



THE LAW SOCIETY
OF NEW SOUTH WALES

PROMOTING YOUR WILLS AND ESTATES PRACTICE

ABOUT THIS RESOURCE

The Law Society of New South Wales provides a wide range of services to assist members:

- in their professional lives
- to provide a better service for their clients
- and to uphold the integrity of the profession.

The Society is aware that the demands of running a successful practice are myriad.

This resource aims to assist you with one aspect of that, which is the marketing of your wills and estates practice.

WHAT'S INCLUDED

- Draft media release you can personalise and send to your local press outlets.
- Information on business development, including using traditional and digital media, and on leveraging your Law Society membership.
- Presentation material from the three previous Will Awareness campaigns to assist you with engaging with your local community to build and consolidate the profile of your practice.

This, and other information and support, is also available on the Law Society's website: www.lawsociety.com.au



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MAKING A GOOD WILL

We've all read about high profile family estate battles, like those that followed the deaths of mining magnate Lang Hancock and prominent businessman Richard Pratt.

However, there are many other cases involving “ordinary” Australians that don't get picked up by the media but which are equally emotionally and financially draining, potentially destructive and prolonged.

A person's will is likely to be one of the most important documents they will make in their life. Having no will, or a poorly drafted will, can have serious financial and other consequences for those who are left behind. However, even with so much online information and do-it-yourself will kits available, we seem to still be getting it wrong. In fact statistics from the Supreme Court point to an explosion in disputed wills in recent years, with a 59 per cent rise in litigation between 2005 and 2013. So why is this?

It has been argued that this is due to the breakdown in family relationships and social changes that have seen the emergence of more blended families. Some cite the fact that grandparents and relatives are now more likely than ever to have the full time care of children, and that more people are raising children who aren't biologically related to them.

There is certainly evidence to suggest that the increase in remarriage and second or third families correlates with the growth in the number of family provision claims. However, there has also been an increase in the size of estates in line with increasing property values. People are also holding more wealth in superannuation, which may on death be paid into the estate but will often be paid directly to dependants. These are just some of the factors that have increased the complexity of estate planning and getting one's affairs in order properly.

Most people would expect that a person making a will would provide for their spouse and any children who are young or dependent on them. There may, however, be other people who would be eligible to make a claim if the will does not adequately provide for them. This group includes adult children.

This can be even more complicated if people have re-partnered and have younger children or stepchildren as well. The problem is that parents who fail to properly provide for adult children run the serious risk of a legal challenge to their wills, which can be extremely costly and time consuming for their families.

There are ways people can ensure their wishes are respected and fulfilled. The best way to avoid problems is to give some thought to what they own, and who needs to be provided for, and make sure that they revise their will if circumstances change.

The Society encourages people to seek expert legal assistance in preparing a will. This is the surest way to avoid common pitfalls and to find out what the legal position is, in relation to each person's specific circumstances. Further information is also available on the Law Society website at:

www.lawsociety.com.au/KnowYourRights

PROMOTE YOUR MEMBERSHIP OF THE LAW SOCIETY

An exclusive logo is available to Solicitor Members who wish to promote their membership of the largest and most influential association for solicitors in Australia.

By using the Members Logo on your website, premises, stationery and certain marketing materials, you indicate to clients, peers and staff that you uphold the principles of professional excellence that the Law Society represents.

Simply read the Policy of Use below, indicate your agreement by clicking the checkbox that follows it, then click the 'Download...' button to receive the approved Members logo.

If I use a previous version of the Members Logo, do I need to replace it?

Solicitor Members who are currently using a Law Society logo from before August 2009 should download the new Members Logo below. It should replace all instances where the previous logo currently appears.

Policy of Use of Law Society Logo by Solicitor Members

Solicitor Members of The Law Society of New South Wales are authorised to use the Law Society's logo on or in any stationery, office windows, office walls, advertisements (including printed and electronic), emails or web site connected with their firm or practice subject to the following conditions:

- The logo used must be the Members Logo in the form approved by the Law Society and must not be altered in any way (other than to resize it with proportions remaining the same);
- The Members Logo and any other mention of being a Member of The Law Society of New South Wales may only continue to be used or to appear for so long as all Solicitors associated with the firm or practice remain Members of the Law Society;
- Where the Members Logo is affixed to the walls or windows in any office premises, upon the office premises being vacated the Members Logo and any other mention of being a Member of The Law Society of New South Wales must be removed; and
- If the firm or practice is owned or operated by a corporation (i.e. an incorporated legal practice) and that corporation also provides other (non-legal) services or trades in any other way, then the Members Logo and any other mention of being a Member of The Law Society of New South Wales may only be used in connection with the incorporated legal practice. It must not be used by or in connection with the corporation's other businesses nor by the corporation alone.



MARKETING YOURSELF

Most lawyers squirm at the thought of marketing themselves...

...perhaps because they think they're being asked to act like the kind of rampant self-promoter who presses their business card immediately into the hands of everyone they meet and then bores them with endless talk of their abilities and achievements. But that's not what marketing yourself is about at all; not, at least, if you hope for your efforts to be effective.

Instead, as a lawyer, marketing is the sum total of your expertise and experience as well as your ability to draw on your network of friends, colleagues, associates and acquaintances.

It's how you conduct yourself, how you relate to clients and colleagues and how you project yourself to the world. In short, it's pretty much everything you do.

A battle on several fronts

To make the most of your career as a lawyer you will need to market yourself to several different groups simultaneously: your colleagues, your clients, the profession and even potential employers. Each of these groups is likely to expect different things from you.

For instance, your employer will want to know that you have sound technical skills, that you can lead, that you're an effective team member and that you have what it takes to develop strong client relationships.

Meanwhile, your clients will want to know that you can give them advice they can act on and that you can relate to them on a personal level. As legal marketing expert Ray Hartley puts it:

Now while your professional colleagues are great judges of your legal knowledge and skills, these are not the things that impress clients the most. It's you as a human being that matters to clients.

Then, of course, there's the need to connect with a much broader audience in order to pick up potential new clients (and potential new employers).

So how do you market yourself to these different audiences?

You're the product, so what's your brand?

The first thing you need to think of is what it is you're marketing, or your personal brand.

A lot of people think of a brand as a product's advertising or logo. But when advertisers develop a product's brand they ask themselves "what are the characteristics that differentiate it from competitors, what is its unique value proposition?"

There are so many lawyers in the market place. So if you think of yourself as the product to be marketed, you should start by asking yourself what it is that sets you apart from other lawyers.

For instance, is it your commercial acumen? Is it the breadth of your knowledge of the law or your knowledge of a specialized area? Is it your ability to relate to clients? Are you still trying to find out?

Different audiences, different approaches

Once you have worked out what truly sets you apart from other lawyers – or what you would like to set you apart from other lawyers – the next step to think about is how to convey this to the rest of the world. And that depends on who you're trying to reach.

The workplace

Marketing yourself to your peers and superiors begins with being competent at your job. But it also means showing that you're engaged, proactive and capable of leading. For instance, when you sit in a team meeting, do you speak up? And when you do, is it to offer something insightful? Do you volunteer for extra assignments? Or do you wait for the work to come to you? Do you lead CPD and contribute to the knowledge of your firm or your practice group? And just as importantly, how do you treat your colleagues? All of these things will help people form a view of who you are.

Beyond that, there is so much you can do to get yourself known for all the right reasons, as Business Management expert Tom Peters puts it in his article for fastcompany.com:

There's literally no limit to the ways you can go about enhancing your profile. Try moonlighting! Sign up for an extra project inside your organization, just to introduce yourself to new colleagues and showcase your skills -- or work on new ones. Or, if you can carve out the time, take on a freelance project that gets you in touch with a totally novel group of people. If you can get them singing your praises, they'll help spread the word about what a remarkable contributor you are.

Current clients

Clients pay you good money and in return they want you to make their lives easy. That doesn't necessarily mean being on call 24/7 (although some clients might expect this). However, it does mean anticipating their needs and taking a strategic and serviced-based approach to dealing with them.

Do you anticipate your clients' needs and forward articles you think they might find useful? When you write an advice do you keep it as simple as possible, easy-to-understand and give practical options that they can act on? After all, it's one thing to have an in-depth knowledge of the law, it's another to be able to translate that knowledge into language that a non-lawyer can understand.

Future clients and employers

Ray Hartley says that when it comes to marketing yourself to future clients there's still no substitute for the word of mouth that comes from giving your existing clients a great experience.

Your clients will refer others to you IF they have had a great experience with you - so you need to make the experience of your clients great, all through the process.

However, there are other forms of marketing that can often be equally as important - both in attracting future clients and potential employers. For instance, if you want to hold yourself out to be a specialist in a particular area, are you publishing articles regularly and/or speaking at events? Are you an active participant in relevant industry groups? Are the deals or cases you're working on being reported in the legal press? Make sure you speak to your firm or company's media department about coming up with a media strategy for publicising your 'wins' if they don't already have one.

Your online life

Finally, it's likely that the first thing a prospective client or employer will do is Google you before they approach you. What will they find? (If you don't know, Google yourself right now.) Hopefully, it will show some of the professional contributions you've made as well, potentially, as some of the positive activities you're involved in outside of the workplace. (Clients do want to know you're a person, remember!).

Then of course, there's social media. Remember that anything you tweet or post on Facebook could potentially be seen by a wide audience. (Adjust your Facebook privacy settings now if that's the case.) You should, of course, also make sure that your Linked In profile is up-to-date and engaging. For more advice read our article, "Tweeting to the top".

DIGITAL MARKETING FOR SMALL PRACTICES

By 2010 Australians were spending an average of 22 hours a week online. It's little wonder then that brands are focusing more and more attention on using online as a medium for getting their message across.

The relatively low cost of digital marketing also makes it a realistic method for small practices like yours to engage with an audience and potentially build business. But because digital is the most interactive (and least controllable) of all media, getting your digital advertising wrong can be disastrous. So before you start out it pays to know the basics of digital marketing.

Managing your online presence

In the old days people who needed a solicitor usually asked for a recommendation from someone they trusted. Now things are different. While word of mouth is still vital, the World Wide Web has become a wealth of information on pretty much everything, including you.

Even if you have already been recommended to a potential client the first thing they'll often do is to Google you. So what will people come across when they plug you or your firm's name into a search engine? And what will they find if they search for "lawyer + [your speciality] + [your suburb/town]"?

Hopefully the first result that should appear is your firm's website.

Making your site work

Marketing is based on the principle of finding a point of differentiation in your product compared to that of your competitors and then doing your best to promote it. Many firms have taken this to heart by using their site to tell potential clients how differently they do things. But is that really the best strategy? While your personality should shine through in everything you do, your clients would probably prefer to know you're a professional rather than an individual.

