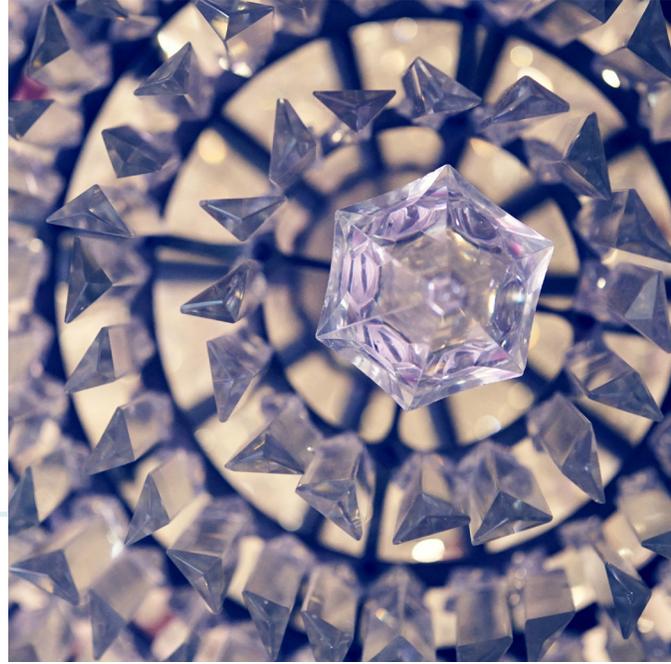


An Introduction to Wills & Estates in Australia & New Zealand

January 2021



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INTRODUCTION

If you require guidance or legal representation in respect of preparing or executing a will, or managing a dispute about an estate, in Australia or New Zealand then these law firms are available to assist in single or multiple jurisdictions. Each Meritas member firm in the ANZ region is listed below and the contacts for each office are provided at the end of this guide.

For New Zealand:

- Martelli McKegg – Auckland

For Australia:

- Bennett & Philp – Brisbane, Queensland
- DMAW Lawyers – Adelaide, South Australia
- Madgwicks – Melbourne, Victoria
- Swaab – Sydney, New South Wales
- Williams + Hughes – Western Australia

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1. WHAT IS A WILL?

1. A will is a legal document made by a person (the testator / will maker) who has testamentary capacity that is intended to be testamentary, in the sense that it does not take effect until death.

In *Lemage v Goodban* (1865) Wilde J explained “The will of a man is an aggregate of his testamentary intentions so far as they are manifested in writing, duly executed according to statute. By his will a testator may not only dispose of his property, but can also appoint executors, trustees, and guardians of his infant children”.

It should be noted that a will does not apply to a testator’s interest in a superannuation fund including a self-managed superannuation fund as this does not form part of the testator’s property. As these interests can contain significant wealth, it is important to consider this as part of one’s overall estate planning strategy.

In general, a testator must be 18 years of age and have testamentary capacity to make a valid will. However there are exceptions to this general rule. For example, the superior courts of most jurisdictions have the power to authorise someone under 18 years of age or someone who lacks testamentary capacity to make a will.¹

2. WHAT MAKES A WILL VALID IN AUSTRALIA OR NEW ZEALAND?

A will generally needs three things to be valid:

- I. It must be in writing (whether handwritten, typed or printed)
- II. It must be signed; and
- III. The Will Maker’s signature must be witnessed by two other people who also need to sign the will. Those witnessing the signature can not be a Beneficiary nor an Executor and, preferably, they should not be related to Beneficiaries or Executors.

A Will maker must be 18 years of age and have testamentary capacity to make a valid will. However there are exceptions to this general rule. For example, the superior courts of most jurisdictions have the power to authorise someone under 18 years of age or someone who lacks testamentary capacity to make a will.²

1 Sections 8 and 8A, *Wills Act 1968* (ACT); ss 5 and 16 *Succession Act 2006* (NSW); ss 7 and 18 *Wills Act* (NT); ss 9 and 19, *Succession Act 1981* (Qld); ss 5 and 6, *Wills Act 1936* (SA); ss 7, 20, 30 and 37 *Wills Act 2008* (Tas); ss 5, 6 and 20, *Wills Act 1997* (Vic).

2 Sections 8 and 8A, *Wills Act 1968* (ACT); ss 5 and 16 *Succession Act 2006* (NSW); ss 7 and 18 *Wills Act* (NT); ss 9 and 19, *Succession Act 1981* (Qld); ss 5 and 6, *Wills Act 1936* (SA); ss 7, 20, 30 and 37 *Wills Act 2008* (Tas); ss 5, 6 and 20, *Wills Act 1997* (Vic).

Late in 2017 a Queensland Supreme Court case³ made news when an unsent text message that was saved in the drafts folder of a deceased person's mobile phone, was held by the Court to constitute an informal Will.

In this case it was found that the deceased, who committed suicide, created the text "on or about the time that (he) was contemplating death". The deceased set out in the text that he left his brother and nephew his house and superannuation entitlements and ended the text with the words "My will" followed by a smiley face emoji. It was found that in specifying his assets the deceased indicated an awareness of the nature and extent of his estate and despite the informal nature of the text it was sufficient to represent the deceased's testamentary intentions, that is, it was a Will.

