

How to Write a Will

Chapter 2, Succession Act (NSW) 2006

Wills are often set aside as invalid due to simple technical errors. Every lawyer should understand the requirements for drafting a valid will in order to advise and represent their clients effectively. This paper is designed to assist legal practitioners in the state of New South Wales.

Basic Requirements

A will is defined as extending to a codicil and any other testamentary disposition.¹ Wills must be reduced to writing and witnessed by two independent people.² The Supreme Court has upheld a video as a codicil to an existing written will³ but a video by itself does not comply with s6 Succession Act. In any case, the testator must identify themselves, their property, and the intention to bequeath that property to specific individuals.

To be valid, a will must be in writing and:⁴

- Be made by a person with testamentary capacity who knows and approves of the contents of the Will.⁵
- Clearly state the property, the beneficiaries, and the intention to bequeath,
- Deal with property and appoint executors,⁶
- Comply with the formalities as to writing, execution, and attestation.⁷
- Not have been subsequently revoked.⁸

Testamentary Capacity

The law requires a person to have a specific mental capacity and level of understanding about what they are doing when they are making their Will.⁹ Wills are often challenged on the basis that the testator suffered from something that impaired their mental capacity.¹⁰

I often see cases where a will is executed a short time before death and is challenged on the basis that the testator did not have capacity due to poor health or was unduly influenced by someone.¹¹

¹ s3(1) Succession Act 2006 (NSW); s3(1) Probate and Administration Act 1898 (NSW).

² s6 Succession Act 2006 (NSW)

³ Re Estate of Wai Fun Chan[2015] NSWSC 1107

⁴ s6 Succession Act 2006 (NSW)

⁵ Succession Act 2006 (NSW) Chapter 2 Part 2.2.

⁶ Succession Act 2006 (NSW) Chapter 2 Part 2.3.

⁷ Succession Act 2006 (NSW) Chapter 2.

⁸ Succession Act 2006 (NSW) Chapter 2 Part 2.1.

⁹ s4 Succession Act 2006 (NSW)

¹⁰ Banks v Goodfellow (1870) LR 5 QB 549

¹¹ Miller v Miller: Estate of Miller (2000) 50 NSWLR 81

When a beneficiary uses trickery, pressure, force or fear, then undue influence has been employed.¹² This situation is a cause of much litigation.

Clear Intention

I often see wills where property and beneficiaries are not clearly identified. Real estate must always be described by street, number, and suburb, never as 'my house'.¹³ The same is true for all other personal property and assets. Likewise, beneficiaries should be referred to by their full name, date of birth, and relationship to the testator. It is extremely unhelpful when a deceased has a son, brother, and nephew all named John Smith.

Formalities

For a Will to be considered valid, the law requires that the Will is to be signed and witnessed in a certain way.¹⁴ If these requirements are not met, the court may consider the will to be invalid and the estate will be treated as if there was no will (intestate). The will should be adopted by the testator and witnessed by two independent people. There are additional formalities for international wills.¹⁵

Last Will & Testament

After a will is executed, it can be amended by a codicil or revoked in its entirety. A will should always begin by stating that all previous wills and codicils are revoked. It is surprisingly common for testators to make a will and disclose it to their family but then subsequently make a secret will with different terms that are not disclosed to the family.

Contesting a Will

There is a twelve month time limit from the date of death to contest a will in the Supreme Court. In addition to the grounds mentioned above, a will can be challenged if the circumstances of the testator have changed. For example:

- Marriage,
- Separation,
- Divorce,
- The death of a spouse or other beneficiary,
- A significant change in their financial situation, or
- The birth of a child or grandchild.

¹² Tobin v Ezekiel (2012) 83 NSWLR 757

¹³ s29 Succession Act 2006 (NSW)

¹⁴ s18A Probate and Administration Act 1898 (NSW)

¹⁵ s50 Succession Act 2006 (NSW)

Family Provisions Act

Finally, even if the Will is valid, an eligible person ¹⁶ can make an application for a family provision order under Chapter 3, Sucession Act 2006 (NSW).¹⁷ In New South Wales, testators have a moral duty to make adequate provisions for their dependents and, if they fail to do so, the Supreme Court can intervene and amend the will to make provision for the dependent.¹⁸

I am available every day if you have any interesting issues.

Chris Nowlan
Barrister at Law
(02) 8251 0066
chris@chrisnowlan.com

¹⁶ s57 Sucession Act 2006 (NSW)

¹⁷ s55 Sucession Act 2006 (NSW)

¹⁸ s59 Sucession Act 2006 (NSW)