Your site should stand out for its simplicity and professionalism. Give potential clients the information they want in a way that's easy to find and, just as importantly, easy to read. Forget fancy designs or long-winded marketing spiels and instead:

- Present yourself professionally. Your design should be crisp rather than cutting edge (leave frames back in the 1990s) and should reflect the fact that your job is an important one.
- Don't overcomplicate things. Make sure your site is easy to navigate and flows logically. Make sure it's easy to search your site if you intend to blog or post articles (see below).
- Let people know how to contact you (you'd be surprised how often this is overlooked). In fact, you should have your contact details in the footer at the bottom of every page.
- Tell people what you do. Let prospective clients know what you specialise in and, if you do have the skills they're after, why they should go with you. That means having a solid "About us" or "Our Services" page which outlines your skills and experience without embellishment.
- Write for your audience. Keep your language simple and avoid legal jargon. Clients don't talk in words like "notwithstanding" and "accordingly". You shouldn't either.

Content is King

Your content – specifically the words you include on your site and to some extent how often you use them – goes some way to determining where your site ranks when people plug search terms into an engine. Using this technique to divert people to your site is known as search engine optimisation (SEO).

One of the easiest and best ways to make sure a site ‘ranks highly’ in response to a search query is by continually updating your content with relevant information. This should include blogging or posting articles about information that is likely to relate to what prospective clients are searching for. For instance, if you specialise in commercial leasing and would like to attract the attention of people looking for a commercial leasing lawyer, you should blog about specific dilemmas they’re likely to face (without, of course, giving advice).

If you take the blogging path there’s a few things you should remember:

- Your clients aren’t lawyers. Don’t write in legal jargon (see above). Avoid any technical terms unless you can also explain them in simple language.
- Everything you put out there stays out there. Don’t be afraid to have an opinion, especially if your clients will be interested. But make sure you’re on firm ground.
- Learn to write all over again. Writing for the web isn’t like writing a legal essay or opinion. People generally don’t want to read vast tracts of text or long sentences. Set out your information simply using short sentences and bullet points.

Lawyering and social media

Probably the area of digital marketing most talked about, and least understood, is social media. It has become fashionable for companies to jump on social media and tweet (through Twitter) or have a Facebook page. However, many, including some of the biggest brands, have failed to give proper consideration to what they’re doing. Social media is a two-way street. Just ask Qantas or Bing Lee.

Twitter

Some misguided law firms have decided that Twitter is a great way to remind people of what it is they do. They tweet: “[InsertFirmName] is an [insertspecialty] law firm in [inserttown], call [insertnumber] and see us today”. What a waste of time.

To use Twitter correctly you need to start following like-minded people and contributing to discussions, that way you can become ‘part of the conversation’ and potentially build your reputation.

LinkedIn

LinkedIn bills itself as the world’s largest professional network, boasting more than 120 million members across the globe. It’s used to connect with peers and exchange ideas and knowledge in a professional environment. Once you’ve set up your LinkedIn profile a good place to start your journey might be the Law Society of NSW Group. You can also join (or even start) groups for people sharing similar experiences or with similar interests to yourself.

Making the most of email

Email may lack the glamour of social media but it is probably more underestimated than any form of electronic marketing (and more directly relevant to building your client base). An email newsletter can be a cheap, simple way of letting your clients know the range of what you do, giving you an opportunity to convert them into more regular clients. It can also be a regular way of staying in contact with clients and letting them know you're still out there while providing something useful.

Email newsletters present their own unique challenges.

- You need data. If you don't have your clients' email addresses on file, get them now. An email out to your list is a cheaper and more efficient way to get a message across than using phone or print.
- Recipients need to open emails for them to be effective. The good news on this front is that your clients are already more likely to open an email that comes from their lawyer than from most companies competing for their attention (as long as you don't earn a reputation as a 'spammer' by emailing them too frequently). You also need to make sure you comply with relevant legislation.
- Your newsletter needs to be written for your clients. Like writing for the web, this means writing in plain English and avoiding jargon. It also means making the subject matter of any articles relevant to your audience.
- Give the reader a reason to contact you. Each story you include in a newsletter should have a strong call to action so that your clients contact you if they face similar challenges. And that also means having your contact details prominently displayed.

Tracking for success

One of the best features of digital media is that pretty much everything you do is trackable. By using Google Analytics you can find out who's visiting your website, find out how they are getting there and even find out what information they're reading.

Email marketing software like Campaign Monitor and MailChimp lets you do the same for email newsletters, giving you precise figures on how many people on your mail list opened each email and what they clicked on.

Unlike traditional methods of marketing, you really can get a sense of what's working and what's not and adjust your strategy accordingly.



member connexions

DISCOUNTS AND BENEFITS

Our popular Member Connexions Program delivers the very best value for your membership through discounts and preferential access to a range of lifestyle, financial and business products and services – from over 20 alliance partners. The program is a key element of our membership offering with each scheme introduced only after extensive research and feedback from our members.



Earn rewards points plus enjoy savings with one of three specialised Credit Cards.



Save thousands on your home loan with discounted interest rates.



Save on private health insurance, designed to suit your needs.



Save time and money. Buy your next new car through your personal buyer's advocate.



Save up to \$100 on Elevate Executive Health Checks.



Receive 10% off standard Fitness First membership rates.



Discounted rental car rates and VIP rewards.



Save an average 40% off the standard catalogue price on selected office supplies.



Access special benefits with OnePath life and income protection insurance products.



Exclusive deals on IT brands like Dell, Lenovo, HP, Apple and more from PowerBuy.



Save on Qantas Club membership rates.



Take up complimentary affiliate membership and access a huge portfolio of wines.

lawsociety.com.au/memberconnexions

THREE SIMPLE STEPS FOR ONLINE MARKETING SUCCESS

by John Gray, Director, John Gray Marketing

Embracing online marketing can be challenging for law firms that have traditionally relied on good old-fashioned word of mouth and a yellow pages ad as their core marketing strategy. None the less it is imperative for the ongoing viability of your firm that you embrace a digital presence.

Many small firms continue to avoid committing to an online marketing program due to factors such as cost, the resources required and a fear of the unknown.

As a result, those firms that are willing to embrace this aspect of law firm marketing still have an opportunity to get ahead of their competitors with minimal effort or expense.

Here are three simple first steps towards success for small firms moving into online marketing for the first time.

1. Get your house in order

The central aspect of all your online marketing should be your website. This is where you are aiming to direct most of your traffic and is the place where your persuasive content converts an online visitor into a potential client.

Almost everyone's website can be improved.

First and foremost, make sure it's up to date. This includes look, style and content. It is essential that staff lists are kept up to date as team pages are often the most visited pages on a law firm website after the home page.

Content is king when we talk about websites. Google loves fresh, useful content so it is essential that you regularly add to your site to dramatically improve your chances of ranking well in search results over competitor websites that will rank lower if their content is static and stale.

Ensure that you write for your audience, not for yourself or your peers. Adding content is great, but adding the right content is even better. Remember to talk about the solutions you can provide to your client.

Don't just talk about yourself. Outlining your experience is important but only as a tool to impress on your client that you are right to help them. Don't bother with content that will only impress other legal practitioners.

Having a website that is modern, well maintained and full of fresh, client focussed content will pay immediate dividends in google rankings, viewer engagement and client conversion.

2. Focussing on your location will save you money!

There are millions of people online everyday searching Google and social media sites, but are they actually potential clients? If you're a firm in Bathurst you don't advertise in the Sydney Morning Herald or the Sydney Yellow Pages. Applying this same approach to online marketing will produce better returns on your investment.

For example:

- Prepare content for your website that references your location
- If you are paying for online advertising with Google or Facebook make sure you're targeting local searches and phrases
- If you pay an SEO company to get you better Google rankings don't chase "family lawyer" when you will catch most of your genuine potential clients for far less cost by targeting "Bathurst family lawyer"

3. Choose the right medium for your message

The idea of focussing your online efforts should also be applied to the choices you make in your methods of communication. Are your clients on Facebook? Do they want to read your content there? Are there LinkedIn groups where potential referrers of work gather? Do your clients form an online community that is active on Twitter or would a regular email newsletter be more to their liking?

For example:

- Facebook pages are a great way to connect with your clients if you're a personal services firm. It's a great replacement for traditional "firm happenings" newsletters. But Facebook is almost entirely useless for marketing a business focussed legal area such as commercial property.
- LinkedIn is a great way to stay connected with a large group of referrers and contacts. Or to demonstrate your niche industry expertise by starting a discussion group for legal issues in your area. But if you're running a conveyancing practice your time would be much better spent elsewhere.
- Twitter can be effective in engaging with a community of like minded people if both you and your audience are regular users of the service. But if you're a commercial lawyer and you understand that your clients are too busy for Twitter, a regular, concise, email newsletter with information directly relevant to them will be far more effective.

By starting with these three steps the wide array of online marketing choices is far more manageable and effective. So before you sign up for expensive SEO campaigns or online advertising take the time to get your house in order, understand how your location influences your marketing and then make sure you choose the right medium for your message.

BUSINESS DEVELOPMENT, MARKETING & CLIENT MANAGEMENT

Successful firms are built on a solid base of long-term clients, so there are two challenges for small practices looking to develop and grow their business. The first is to attract new clients by standing out in a market crowded by lawyers all of whom provide a similar service. The second is to turn existing clients into the sort of repeat customers who will help your practice flourish. This means that for legal practitioners marketing and client management are intertwined concepts and it is not possible to talk about one without the other.

This page looks at both and aims to give you an overview of how you might go about developing your practice so that you achieve everything you set out to do.

Different methods of Marketing

Marketing is a broad term which includes everything your practice does to attract and retain clients. This ranges from tangible methods of getting your name out such as advertising and sponsorship through to more abstract ideas like reputation and brand. For small practitioners, who almost always operate on limited marketing budgets, the most important consideration is to identify those methods that can deliver maximum return for minimum outlay.

➤ [Read our guide to Digital Marketing for small firms.](#)

Restrictions on advertising legal services

The position of trust lawyers have in our society means there are limits on the way they can advertise. The advertising of legal services is governed by the Legal Profession Act 2004. Special provisions apply to personal injury or work injury services so before you begin marketing your practice make sure you know about the laws in this area.

➤ [Read about the limits on advertising legal services.](#)

Developing ongoing relationships

The easiest way to turn one-off clients into repeat ones is to deliver a product they're happy with. The starting point should always be to provide quality advice backed by outstanding service. But even when you've achieved this, clients aren't always aware of the range of what you can do for them. Other times they may need a specific trigger to act. That's why a regular newsletter can be an effective tool. The Law Society's "In touch with the law" client newsletter and "See a Solicitor" brochure are designed to let you showcase your practice as well as inform clients about legal basics and recent developments in the law.

➤ [Read about newsletters and brochures.](#)

➤ [Buy the Law Society newsletter from the Law Society Shop \(login to receive a discounted member price\).](#)

Using the Law Society logo

We encourage small practices to use their Law Society membership as a marketing tool. After all, we're the largest and most influential association for solicitors in Australia and our brand is known and trusted in the general community.

➤ [Login to read more and download the logo.](#)

Solicitor referral service

Our Solicitor Referral Service can be an important source of work. It receives more than 21,000 enquiries a year from solicitors and members of the public.

