising can be minimised. If you are not sure about something, seek legal advice as the costs of doing something now are often insignificant compared to the time, cost and inconvenience of trying to fix problems later.

It is important that experienced legal advice is obtained in order to ensure issues and unintended complications do not arise unexpectedly.

This brochure contains a general legal overview and is not to be considered as legal advice specific to your circumstances.

Frequently Asked Questions about Will Disputes

Contesting or disputing a will – what does this mean?

You can contest a will if it is unfair in that it does not make adequate provision for you, providing you are an eligible person. A family provision claim allows estate assets to be redistributed by the court to make adequate provision for a person's maintenance, education and advancement in life.

You may also challenge or dispute the validity of a will if the will-maker was not competent or of sound mind, did not know or approve of the contents of the will, there was undue influence or fraud, or the will was incorrectly signed and witnessed.

When must I contest or dispute a will?

There is a 12 month time limit from the date of death to make a family provision claim.

If you want to dispute or challenge a will's validity, you should obtain legal advice without delay.

In some circumstances, time limits may be extended e.g. If you did not know the person had died, you were not aware you had to make a claim within the time limit or you have some other valid reason. It is very important you seek legal advice as timing can be critical.

Who can make a family provision claim?

People that may be eligible to make a claim include:

- The wife or husband of the deceased at the time of the death, or a former wife or husband;
- A person with whom the deceased was living in a de facto relationship at the time of death (including same sex couples);
- A child (including adopted children);
- A step-child or (if they lived with and were wholly or partly dependent on the deceased);
- A grandchild (if they were wholly or partly dependent upon the deceased);
- A person who was living in a close personal relationship with the deceased at the time of death.

You cannot make a family provision claim if you do not meet the eligibility criteria.

Can I contest an estate where there is no will?

If there is no last will, the laws of the State in which the deceased lived will determine how the estate is to be distributed. If a person dies without a will it is referred to as dying 'intestate'. A family provision claim can still be brought in these circumstances.

Do I have to go to court?

Not all will dispute matters go to court. Often they can be resolved by negotiation, however, if a resolution cannot be reached court proceedings are often required. Many family provision claims settle at compulsory mediation sessions which are held before a matter is heard by a judge.

What matters are considered in family provision claims?

The following matters may be considered by the court:

- the nature and duration of the relationship between the deceased and a claimant;
- the nature and extent of any obligations or responsibilities owed by the deceased to the claimant and any beneficiaries;
- the nature and size of the estate;
- the age, financial resources (including earning capacity) and financial needs of the claimant and any beneficiaries;
- any physical, intellectual or mental disability of the claimant and any beneficiaries;
- any contributions made by the claimant to the deceased;
- any provision made for the claimant by the deceased during the deceased's lifetime or in their will;
- any evidence of the testamentary intentions of the deceased, including evidence of statements made by the deceased;
- whether the applicant was being maintained by the deceased and who else may be liable to support the applicant;
- the character and conduct of the applicant and any other person before and after the date of the death;

- any relevant Aboriginal or Torres Strait Islander customary law;
- any other matter the court considers relevant.

Is there a way of knowing how much I might receive if I contest a will?

No, but if you are an eligible person the court will consider your need and whether you received adequate provision for your proper maintenance, support, education and advancement in life. Other factors will influence what provision may be appropriate, which is why experienced legal advice is necessary.

Who pays the legal fees if I contest or challenge a will?

Call Turner Freeman to discuss this and our No Win – No Fee policy.

In family provision claims, a successful claimant's legal fees will often be paid by the estate on an ordinary basis, and an executor's fees will often be paid from the estate in full.

In matters where validity is challenged, and where the will-maker has been the cause of the litigation, the costs may be ordered to be paid out of the estate.

What if the estate assets were given away before death?

Assets that do not strictly fall into the deceased's estate, including assets given away prior to death, can in some cases be declared notional estate. Family provision orders can be made from notional estate if:

- assets are given away or sold for less than their value within three years prior to the death;
- the deceased had superannuation or life insurance;
- an asset (such as a house or bank account) was held jointly with another person;
- there was a loan the deceased forgave on their death, or within three years prior to their death.

What if the deceased promised things but did not do them?

If a person suffers detriment because of their reliance on a promise being made, but where that promise was not fulfilled by a deceased person, the court can be asked to assist. These types of matters can be complex and involve equitable principles like estoppel and constructive/resulting trusts. You should seek expert legal advice about these types of matters without delay as time can be a critical factor.

What if I think the deceased was not of sound mind and did not have 'testamentary capacity'?

A will is invalid if the will-maker is found to have lacked testamentary capacity at the time the will is made. The test for capacity is set out in a very old case called *Banks v Goodfellow (1870)*. At the time the will is made, the will-maker must:

- Understand he or she is executing a will and what that means;
- Remember and understand generally the nature and extent of his or her property;
- Comprehend and appreciate any moral obligations he or she might have to friends, family and dependants; and
- Be of sound mind, memory and understanding and free from any delusions or disorder of the mind.

It is possible for a person who is heavily medicated or has Alzheimer's disease or dementia to make a valid will during lucid intervals provided they satisfy the above test.

What if I think the deceased was influenced or pressured into making the will?

It is possible to claim that a will was made under undue influence or duress, although it is often very difficult to prove and requires a lot of evidence. Undue influence or duress may be a threat or in a psychological or physical form. If the court finds there was undue influence, the will may be declared invalid which means it cannot be admitted to probate.

The onus is on the person alleging undue influence to prove it. It is not sufficient to only show there was persuasion or pressure on the deceased. For a claim of undue influence to be successful the evidence must prove the free will of the will-maker was overborne by coercion.

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Great People

At Turner Freeman Lawyers offices throughout Australia you'll find friendly and expert professionals who are passionate about doing a great job for our clients. We have Accredited Specialists in wills and estates law, as well as family law, personal injury law, employment law and property law. Our lawyers are some of the most experienced in their area of practice.

Great Results

Since 1952 Turner Freeman Lawyers have been achieving exceptional results for our clients in legal matters of all sizes and across all areas of law. We have achieved some of the largest damages payouts awarded in Australia and indeed the law has been changed as a result of cases run and won by Turner Freeman. We will go the distance to ensure the best possible outcome is achieved for you.

Great Value

We provide the highest quality legal services at a reasonable fee, often at no up front cost to our clients. We are so confident of the value we provide and encourage you to speak to one of our Partners about our legal fees before you sign a costs agreement with another law firm.

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We also have interstate offices located in:

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Ring our toll free number to be connected to your nearest Turner Freeman office **13 43 63**

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