Comasters
LAW FIRM AND NOTARY PUBLIC

WILLS AND ESTATES

A will is a written document that sets out how the will maker (testator) wants his or her assets to be divided after death.

To be legally enforceable, a will must meet all the requirements of the Succession Act 2006. The requirements are as follows:

- The will must be in writing;
- The will must be signed by the will maker and two witnesses who are not beneficiaries under the will;
- If the will is more than one page long, the testator should sign the bottom of each page; and
- The two witnesses are present to attest the signature of the testator.

The will must state the intentions of the testator in regards to the distribution of his or her property. If the formal requirements are not met, a legal will has not been created and you will be deemed as having died "intestate" (ie. without a will).

A. EXECUTORS

An executor is nominated by you in your will to administer your estate. The executor shall be responsible for seeing that the terms of the will are carried out as you desired. If you have not named an executor, an administrator will be appointed by the Probate Court. This is generally the person to whom you have nominated as the beneficiary of the largest portion of your estate.

B. WHO SHALL I LEAVE MY ASSETS TO?

You are entitled to distribute your assets to anyone you wish, however it is important to consider that if you do not make proper Provisions for your spouse and children, they may contest the will after your death, which is a most unpleasant situation.

C. STORING YOUR WILL SAFELY

Your will should be kept securely. A photocopy should be kept amongst your personal papers with a note explaining where the original is kept.

This will ensure that your beneficiaries are aware of the existence of the will and may distribute your property accordingly. Our law firm provides the services of holding clients' original wills in the firm's safe.

It would be helpful (to your executor) to store with your will a list of people or entities to be informed of your death, such as relatives, friends, bank and insurer. You could also list down the major assets that you own and bank account numbers.

D. CHANGING YOUR WILL

Sometimes you may wish to alter the terms of your will. The reason for this may include the death of a beneficiary, the birth of a new beneficiary, the acquisition of new assets and so on.

It should be noted that marriage automatically revokes the wills of both partners, unless it is contemplated (provided for) in the original wills.

If a will needs to be updated and the required alterations are minor, this may be done by adding a codicil to the will. This is a separate document that is added to the will, containing the new provisions and changes, revocations of old terms and so on. This document must also meet the above legal requirements, and in many cases, it is easier to draft a new will entirely.

E. IF THERE IS NO WILL (INTESTACY)

When a person dies intestate, it means that the person has died without a will.

The Succession Amendment (Intestacy) Act 2009 (NSW) which came into effect on 1 March 2010 has amended (and clarified) both the Succession Act 2006 and the Probate and Administration Act 1898 in relation to intestacy rules.

The major changes to intestacy laws include:

- The definition of the term "spouse", which now includes "party to a domestic relationship" ie. a de facto relationship of a continuous period of two or more years; or a de facto relationship that has resulted in the birth of a child;
- A surviving spouse who has children from the relationship with the deceased spouse will be entitled to the whole of the intestate estate;
- Children from a prior relationship will be entitled to a share in the remainder of the intestate's estate, after the surviving spouse has received: (i) a "Statutory Legacy" (see below); (ii) personal effects; and (iii) one half of the remainder of the estate, (note that under the proposed Act, there is no distinction between half and full blooded siblings);
- "Spouse's Statutory Legacy" is defined as $350,000.00 (to be adjusted by consumer price index) for a surviving spouse who is not entitled to the whole estate (increased from the current legislated amount of $200,000.00);
- Where there are multiple spouses (for example, a de facto partner and a separated but not yet divorced spouse), the intestate estate will be split between the spouses pursuant to either a Distribution Agreement or an order of the Court (Distribution Order);
- Where there are no closer statutory relatives living at the date of the intestate's death, cousins of the intestate may be considered as having a share in the intestate estate;
- Provision has been made for the distribution of the estates of indigenous people under indigenous laws and customs; and
- In the absence of any living statutory relatives, the state of New South Wales will be entitled to the whole of the estate.

Of course the above intestacy rules do not apply if the deceased has a legally valid will in NSW.

The importance of a legal will cannot be underestimated, as certain loved ones may have no call on your assets without specific provisions in your will.

F. HOW CAN WE HELP YOU?

There are areas of will drafting where obtaining professional advice is in your best interests:

- We will ensure that your will is valid, that is, it conforms to the statutory requirements in regards to content, witnessing and signatures.
- We will ensure that the final document reflects your precise intentions as to the division of your property.

Comasters is able to help clients in drafting and finalising a new will.

CONTACT US

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