➤ **Read more about how to register your practice.**

Building your brand

Your brand is the sum of everything you and your practice represent. So building your brand begins by becoming known for something. Specialist Accreditation can help in this task, so too can advertising in the Law Society Journal and the Law Society Diary. But there is no substitute for networking.

This may mean networking with potential clients through common interests such as the local chamber of commerce and social activities. It might also include presenting on your area of expertise at community events and contributing articles and ideas into the public domain.

To learn about what it takes to build your brand we suggest you read this article by Ray Hartley on Developing your Practice.

➤ **Read about networking.**

➤ **Read more about advertising in the Law Society Diary and the Law Society Journal.**

Specialist Accreditation

By obtaining Specialist Accreditation you immediately let clients know you are recognised by your peers for your expertise and excellence. The Law Society has developed a range of resources to help you promote your specialist accreditation to the community.

➤ **Read about Specialist Accreditation Scheme.**

➤ **Download a flyer promoting awareness of Accredited Specialists to the public.**

➤ **Read about how to market your specialist accreditation.**

MAKING A WILL

What is a will?

A will is a legal document which sets out who will receive your property when you die. As well as giving away property in your will you can appoint the person you want to be your executor to make sure the will is followed, and if you have young children you can also appoint someone to be their guardian.

When you have a valid will, you give yourself the best chance of making sure your assets go where you want them to. If you are over eighteen (18) years old you should make a will. This is particularly important if other people are financially dependent on you.

What makes a will valid?

A will generally needs three things to be valid:

- It must be in writing (whether handwritten, typed or printed)
- It must be signed and should be dated, and
- Your signature must be witnessed by two other people who also need to sign the will.

Even when the will seems to be valid, sometimes it can be challenged. It might be challenged, for example, if you did not know or understand what you were signing, or if you were forced to sign against your will.

What happens if you die without a will?

If you die without a valid will (known legally as ‘dying intestate’) a standard formula is used to distribute your property and possessions. Usually, this means all your assets will pass to your spouse or children.

But the situation becomes much more complex if you have a legal spouse and a de facto spouse (ie you’ve separated and have a new unmarried partner), if you have children from different relationships, or if you die with no spouse and no children.

The standard formula only takes into account certain family members. So having a valid will is vital if you do not have close family members or want to leave gifts to friends or charities.

Who makes sure your wishes are carried out?

When you make a will you’ll need to appoint an executor, who will handle your affairs when you die. You can name more than one executor, but it is important to choose people who will be willing and able to work with each other.

An executor’s role is to obtain probate, pay your debts, and distribute your assets in line with your will.

Before you nominate someone as executor or trustee, you should make sure they’re comfortable taking on the responsibility you’re giving them. It’s often a good idea to appoint someone younger than you, or to nominate an alternative executor, in case the one you have appointed dies before you do. It is also important to choose someone you trust, who will take responsibility for ensuring that your estate is properly administered.

Because of their expertise in administering wills, people often choose to appoint their solicitor as executor.

Can you change your will?

You are free to change your will whenever you like. And you should always change your will when your circumstances change – for instance, if you divorce or remarry, or if one of your beneficiaries dies.

But you can't just change your will by crossing something out and writing something different.

As with a will, changes to a will need to be in writing and signed and witnessed by two people.

Where you want to make a major change to your current will, it is usually better to make a whole new will.

What happens if you marry or divorce?

Generally, getting married cancels the terms of any will you have previously made. There are some exceptions, which your solicitor can explain to you.

If you divorce, it cancels any gift you made to your former spouse under your will. Again there are some exceptions, which your solicitor can explain to you.

You should always make a new will if you marry, divorce, if you have separated from your spouse, or if you have started a de facto relationship.

Who can you leave your assets to?

You can leave your assets to whoever you like, but you have a general obligation to provide adequately for your spouse or de facto partner, your children, and any other dependents. If you don't they can bring a claim against your estate.

Where should you keep your will?

You should always keep your will in a safe place and let your executor know where to find it. That's because, if you misplace your will and no one can find it, this will create problems and may prevent your will being effective. Your solicitor can store your will for you (usually free of charge) and give you a copy for your own records.

The truth about homemade wills

Some people choose to make their own will. We think that's a mistake. Although writing your own may seem easy enough, the law around wills can be complex.

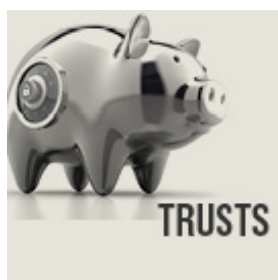
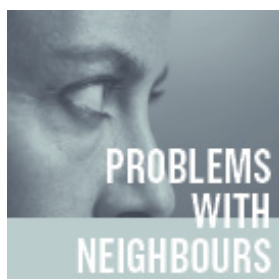
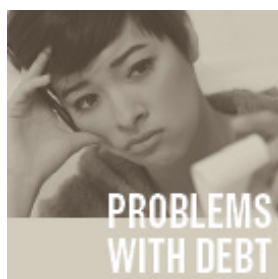
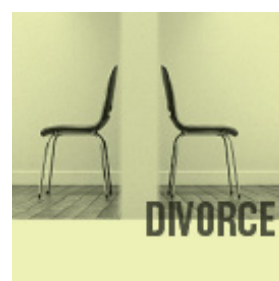
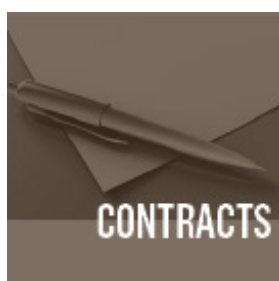
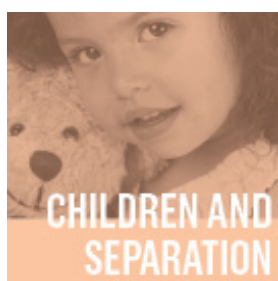
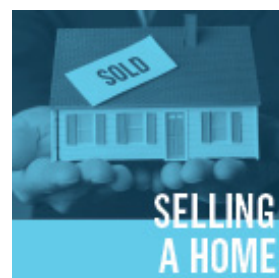
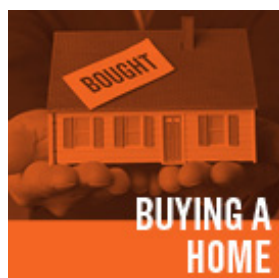
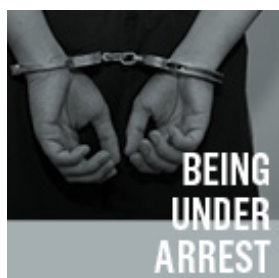
When you make a homemade will, you risk not drawing it up properly or not expressing your intentions clearly enough. Many homemade wills lead to delay and additional legal costs after the person has died. In the worst cases the wishes of the person who made the will are not followed because of some problem with the will. That's why, when you make your will, it's important you have it drafted by someone who understands the law and can advise you on the best way to make sure your assets end up where you want them to. And that means engaging a solicitor.

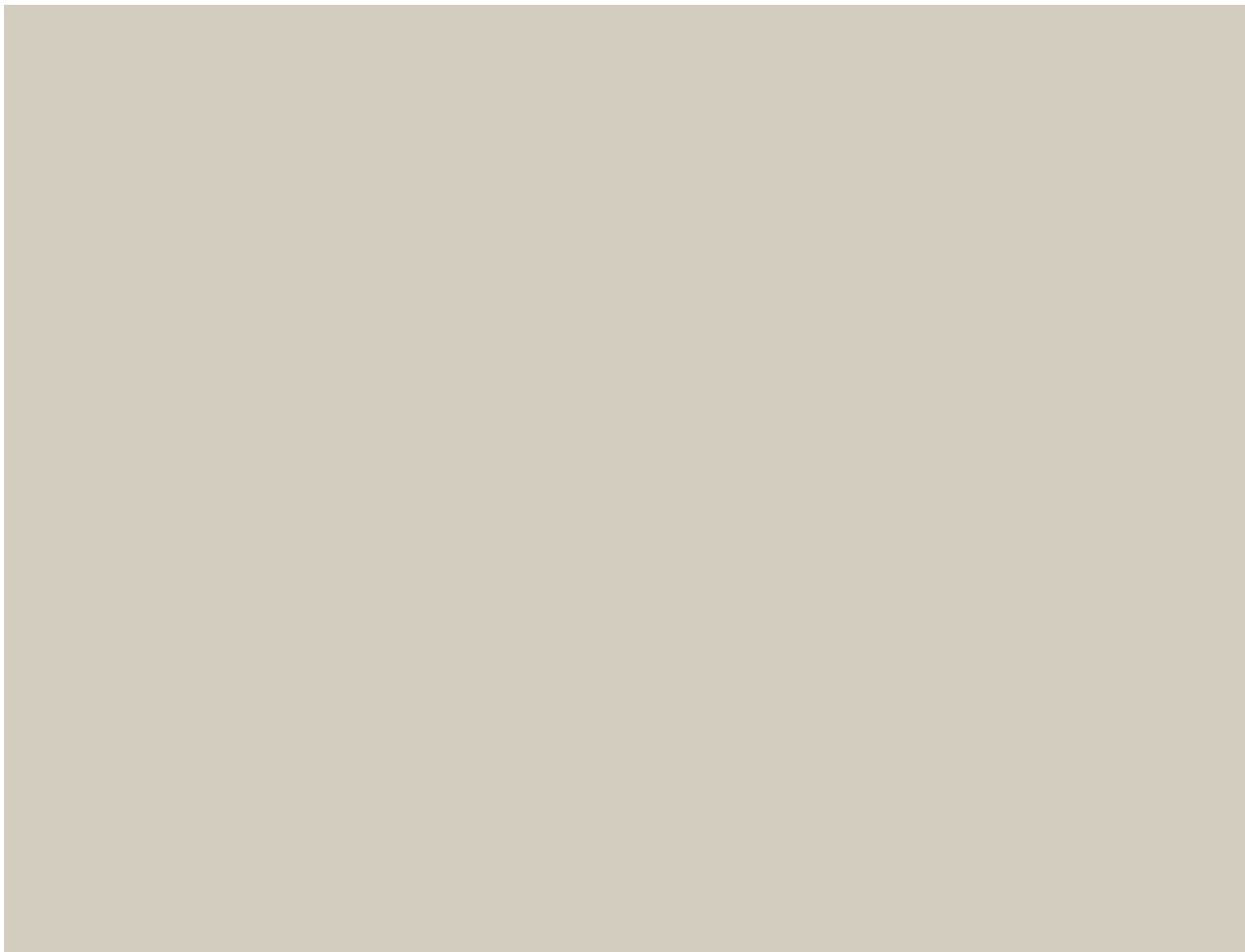
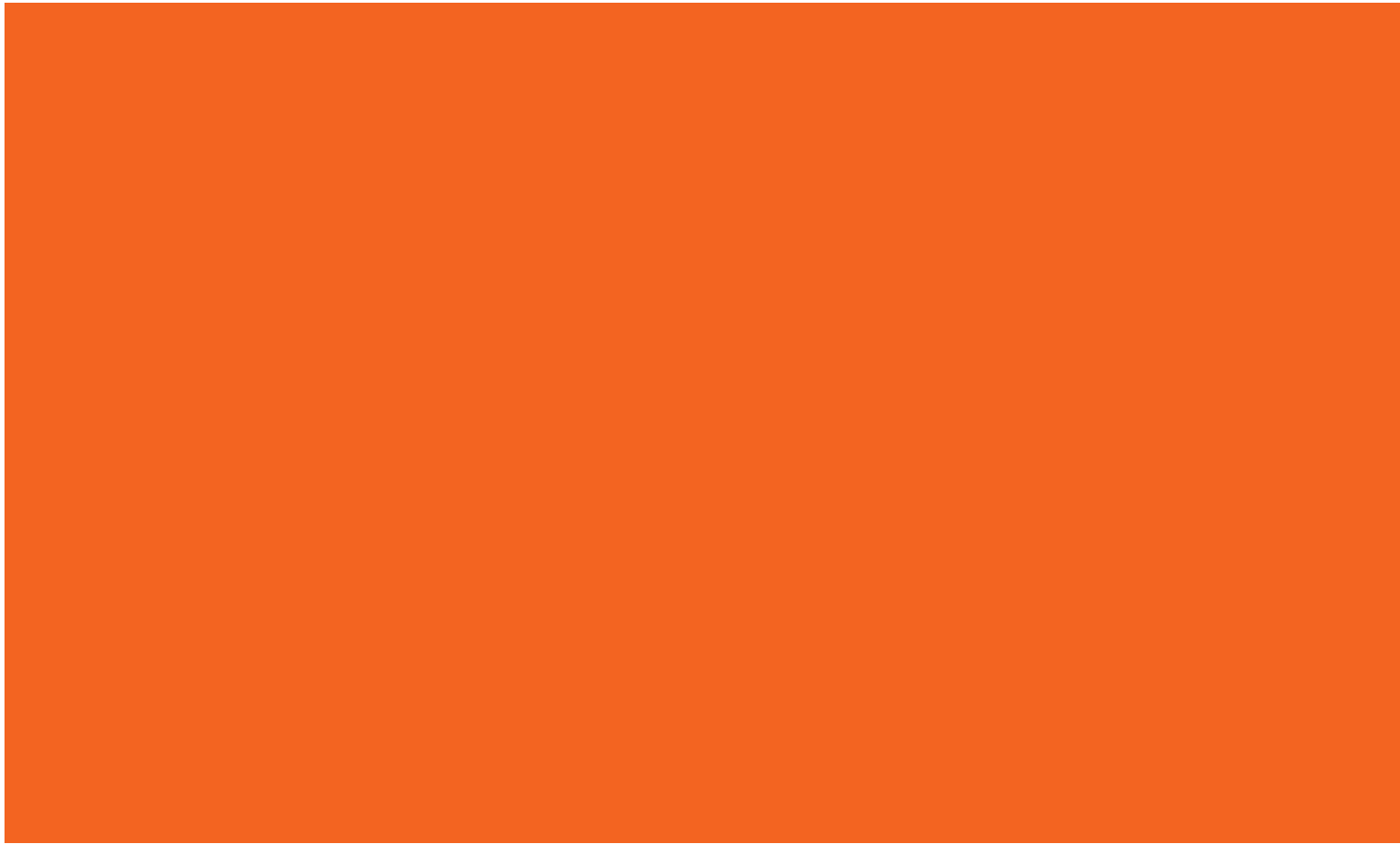
How can a solicitor help?