WHO CAN BE AN EXECUTOR OF A WILL?

Generally, an executor will be appointed by a testator (the will maker) based on the testator's judgement as to who will be in the best position to administer their estate in accordance with the terms of their will and the law.

3.

Any person may be appointed as an executor including a relative or friend of the testator, a beneficiary of the testator's will, the Public Trustee (known as the State Trustee in VIC and the Public Trust in NZ), an authorised trustee company or a professional person (such as the testator's solicitor or accountant).

The Public Trustee, trustee companies and professional executors will generally charge a fee for administering the testator's estate.

Minors can be appointed as executors. If the minor is of full age [18 years] when the testator dies, the minor is entitled to a grant of probate. If the minor is still a minor when the testator dies, the minor is not entitled to a grant. If the minor is the sole executor of the will, the court may grant administration with the will annexed to the minor's guardian or to such other person as the court thinks fit, with full or limited powers to act as executor until probate is granted to the minor upon attaining the age of 18 years.⁴

Companies other than the Public Trustee and trustee companies may not act as executors.

³ Re Nichol; *Nichol v Nichol & Anor*

⁴ Section 33, *Administration Act 1903* (WA) and Rule 26(1), *Non-contentious Probate Rules 1967* (WA); s 21, *Administration and Probate Act 1929* (ACT); s 30, *Administration and Probate Act 1969* (NT); s 70, *Probate and Administration Act 1898* (NSW); s 6(3) *Succession Act 1981* (Qld) and Rule 639, *Uniform Civil Procedure Rules 1999* (Qld); Rule 42, *Probate Rules 2004* (SA); s 23, *Administration and Probate Act 1935* (Tas); s 26, *Administration and Probate Act 1958* (Vic); s 9(1), *Administration Act 1969* (NZ).

4. CAN A BENEFICIARY BE AN EXECUTOR?

While there is no legislation specifically dealing with this issue it is very common for an Executor of an estate to also be a named Beneficiary of an estate.

The spouse or de facto partner of the deceased may be named as an Executor of their estate, either solely or as one of two or more Executors. Outside of these circumstances, it is common practice for an Executor to still be a named Beneficiary under the Will, such as in the case of a child of the deceased.

Where no Will has been prepared, or where a will cannot be followed for any other reason, the Administration Act 1969 (with similar legislation in other States and Territories) provides that the role of Administrator, who is effectively the Court appointed Executor, will be decided by reference to the persons who are most closely related by marriage or blood to the deceased.

A Will may include a specific clause stating that the fact that an Executor is also a Beneficiary of the Estate shall not be deemed to be a conflict of interest, but the absence of such a clause does not generally invalidate the ability of an Executor to perform this role.

However, the role of an Executor is fundamentally fiduciary in nature and they are obligated to perform their role in strict adherence to the terms of the Will, subject to the jurisdiction of the High Court in New Zealand or Supreme Court in Australian States and Territories.

The full extent of an Executor's fiduciary duties are often debated but are commonly held to include the obligation to know and follow the terms of the Will, to only benefit those named or entitled to be considered as Beneficiaries, to act honestly and in good faith and to use their powers for a permitted purpose. Typically the relevant Court, when considering the suitability of an Executor in the event of any dispute, will carefully consider whether there is any risk that the Executor wishes to retain such a role with the intention of protecting their own personal interests.

Executors who are also Beneficiaries must always be aware of the potential for a conflict of interest. It is common in situations where claims are made against the Estate by persons (whether named under the Will as Beneficiaries or otherwise) that an Executor will face claims that they are incapable of exercising this role as they are perceived as lacking a sufficient degree of even-handedness, in particular where they may themselves be affected by any decision they may make, whether solely or jointly with other Executors.

If an Executor finds themselves in a position where they are accused by one or more of the Beneficiaries for abusing their position (often such

claims centre round allegations that they are using their powers other than for a permitted purpose) then an application may be made to the relevant Court for their removal and the appointment of an independent Executor.

In circumstances where the Executor is claiming a share of an Estate that exceeds their stated or undisputed beneficial interest this is commonly perceived to be a clear conflict.

It is rarely considered acceptable for an Executor to make a disputed claim against the Estate they have the responsibility for administering. In such instances it is considered prudent for a Beneficiary named as an Executor who intends to bring such a claim to renounce their right to apply to fulfil the role or, alternatively, to resign from their role prior to bringing such a claim.

5. HOW MANY EXECUTORS CAN BE APPOINTED?

There is no limit on the number of executors a testator may appoint. In the Australian Capital Territory, New South Wales, the Northern Territory and South Australia and in New Zealand probate may be granted to any number of executors at one time. In Queensland, Tasmania, Victoria and Western Australia, although a testator can appoint any number of executors, the court will not grant probate to more than four executors at any one time. The testator should consider the practicalities of appointing numerous executors.

The executor's office is a single office, so that if more than one executor is appointed their authority is joint and several.

6. WHAT IS A TESTAMENTARY TRUST?

A testamentary trust is simply a trust established pursuant to a Will. A testamentary trust is usually created for one of two reasons:

1. It may provide some tax advantages depending on the individual circumstances of the beneficiaries; or
2. To protect beneficiaries who the testator considers should not receive a lump sum inheritance. For example if the beneficiary suffers from a disability and is not able to handle their own affairs, or because the beneficiary is a spendthrift.

