

Your Will and Estate

It's important to have an estate plan that specifies how you would like your assets to be managed when you pass away.

Will

A Will is a document which is made by a person expressing their wishes as to how their property is to be distributed when they die. The person making the Will must have testamentary capacity (i.e. must be of sound mind) at the time they make their Will.

It is common to think you are free to leave your estate to anyone you choose but, if certain family members or other people who are eligible to make a claim on your estate, feel inadequate provision has been made for them, they have options under the Succession Act to make a family provision claim on your estate.

The Succession Act sets out rules relating to the making of a Will which must be followed for the Will to be valid. In each Australian state and territory there is legislation (the Succession Act*) which deals with Wills, family provision claims, intestacy, probate and the administration of deceased estates. The legislation in each state and territory is similar but as there are some differences, if you are drafting a Will, it is important you seek advice from a lawyer in the state or territory where you live. If the rules have not been followed, it generally is necessary to make an application to the court to seek validation of the Will.

Intestacy

A person dies 'intestate' if they die without a Will or if the Will does not properly dispose of all the assets owned by the deceased.

The Succession Act includes intestacy rules which set out who is entitled to the estate of a person who dies intestate.

It is important to have a Will which leaves all of your assets to those who you intend to benefit.

Family provision

Under the Succession Act, the court has authority to make orders to override a deceased's Will. It is possible for certain persons to make a claim on an estate, if they feel they were inadequately provided for under the Will.

Who can make a claim?

The Succession Act lists those persons who are eligible to make a claim on an estate.

Generally persons who are eligible to make a claim on an estate of the deceased are family members, which includes spouses (married or de facto), children, step children, grandchildren and in some cases parents, former spouses, persons who were wholly or partly dependent on the deceased and a member of the deceased's household at any time and persons with whom the deceased was living in a close personal relationship with.

In NSW it is possible for a current or former step child of the deceased to make a claim on the deceased's estate if that child was at any time wholly or partly dependent on the deceased, and was at that time or any other time a member of the deceased's household.

When to make a claim

The Succession Act sets the time period in which a family provision claim should be started. If the claim is started outside the period, the court has the discretion to allow the claim.

In NSW, an application for a family provision claim must be commenced within 12 months from the date of death. In other states and territories the time frame ranges from three months to 12 months from either the date of death, the date of probate or the date that letters of administration of the estate are granted (letters of administration are granted where no Will existed).

* Please note, in this fact sheet a reference to 'Succession Act' is a general term for legislation in each state and territory.

What factors does the court consider?

When considering family provision claims, the court attempts to balance the need of the person making the claim and the wishes of the deceased. Some of the factors the court will consider include:

- the claimant's relationship with the deceased;
- the value of the deceased's estate;
- the financial circumstances of the person making the claim (as well as their spouse);
- the earning capacity of the person making the claim and their current and future needs;
- their age and health; and
- evidence of the deceased's intentions.

Is superannuation part of an estate?

No, unless your superannuation death benefit is paid to your Legal Personal Representative (which is either the executor/executrix of your estate or the administrator of your estate).

To ensure your superannuation benefit is paid in accordance with your wishes, you should make a binding nomination by completing the form available at eisuper.com.au/nominate.

Notional estate in NSW

The Succession Act in NSW allows a court to take into account certain assets which are not held by the deceased as a notional estate of the deceased. If a family provision claim is commenced it is possible for the court to include the following assets as notional estate, thereby increasing the value of the estate:

- superannuation benefits that are not paid to the Legal Personal Representative;
- property owned with another person as a joint tenant;
- life insurance proceeds which are not paid to the Legal Personal Representative;
- property which has been gifted or transferred to another person for less than market value; and
- assets held in a discretionary trust.

There is no equivalent notional estate provision in any state or territory other than NSW.

Steps to protect your family and assets

- Make a Will and appoint financial, medical and lifestyle attorneys to make decisions for you if you lose capacity (note, an attorney can't make or amend a Will, but can apply to the court to do so if you have lost testamentary capacity).
- Ensure you have an up to date, valid binding nomination for your superannuation account.
- Regularly review your Will, powers of attorney, superannuation death benefit nominations, trust deeds and any other documents which relate to your succession plan at least every two to three years and as your circumstances change.
- If you intend to leave a person out of your Will who is eligible to make a claim on your estate, write down your reasons and keep the document with your Will.
- Discuss your intentions with your family and try and resolve any issues with family members to avoid problems with distributing your estate later on.
- Include testamentary trusts in your Will which provide asset protection from creditors, some protection from family law disputes and taxation benefits.

Seek professional advice

Seek advice from legal, accounting and taxation professionals who specialise in superannuation, tax and succession planning.



We're here to help

 1300 369 901

 eisuper.com.au

 GPO Box 7039, Sydney NSW 2001

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