It's a good idea to involve your solicitor whenever you want to make changes to your will or draw up a new one. Your solicitor can:

- Make sure your will is valid and that it is properly drawn up, signed and witnessed
- Make sure you've expressed your wishes in the best possible way, so nothing is left to chance
- Advise you on your rights and obligations to your spouse or de facto partner, children and other dependants.
- Advise you on tax planning, including the best way to minimise any potential capital gains tax from the gifts you're making
- Give you a thorough understanding of the role of your executor and trustee and help you choose appropriate ones
- Advise you on what happens to your superannuation after you die
- Advise you on making a power of attorney and appointing an enduring guardian
- Store your will in a safe place so your executor knows where it is.

ALSO AVAILABLE:







THE LAW SOCIETY
OF NEW SOUTH WALES

**2011
WILL AWARENESS DAY**

SPEAKERS NOTES

Length of presentation:

The Elder Law & Succession Committee (“Committee”) suggests the Will Awareness Day talks run for no longer than 30-40 minutes. Speakers might adopt the approach of providing information about wills in the body of the talk, and then address issues of Powers of Attorney, Enduring Guardianship and other estate planning matters as they arise in questions.

Suggested form of introduction:

The Committee suggests starting the talk by introducing yourself, and your practice. Your introduction might also include something to the effect of the following:

This presentation is an initiative of the New South Wales Law Society. Solicitors in New South Wales are concerned that there have been, in the past five years, significant changes in the law which affect wills, but more importantly, laws affecting how people’s estates are divided up if they die without having made a will, or die without a valid will.

Many people don’t think a will is necessary, for many reasons. However, it is better to have even a simple will than no will at all.

This presentation intends to deal with wills in general, including information on:

- What is a will, do I need one and what are the contents of a will?
- How do I make a valid will?
- What happens if I don’t get it right?
- Can a will be challenged?
- What happens if I don’t make a will?

I intend to speak for about XX minutes, and leave time at the end for your questions.

Background information for the talk

The information provided below is intended to be basic information, and the Committee leaves it up to you to determine the exact content and style of presentation that will be appropriate for your audience. You may not be able to cover all of the material provided below in a 30-40 minute talk.

1. MAKING A WILL

What is a will?

A valid will is a document that distributes the deceased’s property to people or to organisations upon the death of the testator. That document must meet certain formal requirements under the Succession Act 2006 (NSW).

Do I need a will?

A will is required when a person wants his or her property to be dealt with in a particular way upon his or her death. In the event that a person dies without a valid will, his or her property is distributed according to the legislative rules of intestacy, and the order in which next of kin take may not be the way that person would have liked his or her estate distributed. This is particularly a problem if the person who dies without a valid will leaves dependants who are not covered by the intestacy provisions,

although de facto spouses have certain rights under the Succession Act. However, even if family members or dependants, such as a de facto spouse, are not provided for in the deceased's will, they may still have a claim against the estate under the Succession Act or if the rules of intestacy do not adequately make provision.

Under section 5 of the Succession Act, a will made by a minor (person under the age of 18) is not valid except in two specified circumstances:

- A minor who is married or about to be married can make a will in contemplation of marriage or after marriage; however a will made by a minor in contemplation of marriage is of no effect if the marriage contemplated does not take place; and
- The court authorises a will by or for a minor under either section 16 (whether minor has testamentary capacity) or section 18 (whether minor lacks testamentary capacity).

Do I have to have a solicitor?

It is advisable to consult a private solicitor for advice when making a will. Your solicitor should be qualified to handle the intricacies involved in making a valid will. It is usually not an expensive service, and will be far less costly than having a "home-made" will interpreted by the Court. Your solicitor will ensure that your wishes are translated correctly into a valid will that will be accepted by the Court. Your solicitor will also consider and advise you as to the potential consequences of your will in respect of taxation, pension and the protection of vulnerable beneficiaries.

I will talk later about the case of Peter Brock which shows the complications and difficulties caused by using "home-made" wills.

Contents of the will

It is first necessary to choose one or more persons to be nominated as the executor(s) of your will. The executor stands in the shoes of the deceased person and attends to or oversees the administration of the estate in accordance with the will. There are a number of trustee companies that will accept appointment as executor, as well as the NSW Trustee & Guardian. A trustee company will charge a commission for carrying out its duties as executor. Private trustee companies charge varying commissions based on the total gross value of the estate, as well as a commission on income collected during the administration of the estate.

It is usually more common to appoint a member of the family or a close friend as executor because they would not normally apply for commission (which by statute they can do), in relation to discharging their duties as an executor, and would be unlikely to be awarded much commission if they were also significant beneficiaries. Furthermore, the award of commission can be circumvented by leaving the executor(s) a legacy in lieu of commission or making the appointment conditional on not seeking commission.

In the case that you have business interests, it is advisable that you choose an executor with commercial experience who will know how to deal with any problems that may arise.

After appointing an executor(s), it is then necessary to nominate those who are to benefit from your estate. You are able to make specific bequests of assets, or to leave the whole of your estate, or particular assets, to classes of beneficiaries in nominated shares. It is also possible to grant a life interest in particular assets to someone with the capital assets being left to another person. An example would be allowing your spouse to have the use of the family home during his or her lifetime, with the house then becoming the absolute property of your children upon the subsequent death of your spouse.

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You should be aware however that the Court has often taken the view in family provision proceedings or proceedings under the Succession Act that a life estate (including retirement accommodation) is an inadequate provision for a spouse. I will discuss family provision proceedings later in the talk when talking about how a will can be challenged.

Another example would be leaving the income received from shares or an investment property to a particular person during his or her lifetime, with the asset passing absolutely to some other beneficiary on that person's death. The creation of limited or life interests or the disposal of particular assets may however involve possible liability for capital gains tax and should be discussed carefully with your solicitor. There are some limited exceptions to the liability for capital gains taxes, and your solicitor should be able to advise you in relation to these exceptions.

Property left to a child under 18, or at some later specified age, is held in trust on the child's behalf until the child reaches 18 or the specified age respectively. In such circumstances, it is necessary to nominate a competent person or company to act as trustee for the minor beneficiary to manage the entitlement of that beneficiary in accordance with the laws applying to trustees until the minor beneficiary reaches the applicable age. It is possible, and often prudent, to allow advances to a minor from his or her entitlement for education, maintenance and benefit, and particularly so if the child suffers from a particular disability or dependency.

It is also possible to provide in your will for any number of contingencies in the event that the beneficiaries you have chosen do not survive you.

Property owned by the deceased jointly with a spouse or any other person passes automatically to the survivor by virtue of the right of survivorship, not by operation of the will, and such property does not form part of the deceased's estate.

The trustee of the superannuation fund will make that decision in accordance with the terms of the trust deed of the fund. However, it is possible for a person to make a binding death benefit nomination on the trustee of the superannuation fund prior to death. Most binding death benefit nominations must be renewed every 3 years. Super may be paid to the estate or to beneficiaries or in accordance with a binding death benefit nomination but can be taken into account if there is a claim by a family member for greater provision.

Digital Assets

In this day and age many of us have "digital assets". These assets can include Facebook and Twitter accounts and any other electronically held or communicated information. These assets may include important and very personal information. They may not be actually held or controlled by you. You may wish to consider what happens to this information including passwords after your death. Your Will can provide an intention or direction to your Executors saying how you would like these assets dealt with and finalised. You will need to ensure that your Executors are provided or have access to passwords and other relevant information so that your wishes can be complied with. Your will could provide who has the ownership of this information and/or how you wish these digital assets to be dealt with upon your death.