Testamentary trusts allow flexibility in relation to income and capital distributions. The trustee of the testamentary trust is able to allocate income according to the needs and tax position of the beneficiaries. The trustee may make payments to the beneficiary with the smallest income, for example by using the testamentary trusts to stream income to spouses or children if this is tax efficient.

Another advantage of a testamentary trust is that the trustee is able to select the best time to vest the trust. “Vesting” means when assets in the trust are transferred to a beneficiary. The trustee can do this based on the needs of the beneficiaries and also their financial situation at any time.

There are also disadvantages to testamentary trusts, such as ongoing costs associated with administering the trusts. For example, accounts will need to be prepared and tax returns will need to be lodged each year.

In New Zealand, the Trusts Act 2019 will apply to testamentary trusts. If the Will does not clearly modify or exclude the duties now implied by default, then they may apply notwithstanding that this may not have been intended by the will maker. Advice should be sought in this regard.

7. WHAT IS AN ENDURING POWER OF ATTORNEY?

An Enduring Power of Attorney (EPA) is a legal document that enables an adult who has legal capacity (the donor) to appoint another person (the attorney) to act on the donor’s behalf in relation to any matter within the scope of the power conferred by the EPA. However, an EPA does not allow an attorney to act in the donor’s capacity as director of a company.

An EPA may come into effect immediately or only in the event the donor loses legal capacity and is unable to manage his or her own affairs.

An EPA will only be effective if the attorney has accepted the appointment by signing the EPA.⁵

EPAs are governed by legislation in all Australian States and Territories (other than the Northern Territory)⁶ and in New Zealand.⁷

In the Northern Territory, EPAs have been replaced by ‘advance personal plans’ (APP), which are also governed by legislation.⁸ An APP is a legal document that enables an adult who has legal capacity to appoint a another person (decision maker) to make decisions on the adult’s behalf in relation to all or any aspect of the adult’s care and welfare, including health care, property and financial affairs.⁹ An APP will only come into effect in the event the adult loses legal capacity.

5 Section 23, *Powers of Attorney Act 2006* (ACT); s 6(2), *Powers of Attorney and Agency Act 1984* (SA); s 104, *Guardianship and Administration Act 1990* (WA); s 44, *Powers of Attorney Act 1998* (Qld); s 20, *Powers of Attorney Act 2003* (NSW); s 30(2), *Powers of Attorney Act 2000* (TAS); s 37, *Powers of Attorney Act 2014* (VIC); *Protection of Personal and Property Rights Act 1988* (NZ); s 94A.

6 *Powers of Attorney Act 2006* (ACT); *Powers of Attorney Act 2003* (NSW); *Powers of Attorney Act 1998* (Qld); *Powers of Attorney and Agency Act 1984* (SA); *Powers of Attorney Act 2000* (TAS); *Powers of Attorney Act 2014* (VIC); *Guardianship and Administration Act 1990* (WA).

7 *Protection of Personal and Property Rights Act 1988* (NZ)

8 *Advance Personal Planning Act 2013* (NT).

9 Section 8, *Advance Personal Planning Act 2013* (NT).

What Decisions Can an Attorney Make?

The decisions an attorney may make under an EPA differ between jurisdictions. An EPA may give the attorney the power to make decisions on the donor's behalf in relation to any or all of the following:

- New South Wales – Financial or legal matters
- Queensland - Financial matters or personal matters (including health matters)
- Australian Capital Territory - Financial, property, lifestyle or health decisions
- South Australia - Financial matters
- Tasmania - Financial or legal matters
- Victoria – Financial or personal matters
- Western Australia - Financial or property matters
- New Zealand - Personal care and welfare, and property matters

How is an EPA Revoked?

Generally, an EPA may be revoked by the Donor at any time provided the Donor has legal capacity. An EPA will be revoked on the death of the Donor¹⁰ or if the Donee dies, loses legal capacity or becomes bankrupt or insolvent.¹¹ In some jurisdictions, there is a requirement to notify the attorney of the revocation.¹²

In the Northern Territory, an APP remains in force until the adult who made the APP dies or the decision maker, being an individual, dies.¹³

8.

WHAT DOES A POWER OF ATTORNEY COVER?

There is a distinction between the documents what are referred to as a Power of Attorney and either of the two types of Enduring Powers of Attorney (EPA's).

¹⁰ Section 32AE(2), *Powers of Attorney Act 2000* (TAS); s 60, *Powers of Attorney Act 2006* (ACT); s 16(1)(e), *Powers of Attorney Act 2003* (NSW); s 51, *Powers of Attorney Act 1998* (Qld); Legal Services Commission of South Australia website, 'Powers of Attorney', accessed 24.09.2019; s 51, *Powers of Attorney Act 2014* (VIC); s 106(1), *Protection of Personal and Property Rights Act 1988* (NZ).

¹¹ Section 56-58, *Powers of Attorney Act 1998* (Qld); s 32AE(5)(b), *Powers of Attorney Act 2000* (TAS); s 61-63, *Powers of Attorney Act 2006* (ACT); s 5, *Powers of Attorney Act 2003* (NSW); s 52-54, *Powers of Attorney Act 2014* (VIC); s 106(1), *Protection of Personal and Property Rights Act 1988* (NZ).

¹² Section 56-58, *Powers of Attorney Act 1998* (Qld); s 32AE(5)(b), *Powers of Attorney Act 2000* (TAS); s 61-63, *Powers of Attorney Act 2006* (ACT); s 5, *Powers of Attorney Act 2003* (NSW); s 52-54, *Powers of Attorney Act 2014* (VIC); s 106(1), *Protection of Personal and Property Rights Act 1988* (NZ).

¹³ Section 11(b)(iv) and s 19(1)(a), *Advance Personal Planning Act 2013* (NT).

A Power of Attorney is intended to confer on the Attorney the authority to enter into a contract or agreement in a manner that binds the Donor to the same extent as if the Donor had signed or agreed personally. The power is required to be set out in writing and may also have the words 'and Deed of Delegation' added to make it clear that there is a delegated authority being given to the Attorney by the Donor. Usually documents of this nature are only intended to permit the Attorney to give effect to the decisions the Donor has already chosen to make but is unable to perform a certain action. A Power of Attorney does not allow an attorney to act in the donor's capacity as director of a company.

Where the Donor becomes mentally incapacitated then a Power of Attorney of this nature must come to an end as it is a power that is subject to the direction and oversight of the Donor.

In the event of death of either a Donor or Attorney then such a power ends immediately, unless a substitute or successor attorney is provided for in the document.

These documents are commonly used in commercial situations where a Director or Shareholder of a company may give a limited discretionary power to a representative to act on certain matters. The document is often limited to only take effect in certain situations. Any delegated authority given to the Attorney to make a decision without reference to the Donor is often subject to financial or other limits and the Attorney is expected to report to the Donor as to the extent of any decision that has been made.

The formal requirements of the documents vary between jurisdictions. There is no requirement that the witness to the granting of such a power be a lawyer or other person authorised to witness oaths although it is common to have lawyers prepare such documents.

In some jurisdictions, the form used may be produced by a law firm using a precedent approved by the relevant Law Society whereas in others it must be a form approved by legislation.

In Queensland, if the document is required to be registered, it must be witnessed by a Justice of the Peace, Commissioner for Declarations, Notary Public or lawyer.

The Attorney, when signing any documents on behalf of the Donor, should ensure they sign a certificate confirming their appointment has not been revoked.

A Power of Attorney can be used to apply to both Estates and Trusts and can permit the Donor to have another person sign documents on their behalf provided it is worded appropriately and there are clauses permitting such an action in the relevant trust instrument.

The degree to which a Trustee may delegate his or her authority to make a decision however, should always be treated with care and very strict limits should be set on any such authority.

9. WHAT DOES AN ENDURING GUARDIANSHIP COVER?

An Enduring Guardianship in Australia is referred to as an Enduring Power of Attorney (EPA) in New Zealand.

Entry into an Enduring Power of Attorney is intended to allow the holder of the power, the Attorney, to make decisions for a Donor who may be temporarily or permanently mentally incapacitated.

An Enduring Power of Attorney can relate to Property and covers all money and assets held by the Donor in their personal capacity.

The power can come into effect before the Donor loses mental capacity and the Donor can appoint either one or more Attorneys to act in respect of these matters and a similar number of successor Attorneys.

The Enduring Power of Attorney for Property can be subject to certain limitations and exemptions including in respect of self-benefit but at all times the holder is required to act in the Donor's best interests.

In New Zealand, the Attorney can even make a Will for the Donor subject to the supervision of the Family Court, if expressly permitted in the Enduring Power of Attorney.

In the event of death of a Donor then such a power ends immediately while it is usual for a successor to be appointed to act if the Attorney dies.

An Enduring Power of Attorney cannot be used to make decisions over assets held by the Donor in their role as a Trustee where the Donor is deemed to have lost mental capacity.

An Enduring Power of Attorney for Personal Care and Welfare permits the Attorney to make decisions regarding the Donor's health, accommodation, and associated care decisions, and comes into effect only if a medical professional or the Family Court decides the Donor has become 'mentally incapable'.

Some jurisdictions require that there can only ever be one Attorney acting in this role at a time.

In both types of EPA there is the ability of the Donor to impose a requirement on the Attorney(s) to consult with certain persons, often family members, prior to making a decision regarding the actions they intend to take on behalf of the Donor. Alternatively it is common to include a requirement that the Attorney must provide information to certain people if they make such a request. In both cases the intention is to ensure that the wishes of the Donor are respected and the Attorneys are able to be held accountable for their actions. The Attorney should seek to ensure that the Donor is consulted with and able to express their views as to the decisions that should be made if they are able to do so.

In New Zealand, the forms used to create Enduring Powers of Attorney are set by the Ministry of Social Development and require a lawyer to witness the signature of the Donor. Detailed advice must be given to the Donor and there are strict requirements regarding the degree to which the lawyer must be considered to be independent from the Attorney(s) being granted the power by the Donor.

The Attorney, when signing any documents on behalf of the Donor, should ensure they sign a certificate confirming their appointment has not been revoked.

In most Australian State and Territories, two separate forms need to be completed and signed; one being for property and financial related matters and another for personal and health related matters. In Queensland, only one form is completed and signed for both these types of matters.