2. HOW DO I MAKE A VALID WILL?

Formal Requirements

The formal requirements for a valid will are set out in the Succession Act. If these requirements are not met, the effect would be the same as a person dying without leaving a will (dying “intestate”), and the estate would be distributed as on intestacy. The formal requirements for a will are the following unless the Court declares that the informal document operates as a will:

- a) The will must be in writing;
- b) The will must be signed by the person making the will (the “testator”) with the intention of executing the will;
- c) The signature of the testator must appear on, and preferably at the end, of the will. (Where the will is longer than one page, the testator should sign at the bottom of each of the will’s other pages. Although this is not a legal requirement, it is a matter of prudence);
- d) The signature and initials of the testator should be witnessed by two witnesses. Both of these witnesses must be present at the time the testator signs at the end of the will and initials the pages; since 1 November, 1989 they do not need to be in the presence of one another when they sign as witnesses, merely to be both present when the testator acknowledges the will or signs it, and for them to sign in the presence of the testator.

Witnesses

The person making the will (the “testator”) and witnesses should note that a beneficial disposition under a will to a person who witnessed the testator’s signature could be void.

A witness who attests the execution of a will that makes a beneficial disposition to that witness is an “interested witness” under the Succession Act. Section 10(2) of the Succession Act voids a beneficial disposition of that will to the extent that it concerns the interested witness or a person claiming under that interested witness. Testators and witnesses should be aware of this as it may frustrate the testator’s intentions.

There is however relief from this rule under section 10(3) of the Succession Act. An interested witness is not disentitled if there were two other witnesses who are not beneficiaries, or if all of the other beneficiaries consent, or if the Court makes an order confirming that the testator made the gift freely and voluntarily.

Validity of a Foreign Will

If the will of the deceased was made overseas, and is valid according to the law of the country where the deceased then lived, or where the deceased was at the time of making the will, it may be accepted in NSW under sections 47 to 50 of the Succession Act despite the fact that such a will may not be valid according to NSW law. In other words, if an immigrant person’s will is valid in the country where it was made, probate may be granted in NSW.

Use of Legal Jargon

A will does not have to contain any particular words or legal jargon, and ideally, it should be in plain language. The document should however state that it is the will of the testator, that previous testamentary documents or wills are revoked, and that the testator’s property is to be distributed in a certain way upon his or her death. Although the omission of special words or phrases by no means renders the will invalid, it is advisable to insert particular wording for the “attestation clause”.

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In the event that there is no attestation clause in the will, or no sufficient attestation clause, the Probate Rules require an affidavit of one or more of the witnesses to the will to establish the due execution by the testator of his or her will.

An example of a simple attestation clause which can be used is the following

“Signed by the testator in our presence and attested by us in the presence of him/her and each other”.

By using such a clause, no affidavit of an attesting witness is required, where the will was prepared by a solicitor.

Additional wording should be used in an attestation clause where the testator has an impairment such as a condition affecting eyesight, hearing or language comprehension. An affidavit will be required in these instances.

Informal Wills

Despite the formal requirements for wills, there is provision under the Succession Act for testamentary documents (which do not have to be paper) or parts of testamentary documents that do not conform to the formal requirements to be admitted to probate. Under section 8 of the Succession Act, the Supreme Court can dispense with the formal requirements of a will. To do so, the Court would have to be satisfied that the deceased intended for documents that purport to embody the testamentary intentions of a deceased, although not executed in accordance with the formal requirements, to constitute his or her will (or alteration to or revocation of his or her will).

In forming this view, the Court may have regard to any other evidence (i.e beyond the document) as to the deceased’s testamentary intentions, and this includes statements that were made by the deceased. Of course, whilst this exception to formal validity is available, it is not advisable that a testator execute an informal testamentary document. Unless there is consent to a section 8 document, contested applications to the Court are nearly always costly, and they are also not guaranteed to be successful.

3. WHAT HAPPENS IF I DON’T GET IT RIGHT?

The effect may be that even if you have made a will, it may be found to be invalid, or partially invalid.

For example, sometimes people draw their own wills using as a guide a will kit which they purchase from newsagents or over the Internet. Obviously this may be better than having no will at all, but in a lot of cases home-made wills do not achieve what the deceased person intended and can cause expensive court proceedings to be commenced in order to determine the meaning of the document and whether or not the document is a valid will.

Take, for example, the famous case of Peter Brock: the Supreme Court of Victoria had to sort out the mess which Peter had caused by having no fewer than three wills competing for recognition as the expression of the wishes of the man who lived by the name “Peter Perfect.”

Without going over the whole of these court proceedings, essentially Peter Brock made three “wills”. The first was in 1984 with his solicitor, the second in 2003 using a will kit, and the third in 2006 (6 weeks before he died), also using a will kit. At the time of his death, Peter Brock’s “family” included his de facto wife of about 15 months, Julie Bamford, his previous de facto wife of about 18 years, Bev Brock, his biological children (son Robert and daughter Alexandra) and Bev’s son James, whom Peter treated as his own child.

The 1984 will left the bulk of the estate in shares to Mr Brock’s parents, Bev and the three kids. The 2003 will was silent on how the estate was to be divided, and the 2006 will left the bulk of the estate to

Ms Bamford and the three kids.

The 2003 and 2006 wills did not meet all the formal requirements of a will (including the requirements that a will be signed by the testator and by two witnesses). The 1984 will did. It was argued that the later wills could still be valid. The court was asked to decide.

The court found the will made in 2006 invalid.

The 2006 will was prepared by Brock's personal assistant, Ms Denman, using a will kit. Ms Denman wrote the will up at Brock's direction while he sat next to her. The will appointed two of Brock's friends as executors, left his superannuation and some shares to the three kids, and left the remainder of the estate to Ms Bamford. The will also gave directions for cremation and expressed a wish for no flowers at the funeral.

The will was signed by Ms Denman as a witness, but was not signed by Brock. Ms Denman said that during the preparation of the will, Brock was interrupted by a phone call and left the room, and that, on his return and afterwards, the will was not mentioned.

The court said that the 2006 will probably expressed at least some of Brock's wishes about his estate at the time of his death. It based this conclusion on the evidence of several witnesses, including Peter's brother. The court, however, was not satisfied that Brock intended the 2006 will to be his last will, especially because he had not signed it.

The will was held to be invalid.

The court found the will made in 2003 valid but incomplete.

The 2003 will was also prepared using a will kit, although on this occasion Brock hand-wrote the details himself, in the presence of Bev and his then personal assistant, Ms Williams. The will revoked all earlier wills and again appointed Brock's friends as executors, and gave directions for cremation.

However, the part of the will form that was designed to say who was to get the estate was left blank. Brock told Bev that he trusted her completely and that she should fill up the form at the time of his death, with whatever she thought fitting. Brock then signed the will in the presence of both Bev and Ms Williams. Ms Williams signed as witness. Bev did not sign.

The court said that the 2003 was valid, despite the fact that it was signed by only one witness, instead of two. It said that it was satisfied that Brock did intend the will to have immediate effect as his will, and therefore it revoked the 1984 will.

The court also said that it validly appointed executors despite the fact that Brock mistakenly assumed that he could give Bev the task of deciding who was to receive his estate. The law would not let Brock delegate his will-making powers.

So, who gets what?

The court's ruling means that the 2003 will stands as Brock's final will, and that the 1984 and 2006 wills are irrelevant.

Because the 2003 will made no provision for how the estate should be divided, the law interprets it as if Brock had died intestate; that is, without having made a will. The legal effect of this is that the estate will be divided equally between Brock's two biological children, and Bev, Ms Bamford and James will receive nothing. So you can see from this case, as briefly summarised, how many problems can arise because Peter, for whatever reason, failed to attend to the very basic requirements to ensure that there was a proper passing of his assets.

4. CAN A WILL BE CHALLENGED?

The area of change in the law that seems to create the most controversy is the situation where a deceased person has in fact left a will which fulfills all the legal requirements for a binding will but someone in the family of the deceased believes that they have not been left a sufficient share of the estate. This is where a claim under the Family Provision section of the Succession Act comes into consideration.

On 1 March 2009 extensive changes were made to the law to broaden the category of people who could challenge a deceased's will and try and get for themselves a greater share of the deceased's property as a result of such a challenge.

Essentially what happens is that the Court must be satisfied that the person making the claim comes within the category of an eligible person and the Court also has to be satisfied that adequate provision for proper maintenance, education and advancement in life of that person has not been made by the will of the deceased or by the operation of the laws of intestacy.

The matters which the Court can take into account are very wide and designed to offer a lot of flexibility in the nature of the orders that the Court may make, taking into account, for example, the character and conduct of the applicant before and after the date of death of the deceased person; any other matter the Court considers relevant, including matters in existence at the time of the deceased's person's death or at the time the application is being considered.

Family provision claims under the Succession Act 2006

The Succession Act 2006 enables the:

- husband or wife of the deceased;
- child of the deceased;
- de facto spouse with whom the deceased was living at the time of death;
- former spouse of the deceased;
- grandchild of the deceased who was wholly or partly dependent upon the deceased at sometime during the lifetime of the deceased person;
- any other person who was wholly or partly dependent upon the deceased at sometime during the lifetime of the deceased person and was a member of the deceased's household; and
- any person with whom the deceased was living in a close personal relationship at the time of death.

to apply to the Court for an order making adequate provision for their maintenance, education or advancement. Any entitlement to be provided for is calculated as at the date of hearing of the application, based on their needs and circumstances at that time.

The Court needs to be made aware of the applicant's relationship to the deceased and to the existing beneficiaries, the circumstances giving rise to the applicant's claim for relief and the comparative claims of the existing beneficiaries as well as particulars of any acknowledgment by the deceased as to the applicant's claims on the deceased's bounty.

Is there a time limit to make a family provision claim?

Yes - the period within which a claim is required to be made is 12 months from the date of death of the deceased. The time can be extended if sufficient cause for the delay can be established and provided the beneficiaries under the will would not be unacceptably prejudiced by such extension and depending on whether there has been any unconscionable conduct on either side which is relevant to the claim.

How do you determine that a person can claim as a “de facto” spouse?

The person has to establish to the satisfaction of the Court that he or she was living with the deceased at the date of death as the spouse of the deceased on a bona fide domestic basis. The definition is not restricted to heterosexual couples. Points that the Court takes into consideration in deciding whether a “bona fide domestic” relationship exists are essentially taken from section 4 of the Property (Relationships) Act 1984 and include:

- conduct in the manner of husband and wife
- sexual relationship
- joint parents of a child
- the exclusiveness of their living arrangements and sexual activity
- permanence of the relationship
- pooling their resources
- sharing their expenses
- carrying on a joint social life
- a subjective belief in their relationship being akin to that of husband and wife
- the legal right to enforce each other’s obligations.

What are the rights of a former spouse?

Apart from establishing the existence of the married relationship the former spouse will need to establish factors warranting a claim and need. Points that the Court will take into consideration include:

- Where a spouse has died after divorce but before property orders have been made by the Family Court.
- Where the husband and wife have not settled all their property dealing at the time of death.
- Where maintenance being paid to a former spouse is inadequate for his/her provision after the death of the paying ex spouse.
- Where after divorce the deceased ex spouse was, because of special circumstances or a residue of affection, providing money for the former spouse’s medical treatment or living expenses.