10. THE FAMILY COURT CAN ORDER THE REMOVAL OF AN ATTORNEY

In some Australian State or Territories, the Family Court (an Administrative Tribunal in other State or Territories) retains jurisdiction to review all actions taken by an Attorney and can require a full account to be provided of all expenditures or any other decision made by the Attorney.

The Family Court can also order the removal of an Attorney and can appoint a Welfare Guardian or Property Manager in the Attorney's place or in circumstances where no EPA had been entered into.

11. DO ENDURING POWERS OF ATTORNEY NEED TO BE REGISTERED?

It is possible, but not mandatory, to register Enduring Powers of Attorney (EPA) in these jurisdictions. An EPA will only need to be registered to allow an attorney to conduct real property transactions on behalf of the Donor. This does not need to occur at the time of creation of the EPA and can occur after a Donor has lost capacity.

It is common for an EPA to be prepared but not registered until or unless an Attorney needs to conduct property transactions on behalf of a Donor. This may occur where a Donor has lost capacity and there is a need to sell their residential property in order to fund the purchase of a more suitable property or payment of a bond for a care facility.

In these circumstances, registration will occur with the relevant Land Titles Office. In Australia, this is managed at a state/territory level. There is no such registration process in New Zealand. The original document will need to be produced and registered with the relevant office. There is a general requirement for the completion of an application to register a deed and the payment of a small fee (approximately AUD 150) for this registration.

For any other transactions where an Attorney seeks to rely on their appointment in order to conduct dealings on behalf of the Donor (for example, dealing with banks or health care providers), it is appropriate for them to rely on an unregistered certified copy or the original document.

In the Australian Capital Territory (ACT):

The *Land Titles Act 1925* states that registration of a power of attorney under the *Registration of Deeds Act 1957* (RDA) is a necessary prerequisite to the use of the power for *Land Titles Act 1925* purposes (Section 2(b) RDA).

The original document must be lodged with Access Canberra, along with an Application to register a deed and payment of a lodgement fee.

12. IF A PERSON DIES WITHOUT A WILL THEN WHAT IS THE SURVIVING SPOUSE ENTITLED TO?

Where a person dies without a valid will, or the will does not dispose of their entire estate, the rules of intestacy will apply with respect to the distribution of the residual estate. Each Australian state and territory has its own legislation on intestacy.

Where a deceased dies intestate, in all jurisdictions across Australia, primacy will be given to the surviving spouse or, in some states, de facto partner.¹⁴ Indeed, where the deceased is survived solely by their spouse, all Australian states provide that the spouse is entitled to the entirety of the estate.¹⁵

The states differ, however, in their treatment of the spouse where the deceased is also survived by other family members.

In Victoria, New South Wales, and Tasmania, where the deceased is survived by their partner and a child (or children) of that relationship, then the partner will be entitled to the entirety of the estate.¹⁶

However, different rules apply in those states where the deceased is survived by one partner and children born of a different relationship.

In Victoria, the partner will receive the personal chattels, a statutory legacy of \$451,909 and 50% of any remaining balance.¹⁷ The other 50% of the remaining estate will be received by the children in equal parts (or in whole where there is only one child).¹⁸

The legislation in NSW and Tasmania is similar, whereby the partner will receive the benefit of the personal chattels, the statutory legacy of \$350,000 (indexed to the consumer price index) and one half of the remainder of the deceased's estate.¹⁹

In each state, however, where the value of the estate is less than the statutory legacy amount for that state, then the entire estate will be distributed to the partner.

In South Australia, where the deceased is survived by a partner and children, the partner will benefit from the whole of the estate if the value of the estate is less than \$100,000, or if the estate is greater than \$100,000, that amount plus one half of the balance of the estate.²⁰ In South Australia, the partner is also entitled to the household chattels.²¹

14 Note that the legislation of some jurisdictions, such as South Australia, maintain slightly different provisions with respect to de facto, or 'domestic partner' relationships.

15 *Administration and Probate Act 1958* (VIC) section 70J; *Succession Act 2006* (NSW) section 111; *Intestacy Act 2010* (TAS) section 12; *Administration and Probate Act 1969* (NT) Schedule 6 Part I Item 1; *Administration and Probate Act 1929* (ACT) Schedule 6 Part 6.1 Item 1; *Administration and Probate Act 1919* (SA) section 72G(1); *Succession Act 1981* (QLD) Schedule 2, Part 1; *Administration Act 1903* (WA) section 14(1).

16 *Administration and Probate Act 1958* (VIC) section 70K; *Succession Act 2006* (NSW) section 112; *Intestacy Act 2010* (TAS) section 13.

17 *Administration and Probate Act 1958* (VIC) section 70L(1); please note that the statutory legacy amount is to be adjusted per the formula set out in *Administration and Probate Act 1958* (VIC) section 70M.

18 *Administration and Probate Act 1958* (VIC) section 70L(2).

19 *Succession Act 2006* (NSW) sections 106 and 113; *Intestacy Act 2010* (TAS) sections 7 and 14.

20 *Administration and Probate Act 1919* (SA) section 72G(1)(b).

21 *Administration and Probate Act 1919* (SA) section 72H(1).

The Queensland Succession Act 1981 provides that where the deceased is survived by a partner and children, the partner will be entitled to a statutory legacy of \$150,000 and, where there is only one child, one half of the remaining estate, or one third of the remaining estate where there is more than one child.²²

The laws in the Australian Capital Territory are similar, however, the statutory legacy is \$200,000.²³

Intestacy law in Western Australia is governed by the Administration Act 1903 (WA). It should be noted that the position as presently applies will change if and when the Administration Amendment Bill 2018 (WA) makes its way through Western Australian parliament. The present position²⁴ is as follows:

- Where a deceased leaves a spouse and issue and the value of the estate does not exceed the sum of \$50,000 then the surviving spouse will be entitled to the whole of the estate.
- Where the deceased leaves a spouse and issue and the value of the estate is greater than \$50,000 then the surviving spouse will be entitled to that amount (plus interest)²⁵ and one third of the residue and the surviving child or children will be entitled to the remaining two thirds; and
- Where a deceased leaves a spouse and another family member, being a parent, sibling or child of a sibling but leaving no issue and:
 - the value of the estate does not exceed the sum of \$75,000 then the surviving spouse will be entitled to the whole of the estate; and
 - the value of the estate is greater than \$75,000 then the surviving spouse will be entitled to that amount (plus interest)²⁶ and one half of the residue and the other half of the residue will be distributed between those other family members in accordance with the legislation.

²² *Succession Act 1981* (QLD) Schedule 2 Part 1.

²³ *Administration and Probate Act 1929* (ACT) Schedule 6, Part 6.1, Item 2.

²⁴ *Administration Act 1903* (WA) section 14(1).

²⁵ *Administration Act 1903* (WA) section 14(4).

²⁶ *Ibid.*

If and when the Administration Amendment Bill 2018 is passed the spousal statutory legacies referred to above will increase to \$435,000 where the deceased leaves a spouse and issue²⁷ and \$650,000 where the deceased leaves a spouse and another family member but no issue.²⁸ The Bill also creates power for the Minister to declare other amounts to apply in future, such amounts to be determined in accordance with the formula provided set out in the Bill.²⁹ The reader should make appropriate enquiries to determine the amount of the statutory legacies that apply at the relevant time.

The law in the Northern Territory is similar to that of Western Australia in that provision is made for parents or siblings of the deceased even where there is a surviving spouse but no children. For estates valued at over \$500,000, the spouse will inherit a sum of \$500,000 plus one half of any remainder in the estate.³⁰ The other half of the remainder will be distributed to any surviving parents or, where there are no surviving parents, to any brothers and sisters equally.³¹

Estates valued at \$500,000 or less will be inherited by the partner.³² Alternatively, where the deceased is survived by a partner and children, the partner will benefit from the whole of the estate if the value of the estate is less than \$350,000, or if the estate is greater than \$350,000, that amount plus one half of the balance of the estate.³³

In New Zealand, section 77 of the Administration Act 1969 determines how an estate will be distributed where the deceased died intestate.

Where the deceased is survived by a husband, wife, civil union partner or de facto partner, they take all of the deceased's personal chattels absolutely, except where they are subject to a hire purchase agreement, those being taken subject to the vendor's rights under the terms of agreement.³⁴ The husband, wife, civil union partner or de facto partner will then receive a payment of the prescribed amount of the residuary of the deceased's estate, which is presently \$155,000.³⁵ The remainder of the residue being held on trust for their benefit.³⁶

²⁷ *Administration Amendment Bill 2018* (WA) subsections 4(2)(c) and (d).

²⁸ *Ibid* subsections 4(2)(e) and (f).

²⁹ *Ibid* section 5, to become section 14A of the *Administration Act 1903* (WA).

³⁰ *Administration and Probate Act 1969* (NT) Schedule 6, Part 1.

³¹ *Ibid*.

³² *Ibid*.

³³ *Ibid*.

³⁴ *Administration Act 1969*, section 77.

³⁵ *Administration (Prescribed Amounts) Regulations 2009*, section 5.

³⁶ *Administration Act 1969*, section 77.

Where the deceased was also survived by children, the surviving husband, wife, civil union partner or de facto partner receives the chattels and a payment of the prescribed amount, as described above, with the first third of the remainder of the residue held on trust for their benefit. The remaining two thirds are held for the deceased children in equal shares and if they are minor's on statutory trust.³⁷

Where the deceased has no children but is survived by their parents, the husband, wife, civil union partner or de facto partner, will receive their chattels, payment of the prescribed amount and two thirds of the remaining residuary will be held for their benefit. The remaining third will be held deceased's parents absolutely and if only one parent for that parent absolutely.³⁸

In the event that the deceased is not survived by any husband, wife, civil union partner or de facto partner but they were survived by their children, the entirety of the estate is held for the children in equal shares or if they are minors on their behalf by way of statutory trusts. There is no provision for the intestate parents in these circumstances.³⁹

Where the deceased is not survived by their husband, wife, civil union partner or de facto and they are also not survived by any of their children, the residuary will be held for their parents absolutely and if only one parent for that parent absolutely.⁴⁰

Where none of the above apply then the entirety of the estate is held for the intestate's siblings, including any half-brothers or sisters.⁴¹

There are further provisions which apply where only more distant relatives survive.