It should also be noted that under s.15A of the Wills, Probate & Administration Act 1898, a final divorce decree (a decree of dissolution of marriage or of nullity) revokes any gift by the deceased’s will to a former spouse and any appointment of the former spouse as Executor and Trustee or otherwise. The only exception is where there is a specific provision in the will saving the gift or a subsequent writing by the deceased confirming the gift and/or such appointment. In the absence of any such provision or subsequent confirmation, the former spouse will not receive anything under the will in respect of the deceased’s NSW property and his or her entitlement (if any) will depend on the ability to make a successful family provision claim.

What about other dependants?

Apart from the need to establish a claim and need at the date of hearing any such applicants must have been wholly or partly dependent upon the deceased at some time during the deceased's lifetime.

How is the application made?

Action is commenced by a Summons in the Supreme Court (or in the District Court, where the court can make an order up to \$750,000), and the applicant is required to file a detailed affidavit setting out his/her age, occupation and marital status, particulars of the deceased's death and age at the time, particulars of any will, or other testamentary instrument, and of Probate or Letters of Administration, a brief statement of the estate assets, and details of the applicant's relationship to the deceased and of the circumstances establishing his or her claim to be provided for. The making of an order for costs of the application, is a matter for the Court to decide. The costs of the application are not automatically payable by the estate. The important thing is to consult a solicitor so that you can be properly advised and protected, since the costs of unsuccessful claims may be and often are, awarded against the applicant.

Your solicitor will be able to advise you about alternative dispute resolution (ADR) and explain that it can be used instead of, or at the same time as, litigation, and will generally cost less. Your solicitor will be able to advise you of the different ADR processes, which include mediation, conciliation, negotiation, independent expert appraisal and various forms of arbitration. If there is a need the Law Society can assist in the appointment of an independent Mediator.

5. WHAT HAPPENS IF I DON'T MAKE A WILL?

The Succession Act, which affects any person who dies intestate or partially intestate after 1 March 2010 has brought about a significant change to previous intestacy law. The significant change is that when a person dies intestate, the preferred person entitled to receive his or her estate is the intestate's spouse. If there are no persons entitled, the estate passes to the State as *bona vacantia* (that is, property which does not have an owner). In that event, persons who believe that they should benefit from the deceased's estate may petition the Crown for the property that passed as *bona vacantia*. The Crown's decision is naturally of a purely discretionary nature.

The Succession Act has expanded the definition of "spouse" to include not only a person married to the intestate immediately before the intestate's death, but also a person who was in a domestic partnership immediately before the intestate's death.

The order in which person's entitled share in the deceased's estate depends upon them surviving the deceased by 30 days, this period of time applies in all cases as set out in Parts 4.2 and 4.3 of the Succession Act. The order is fixed and no special account can be made of particular wishes of the deceased which are not expressed in a will. It should however be noted that the expression "domestic partnership" includes a "de facto relationship". Under the Succession Act, this means that persons who were in a "domestic partnership" for a continuous period of not less than 2 years immediately prior to death, or resulted in the birth of a child (this includes children born within nine months of the death of the intestate and survived 30 days), are defined in the Succession Act as a spouse. The criteria for establishing the existence of a "de facto relationship" is set out in section 4 of the Property (Relationships) Act 1984 and extends to same sex couples.

The statutory order follows:

First

If the deceased leaves a spouse or a domestic partner and even if there is issue of either of them and the deceased, the whole of the estate passes to the surviving spouse or domestic partner, provided there are no other children of the deceased from another relationship.

The Succession Act introduces a new concept of “multiple spouses” where the intestate is still married and also has a domestic partner. In these circumstances, there is a complicated process by which the whole of the estate is to be shared solely between the multiple spouses, even if there are issue of the deceased and the spouse or domestic partner.

Second

If the deceased leaves a spouse AND a domestic partner (multiple spouses) and issue of either the deceased and the spouse or domestic partner, the situation is more complicated.

The spouse and domestic partner share the whole of the estate either:

- (a) in equal shares, or
- (b) by agreement or court order.

NOTE: A spouse, if there is only one, is entitled to elect to acquire property from an intestate estate and in certain circumstances, requires the Court’s authorization. There is a procedure to be followed by the spouse and the deceased’s personal representative.

Third

However, if the deceased has a child or children other than to the spouse or domestic partner, the spouse and domestic partner lose their priority position and share the estate as follows:

- (a) the statutory legacy \$350,000,
- (b) CPI adjustment from December 2005,
- (c) interest on the legacy, if outstanding, 1 year after the death of the deceased on the amount due from the 1 year anniversary,
- (d) personal effects
- (e) one half of the residue, if any

Spouse and domestic partners share either:

- (a) in equal shares, or
- (b) by agreement or Court Order.

If all children survive 30 days after the death of the deceased, they will all share the remaining one half of the residue (if any).

Fourth

Where there is no surviving spouse and no domestic partner, but there are children of the deceased, those children get equal shares of the estate. (See commentary below).

Fifth

Where the deceased leaves no spouse and no children, the parents of the deceased get equal shares of the estate, or if only one is alive, the whole estate goes to that surviving parent.

Sixth

If the deceased does not leave any spouse, children or parents, the members of one of the following classes receive the whole estate. If no one falls within the first class, the whole estate will be given to the second class or to the next class of which there is a member, and so on. Once there is a person qualifying in the particular class, the whole estate passes to that class. No classes lower in the order would then receive any of the estate. The order of classes is:

- (a) brothers and sisters (see commentary below),
- (b) children of brothers and sisters (nieces and nephews),
- (c) grandparents,
- (d) uncles and aunts (or any child of a deceased uncle or aunt).

The relationship stated is to a direct relationship to the deceased only, and not to relationships to a “spouse” or “domestic partner” of the deceased.

Seventh

If no one satisfies this order of distribution, the estate passes to the State of NSW. There is an important qualification to this - if the deceased left any dependants who are not members of the family, they may nevertheless be awarded some of the deceased’s estate. This applies to persons for whom the intestate might reasonably have been expected to provide; such persons could be, e.g. a foster child or a “houseguest” or a “companion” who, was, dependent on the deceased s.137 or for whom the deceased might reasonably be expected to have made provision. Such an award, which is purely discretionary, is only granted after the making of a petition to the Crown.

Commentary on the Statutory Order

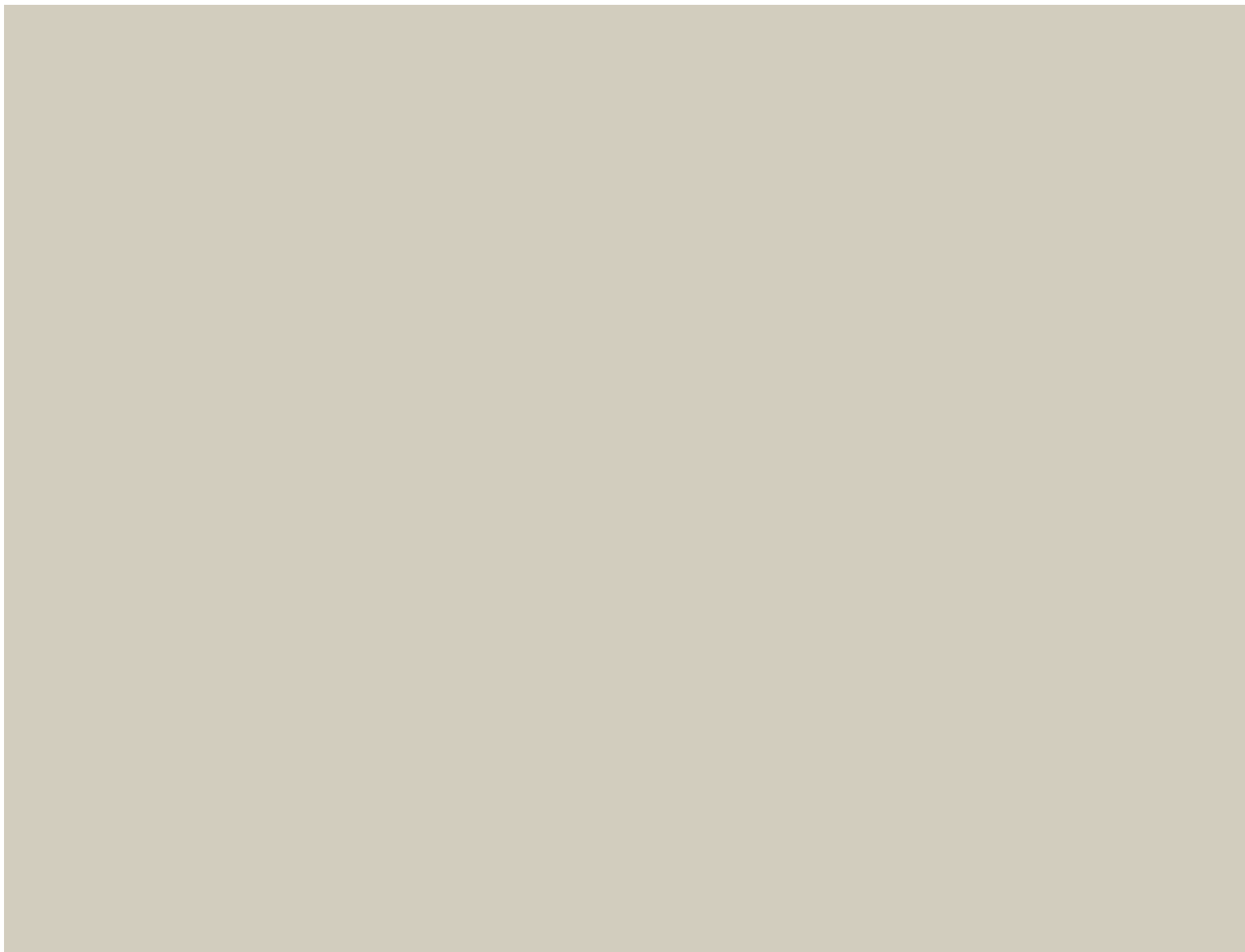
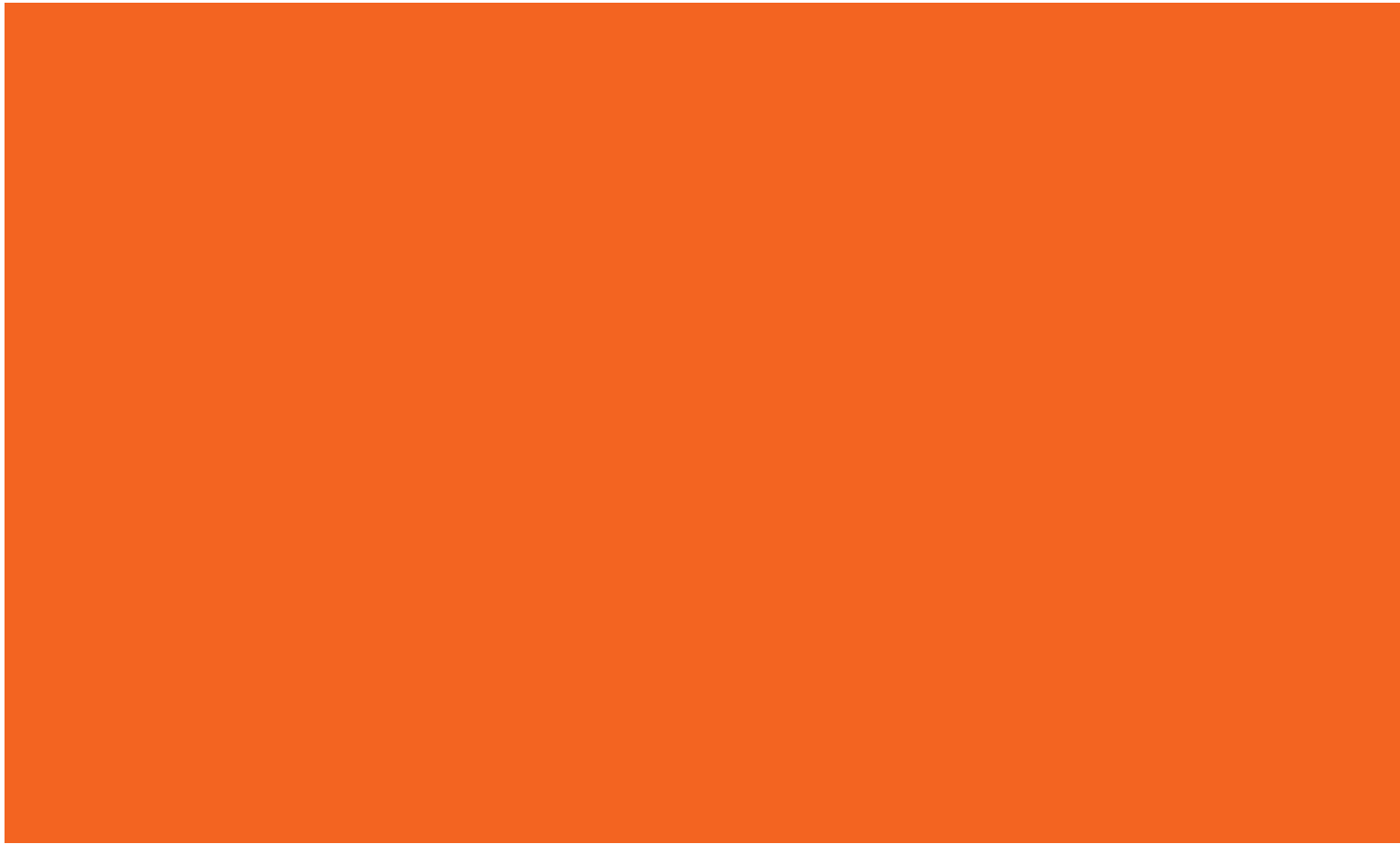
The word “issue” (meaning “children”) is used in the Succession Act where a child of the deceased has died but other children of the deceased are still alive, the children of the deceased child (i.e. the deceased’s grandchildren) get their dead parents’ share of the intestate’s estate. If there are no children of the dead child of the deceased, the other living children of the deceased take the dead child’s share in equal shares. This principle extends to the categories of the family referred to in (a) and (b) above. Thus, children of brothers and sisters may be able to share in the estate of the deceased. Adopted children qualify as legal children of his/her deceased parent.