13. WHAT HAPPENS IF THE ESTATE INCLUDES PROPERTY IN OTHER STATES OR COUNTRIES?

Where probate or administration has been granted, usually by the Supreme Court of the state where the deceased resided, it is the role of the appointed executor(s) or administrator(s) to distribute the deceased's estate accordingly.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

However, in some situations, a deceased may have left property in a state other than the state in which they resided, or in a foreign country. Where this is the case, the executor or administrator may need to apply for the reseal of the grant in that state or foreign country so the property located there can be dealt with.

Notably, where some assets are located in a different Australian state or in a particular country, such as a Commonwealth country, then a reseal may not be necessary as the courts in those jurisdictions will recognise the original grant.

Resealing requirements and processes are similar across the Australian state and territory jurisdictions.

In New South Wales (NSW), for example, resealing of grants is permitted under section 107 of the Probate and Administration Act 1898 (NSW). Whether resealing is required for assets located in NSW will depend on the type and value of those assets. Real estate located in NSW will require a reseal, however, other forms of assets such as funds held in a bank account may not.

To determine whether resealing is required in those circumstances, the asset holders (e.g. the bank) should be contacted.

Where the grant does need to be resealed, a notice of intention to apply for the reseal must be published on the NSW online registry at least 14 days prior to filing the application with the Supreme Court of NSW. Once sufficient notice has been provided, the applicant will need to file a Summons (Form 111), Reseal (Form 113), Inventory of Property (Form 117), Affidavit of Applicant for Resealing (Form 121), and the original grant or exemplification of the grant, along with any required documentation.

Once the grant has been resealed, the original grant will be deemed to have the same effect in NSW as the original grant.

If the deceased was a resident in New Zealand and died leaving assets in other countries, application will likely have to be made for probate to be resealed in these jurisdictions.

14. IS THERE INHERITANCE TAX OR DEATH DUTY IN AUSTRALIA OR NEW ZEALAND?

No. Capital Gains tax may however be payable on inherited assets when sold or transferred to a beneficiary that is an overseas resident.

In New Zealand, capital gains tax, inheritance tax, and estate duties are not presently in force.

15. WHO CAN YOU LEAVE YOUR ASSETS TO?

Freedom of testation is recognised throughout Australia and New Zealand meaning that a Will maker has full power to dispose of their estate as they wish. This applies whether the assets are classed as personalty or realty, the distinction having long disappeared.

The system of testamentary succession is based on the common law view which recognises individualistic property ownership rather than ownership as a family unit. It is this view which allows the great freedom of testamentary disposition to the individual.

The contrary view may be seen in countries which impose a civil law whereby limitations are imposed upon free testation by means of forced disposition rules favouring a spouse, descendants or other close relatives.

However, while Australia and New Zealand's common law approach may seem to be generous, it is restricted by the imposition of legislation allowing for family provision claims.

This legislation enables the courts to dismantle and restructure the terms of a Will in order to make adequate provision for a family member (usually) who the court deems has not been adequately provided for under the terms of the Will. As a result, the common law view has become blurred and fettered.

In addition to family provision legislation, other statutes may indirectly curtail testamentary freedom whereby certain directions may be contrary to law. For example, some wills make provision for the destruction of a family pet upon the death of their owner and whilst this may not be a direct offence the destruction of an otherwise healthy animal by act or authorisation of an executor may be regarded as an act of cruelty and may leave him or her open to prosecution depending on the laws of the relevant jurisdiction.

16. WHO IS ELIGIBLE TO APPLY AGAINST A WILL?

Australia and New Zealand each have their own legislation allowing certain courts the power to override the terms of a Will if it is found that the Will does not make adequate provision for the 'proper maintenance and support' of a particular person.

These are often referred to as 'family provision' claims. The name however is somewhat misleading as it is not open to all family members. Those persons eligible to claim differ depending on the jurisdiction.

Very broadly, the following categories⁴² of people are generally eligible to make a family provision claim:

In New Zealand, while a claim can be made under the relevant legislative regime provided by the Family Protections Act 1955, the husband, wife, civil union partner or de facto partner may also be entitled to apply under the Property (Relationships) Act 1976 in respect of claims relating to relationship property.

Spouses

The surviving husband or wife of a deceased person is eligible to make a family provision claim. A surviving person from a 'de facto' relationship is also generally eligible to make a claim. A de facto relationship is one where a couple lived together on a genuine domestic basis but there was no legal marriage.

In some parts of Australia, former wives or husbands are also eligible to make a claim.

Children

Biological children of deceased persons are eligible to make a claim, as are adopted children.

Step-children are eligible to make family provision claims in most jurisdictions. A step-child generally refers to a deceased's spouse's child from a previous relationship. Some jurisdictions, including New Zealand, require that the step-child must have lived with and/or been financially supported by the step-parent immediately prior to his or her death.

A foster-child can also make a claim in certain jurisdictions.

Grandchildren

Grandchildren are eligible to make a claim in all jurisdictions (except Tasmania) subject to the requirements of each particular jurisdiction.

⁴² s 91, *Administration and Probate Act 1958* (Vic); s 57(1), *Succession Act 2006* (NSW); s 41(1), *Succession Act 1981* (Qld); s 6, *Inheritance (Family Provision) Act 1972* (SA); s 3A, *Testator's Family Maintenance Act 1912* (Tas); s 7(1), *Family Provision Act 1969* (ACT); s 7(1), *Family Provision Act* (NT).

For example, New Zealand legislation simply requires that the grandchild be alive as at the date of death; in Queensland, the grandchild must have been dependant on the deceased as at the date of death; in Victoria, the deceased must have had a responsibility to provide for the grandchild. In New South Wales, the grandchild must have been wholly or partly dependant on the deceased at some time.

Parents

In certain situations a parent of a deceased may be eligible to make a claim.

For example, Queensland legislation would permit a parent to claim if he or she was maintained or supported by the deceased at the time of death whereas under South Australian and New Zealand legislation the parent must have cared for or contributed to the maintenance of the deceased during his or her lifetime.

In New Zealand, such persons are normally required to make such claim under the Law Reform (Testamentary Promises) Act 1949 or some other form of action rather than using the previously referred to family provision legislation.

Family Members

In some jurisdictions, it is possible for a family provision claim to be made by a niece, nephew, brother or sister of a deceased, depending on the circumstances though these are far less common.

Carers & Others

In some jurisdictions (and in very limited situations), carers are also able to make a claim.

Family provision claims are generally limited to the estate assets except in NSW where, under the concept of 'notional estate', the following may also be used to satisfy a family provision claim:

- Assets the subject of a transaction that took effect within 3 years before the date of death which was entered into with the intention of denying or limiting provision;
- Assets the subject of a transaction that took effect within one year before the date of death and was entered into when the deceased had a moral obligation to make adequate provision to any person who is entitled to apply for a family provision order which was substantially greater than any moral obligation to enter into the transaction; and

- Assets the subject of a transaction that took effect or is to take effect on or after the date of death.

Examples of property that may be subject to a NSW notional estate order includes property held as joint tenants or superannuation and life insurance benefits.

17. HOW LONG DO YOU HAVE TO CONTEST A WILL?

In New Zealand a claim must usually be filed in the court within 12 months of the grant of probate (or date of death if no probate). The court can extend this timeframe but not if the estate has already been distributed. An executor may distribute the estate after 6 months if they have not received notice of any claim. If a claim is notified to the executor after this time, the executor is protected (for having made that distribution) and the claimant would need to apply to the court to follow the assets distributed.

In Australia the rules about the time you have to contest a will is different between the States and Territories.

- In New South Wales and the Northern Territory you have 12 months, from the date of death of the Will maker, to file an application.
- In Queensland you have 9 months after death of the deceased to file your claim however notice must be given to the executor that a claim will be made. This notice must be in writing and must be given within 6 months of the date of death.
- In Victoria, South Australia, Western Australia, the ACT, you have 6 months from the grant of probate to file a claim
- In Tasmania you have 3 months from the grant of probate to file a claim

18. AN INTERNATIONAL WILL

To simplify succession law in Australia, the Australian Government acceded to the Convention Providing a Uniform Law on the Form of an International Will 1973 which entered into force for Australia on 10 March 2015. All states and territories have passed legislation to give effect to the convention.

The convention seeks to harmonise and simplify proof of formalities for wills that have international characteristics. It does this by setting up a uniform law introducing a new form of will, known as an 'international will', which is recognised as a valid form in all countries that are party to the convention. The uniform law is annexed to the convention and establishes the international will as an alternative form of will available to prospective testators.

International wills can provide clarity when dealing with worldwide assets as only one will is required, but they also have their limitations.

Source: <https://www.ag.gov.au/international-relations/private-international-law>
[international-wills](https://www.unidroit.org/instruments/international-will) and <https://www.unidroit.org/instruments/international-will>

19. WHERE WOULD AN EXECUTOR FIND A COPY OF THE WILL?

There is no centralised public registry of wills in Australia and New Zealand. As a result, when looking for the will of a deceased person, there's no clear or easy way of definitively determining its existence or location.

Additionally, public records relating to wills are maintained on a state by state basis. Therefore, cross-jurisdictional searches may be required where it is possible that a will was registered in a different state or territory (for example, where the deceased previously resided in a different state).

There are a number of places a person can search when looking for the will of a deceased person. In some situations, it may be located in the home of the deceased (for example, in a safe).

Professional service providers, such as banks, lawyers, accountants, and financial advisors often store estate planning documents for their clients, and this is therefore another location where the will may be kept.

The probate office or registry of the Supreme Court in the state in which the deceased resided can also be contacted, as they often offer safe storage facilities. However, there is no certainty that the Will kept on file is the most recent.

The public trustee of most states, such as the NSW Trustee and Guardian or the Public Trustee of Queensland, offer safe storage services for wills and other estate planning documents. It would therefore be prudent to lodge an enquiry with the public trustee in the appropriate states when looking for a will.

In New Zealand, the court will require, in cases where an intestacy application referred to as a grant of letters of administration is being made, that the applicants swear or affirm that a search has been made of the deceased's papers and that advertisement had been placed in the national legal publications, requesting all lawyers to carry out a search of their deeds to determine whether the deceased had prepared a will. This advertising period normally takes approximately one month.

20. CONTACTS

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