Indigenous Person's Estates

The definitions used by both state and federal governments are used in the Succession Act to identify indigenous persons.

The provisions of the Act allow for claims of distribution to be made under laws, customs, traditions and practices of an indigenous community, as well as the general rules of intestacy.

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THE LAW SOCIETY
OF NEW SOUTH WALES

**2012
WILL AWARENESS DAY**

SPEAKERS NOTES

DO PARENTS HAVE AN OBLIGATION IN THEIR WILLS TO MAKE PROVISION FOR ADULT CHILDREN?

Most people would agree that a person making a will should provide for their spouse and any children who are young or dependant on them. But what about adult children? Opinion seems to be divided between, on the one hand, those who think the bond between a parent and a child is a lifelong thing and it is reasonable to think that a parent will provide for children of any age, and on the other hand, those who think adult children should make their own way in the world without expecting to inherit from their parents.

We have all heard of cases where adult children have made claims in the Supreme Court of NSW on the basis that either the provision made for them in a parent's will is insufficient, or in some cases, where no provision has been made for them in a will.

Parents who wish to make a will leaving little or no provision for their children will be warned by their solicitor that they are running the risk of the child bringing a court action claiming provision, which could end up costing the estate a lot of money. Whether the child's claim will be successful will depend on a number of factors, including the child's needs, the needs of other family members and the relationship between the parent and the child.

The parent might then ask the solicitor: "Why bother making a will when a will can be contested?"

An important message from today's talk is that it is much better to make a will than not to make one. A family provision claim can be made in an estate whether there is a will or not, but at least if there is a will you have an opportunity to provide for the people who you want to receive your assets. Just because someone can make a claim does not mean that they will. Not all claims are successful. Even if a claim is successful, the Court will only disturb the will to the extent it needs to make provision for the excluded child.

TESTAMENTARY FREEDOM – REALITY OR MYTH?

A person is free to set out, in a will, their intentions for the distribution of their assets after death, often referred to as "testamentary freedom". That freedom is not absolute in Australia, New Zealand (NZ), Canada and, to some extent, the United Kingdom (UK). Other countries have other arrangements for the share of a person's assets between spouses and children. Those shares are often defined by legislation, or by custom, so that in those countries, a distribution of a person's assets after death is fixed. Therefore, in effect there was no absolute testamentary freedom.

THE CONTEST BETWEEN TESTAMENTARY FREEDOM AND TESTAMENTARY DUTY

The concept of testamentary freedom was a feature of the 19th century, however towards the end of the 19th century it became apparent that testamentary freedom allowed some testators to ignore their responsibilities to close family members, particularly spouses and children.

It is interesting to note that in the dominions of Australia, NZ and Canada, in the late 19th century, these were cases where very wealthy men, left their widows and children unprovided for in their estates. These cases generated public outrage and agitation for legislative interference with testamentary freedom.

The first dominion to introduce a Testator Family Maintenance Act was NZ in 1900, although there had been earlier legislation in NZ as early as 1877 which entitled illegitimate children under 14 to apply for maintenance out of the estate of deceased parents. The idea of legislation to ensure proper provision for family members subsequently spread throughout Australia and eventually to Canada and the UK.

NSW FAMILY PROVISION

NSW introduced the concept of family provision in the Testator's Maintenance and Guardianship of Infants Act 1916, based upon the NZ legislation. This Act was replaced by the Family Provision Act 1982, and subsequently by the Succession Act 2006. In the main, the legislative changes were to broaden the class of persons entitled to make a claim, eg ex nuptial children and defacto partners.

All Australian States and Territories have family provision legislation. Some States refer, in the legislation, to "proper maintenance and support". NSW uses the term "proper maintenance, education and advancement in life".

The High Court, when required to consider the different legislation of the States, has encouraged uniformity of interpretation in its decisions.

However, in family provision claims, true uniformity cannot be guaranteed because each case depends upon its facts.

It is clear that in NSW, testamentary freedom and a person's absolute ability to make a will, free of statutory interference, is limited by the need for that person to make adequate provision for the proper maintenance of certain eligible people as set out in the Succession Act 2006 (NSW), and does sometimes result in a conflict arising between a person's absolute ability to freely make a will and the need to fulfil one's obligations to make adequate provision for the proper maintenance of certain "eligible persons".

SUCCESSION ACT 2006 (NSW)

The Act defines persons who may apply to the Court for a Family Provision order in respect of the estate of a deceased person.

These persons are defined as 'eligible persons' consisting of:

- a spouse
- a defacto partner
- a child
- a former spouse
- a grandchild who has been dependant on the deceased
- a person who was a member of the same household with and dependant on the deceased
- a person who was living in a close personal relationship with the deceased at the time of death. This group could include a person who went to care for the deceased, not a relative.

AN IMPORTANT PRINCIPLE

It must be noted that the Succession Act 2006 (NSW) –

“does not confer on any of the ‘eligible persons’ a statutory entitlement to receive a certain portion of a deceased person’s estate, nor does it impose any limitation on the deceased’s power of disposition by his, or her, will. It is only if the statutory conditions are satisfied, that the Court is empowered, under the Act, to alter deceased’s disposition of his or her estate, to produce a result that is consistent with the purpose of the Act. Even then, the Court’s power to do so is discretionary.” *Dugac v Dugac* [2012] NSWSC 192, per AsJ Hallen.

THE BASIC PRINCIPLE – STEP 1

In order to make a claim, an applicant must firstly qualify as an ‘eligible person’.

Therefore the Court, before proceeding further, must be satisfied that the applicant is an ‘eligible person’.

THE COURT’S DISCRETION - STEP 2

The second step is for the Court to determine –

“whether adequate provision for the proper maintenance, education or advancement in life of the Applicant has not been made by the will of the deceased.”

Therefore, to proceed further, the Court needs to be satisfied of the inadequacy or lack of provision provided for the “eligible person”.

In this second stage, the Court is required to consider whether an order should be made, and if so, what order should be made.

WHEN FAMILY PROVISION ORDER MAY BE MADE – SECTION 59

The Court, must firstly satisfy itself that the applicant is an ‘eligible person’, then the Court “may make such order for provision out of the estate of the deceased person as the Court thinks ought to be made for the maintenance, education or advancement in life of the eligible person, having regard to the facts known to the Court at the time the order is made.”

WHAT THE COURT MUST CONSIDER

In making a family provision order, the Court has to consider the following matters:

- (a) any family or other relationship between the applicant and the deceased person, including the nature and duration of the relationship,
- (b) the nature and extent of any obligations or responsibilities owed by the deceased person to the applicant,
- (c) the nature and extent of the deceased person’s estate and any liabilities,
- (d) the financial resources (including earning capacity) and financial needs, both present and future, of the applicant,
- (e) if the applicant is cohabiting with another person-the financial circumstances of the other person,
- (f) any physical, intellectual or mental disability of the applicant,

- (g) the age of the applicant,
- (h) any contribution (whether financial or otherwise) by the applicant to the acquisition, conservation and improvement of the estate of the deceased person,
- (i) any provision made for the applicant by the deceased person, either during the deceased person's lifetime or made from the deceased person's estate,
- (j) any evidence of the testamentary intentions of the deceased person, including evidence of statements made by the deceased person,
- (k) whether the applicant was being maintained, either wholly or partly, by the deceased person before the deceased person's death,
- (l) whether any other person is liable to support the applicant,
- (m) the character and conduct of the applicant before and after the date of the death of the deceased person,
- (n) the conduct of any other person before and after the date of the death of the deceased person,
- (o) any relevant Aboriginal or Torres Strait Islander customary law,
- (p) any other matter the Court considers relevant, including matters in existence at the time of the deceased person's death or at the time the application is being considered.

THE COURT'S ROLE IN CONSIDERING THE RELEVANT FACTS

The Court, in taking into account the matters which the Court is required to consider, is not required to achieve a fair division of the deceased's estate.

Bryson J noted in *Gorton v Parks* (1989) 17NSWLR 1, said

"The Court's role is not to reward an applicant, or to distribute the deceased's estate according to notions of fairness or equity, nor is the purpose of the jurisdiction conferred by the Act the correction of hurt feelings or sense of wrong, felt by the applicant. Rather, the Court's role is of a specific type and goes no further than the making of "adequate" provision in all the circumstances for the "proper" maintenance, education and advancement in life of an applicant."

Stephen J, in *Cooper v Dungan* (1976) 50ALJR 539, reminded the Court to be vigilant in guarding -

"against a natural tendency to reform the deceased's will according to what it regards as a proper total distribution of the estate, rather than to restrict itself to its proper function of ensuring that adequate provision has been made for the proper maintenance and support of an applicant."

The critical words for the Court's to consider are -

"proper maintenance, education and advancement in life".

Interestingly enough, the words "provision", "maintenance" or the phrase "advancement in life" are not defined, but have been judiciously determined, and are left to the exercise of the Court's discretion, based upon the relevant facts.

Provision was noted in *Diver v Neale* 2009 NSW CA54 at 34, as being a term which "covers the many forms of support and assistance which one individual can give to another." That support and assistance will vary over the course of the person's lifetime.

PROPER MAINTENANCE

Proper maintenance was held in *Alexander v Janson* 2010 NSW CA176 by Brereton J to be “proper maintenance is not limited to the bare sustenance of the claimants” but “requires consideration of the totality of the claimant’s position in life, including age, status, relationship with the deceased, financial circumstances, the environs to which he or she is accustomed”.

The phrase “advancement in life” in *Mayfield v Lloyd-Williams* [2004] NSW SC419 White J noted that the expression “advancement in life” is not confined to an advancement of an applicant in his or her younger years. It is a phrase that can extend beyond those younger years.

The Court has also commented that in larger estates, a more extravagant allowance for contingencies could be made, than would be permissible in a smaller estate and still fall within the concept of “maintenance and support”.

PROVISION FOR ADULT CHILDREN – A VEXED QUESTION

It is interesting to note that in the USA, a number of states have legislation which provides, that irrespective of the terms of a will, a surviving spouse is to receive 3-50% of the estate, depending on the length of the marriage. Some states have an elective provision which allows the surviving spouse to take either an elective (forced) share of the estate, or to take whatever share they have been left in the will.

Philosophically there is a broad range of opinion about provision for adult children, ranging from equal making of provision for all their adult children, to the other end of the spectrum, that having nurtured these adult children and provided for them to a certain age, they should have no further call upon your estate and wish to dispose of their estate without concern for those children.

The proper provision for adult children and what provision is proper for any applicant, especially for an adult applicant, can be a vexed question, because the Succession Act, even though it prescribes the matters which are to be taken into account, does not prescribe the circumstances that do, or do not, “constitute inadequate provision for the proper maintenance, education and advancement in life of the applicant”.

Some Judges have referred to this aspect of the Succession Act as being “a multi-faceted evaluative judgement” or “an intuitive assessment”.

The outcome is based upon the Court’s discretion and the facts presented to support the applicant’s claim.

Recently Hallen AsJ in the matter of *Dugac v Dugac* [2012] NSWSC192, in considering in detail a claim by an adult child, provided a detailed list of applicable principles, these being:

- “(a) The relationship between parent and child changes when the child leaves home. However, a child does not cease to be a natural recipient of parental ties, affection or support, as the bonds of childhood are relaxed.
- (b) It is impossible to describe in terms of universal applicant, the moral obligation, or community expectation, of a parent in respect of an adult child. It can be said that, ordinarily, the community expects parents to raise, and educate, their children to the very best of their ability while they remain children; probably to assist them with a tertiary education, where that is feasible; where funds allow, to provide them with a start in life – such as a deposit on a home, although it might well take a different form. The community does not expect a parent, in ordinary circumstances, to provide an

unencumbered house, or to set his or her children up in a position where they can acquire a house unencumbered, although in a particular case, where assets permit and the relationship between the parties is such as to justify it, there might be such an obligation.

- (c) Generally, also, the community does not expect a parent to look after his, or her, child for the rest of the child's life and into retirement, especially when there is someone else, such as a spouse, who has a primary obligation to do so. Plainly, if an adult child remains a dependent of a parent, the community usually expects the parent to make provision to fulfil that ongoing dependency after death. But where a child, even an adult child, falls on hard times, and where there are assets available, then the community may expect a parent to provide a buffer against contingencies; and where a child has been unable to accumulate superannuation or make other provision for their retirement, something to assist in retirement where otherwise they would be left destitute.
- (d) If the applicant has an obligation to support others, such as a parent's obligation to support a dependent child, that will be a relevant factor in determining what is an appropriate provision for the maintenance of the application. But the Act does not permit orders to be made to provide for the support of third persons whom the applicant, however reasonably, wishes to support, where there is no obligation to support such persons.
- (e) There is no need to an applicant adult child to show some special need or some special claim.
- (f) The applicant has the onus of satisfying the court, on the balance of probabilities, of the justification for the claim.
- (g) Although some may hold the view that equality between children requires that "adequate provision" not discriminate between children according to gender, character, conduct or financial and material circumstances, the Act is not consistent with that view. To the contrary, the Act specifically identifies, as matters that may be taken into consideration, individual conduct, circumstances, financial resources, including earning capacity, and financial needs, in the court's determination of an applicant's case."

However, his Honour in summary, states that he does not expect that the principles he has set out are to be elevated into rules of law. He further states:

"nor do I wish to suggest that the jurisdiction should be unduly confined."

He states that he is merely identifying them to provide:

"useful assistance, in considering the statutory provisions, the terms of which must remain firmly in mind."

TESTAMENTARY CONTROL

Most countries have some method of controlling testamentary dispositions, be it by custom, a forced share approach by way of statutory division, or Family Provision legislation, to ensure that adequate provision is made for the members of the family of a deceased person, and certain other persons in the estate of the deceased person.

It is important to remember that the Succession Act does not confer upon applicants, a statutory entitlement to receive a certain portion of a deceased person's estate, nor does it impose any limitation on the deceased's power of disposition by his or her will.

It is only if the statutory conditions are satisfied, that the Court is empowered, under the Act, to alter the deceased's disposition of his or her estate, to produce a result that is consistent with the purpose of the Act. Even then, the Court's power to do so is discretionary, and is not intended to rewrite the deceased's will, but only to alter it, if required.

CASE STUDIES

Case study: *Dugac v Dugac* [2012] NSWSC192

- This is an application by an adult child who was provided for in the will, but by the time the parent died, the legacies to the female child had all been disposed of.
- She was entitled to make an application, which she did, and Hallen AsJ considered her application in considerable detail.
- The problem which the applicant had was that she informed the Court that she would give all or most of any provision she received out of the estate to her own children.
- Hallen AsJ found that she was an eligible person, but since the applicant gave evidence that she intended to distribute any provision made for her, mostly to her own children, who were adults and able-bodied, and since the applicant did not demonstrate any obligation to provide for any of her children, Hallen AsJ dismissed her claim.

For other case studies involving claims by adult children see separate case notes on:

1. *Cooper v McNiece; Munday v McNiece* [2012] NSWSC 414
2. *Keep v Bourke* [2012] NSWCA 64
3. *Collins v Mutton* [2012] NSWSC 548

CASE STUDIES – CLAIMS BY ADULT CHILDREN

1. Cooper v McNiece; Munday v McNiece [2012] NSWSC 414
 - 1.1 Decision by Macready AsJ on 27 April 2012.
 - 1.2 Family provision claims by 2 adult children in respect of the estate of the late Edna May Munday, who died on 16 October 2008.
 - 1.3 Her husband predeceased her and she was survived by five of her children. Two of them, Judith and Warren, are plaintiffs in the proceedings.
 - 1.4 Another child, Anthony, survived the testatrix but died before the hearing – his estate went to a friend. Another son, Alan, predeceased the testatrix. Two other daughters, Pamela and Marilyn, were given notice of the proceedings but did not make a claim.
 - 1.5 Will – the deceased’s will was made on 9 Oct 2006 and appointed Mr McNeice, the family accountant, the executor. In her will she gave a legacy to her daughter Judith of \$10,000 and gave the residue of her estate equally between her sons Warren and Anthony.
 - 1.6 Estate consists of:
 - (a) Deceased’s home at Hilltop Avenue, Lake Heights – approx. \$310,000 and \$330,000;
 - (b) Investment property at Figtree – approx \$400,000 and \$420,000;
 - (c) Cash of \$23,656.
 - (d) Gross value - \$743,285 to \$783,285.
 - 1.7 Costs in these proceedings total \$197,535.
 - 1.8 Net value estate – approx. \$545,750 to \$585,750.
 - 1.9 Family history - The deceased’s husband was born in November 1913 and the deceased herself in March 1919. They married in 1940 and had a large family. Anthony was born in July 1942; Judith, 1946; Marilyn, December 1948; Alan, November 1952. Pamela, May 1956; and Warren in September 1966. Warren was substantially younger than the other children. Judith left school in 1962 and went to work as a cleaner. That was some four years before Warren was born. Judith married and left home in 1969.
 - 1.10 Judith (plaintiff) – eligible person:
 - (a) 64 years old
 - (b) single – no dependants
 - (c) resides in a Housing Commission flat.
 - (d) \$2,500 in household contents, \$360 in superannuation and \$29 in the bank. Her debts total \$2,000.
 - (e) Works as a cleaner three days a week, a job she has been doing for many years. Her income from work is \$400 per fortnight and she receives a part pension of \$540 per fortnight. This is all consumed in her expenses.

- (f) Judith's marriages have failed and she is almost at an age where she has to retire. Her education only took her to year 7 and, apart from some time off to raise children, she has worked in low paid jobs all her life.
 - (g) Her relationship with the deceased was always good but for most of her life since she left home she has lived in Sydney. She travelled to Wollongong to see her mother on a fortnightly basis.
 - (h) The reason for her receiving only \$10,000 in the will seems to have been because her mother thought that the properties should stay with the male line.
- 1.11 Judith was seeking \$350,000 to \$599,000 to buy herself a 2 bedroom house. She originally sought \$240,000 to \$300,000 to purchase a single bedroom flat.
- 1.12 Warren (plaintiff) – eligible person and granted extension of time to commence claim:
- (a) 46 years old
 - (b) single – no dependants
 - (c) lives in family home – purchased 1970
 - (d) Warren purchased a block of three units at Propane Street, Albion Park for investment purposes - valued at approx. \$320,000. His parents assisted him with the purchase. The income from rental properties – approx. \$1010 pw.
 - (e) 2 motor vehicles
 - (f) Share portfolio – lost value in GFC - \$36,772.39
 - (g) Bank account \$2,195 – query other accounts?
 - (h) Another flat at the home which was not let.
 - (i) Earned a little from what work he did, occasionally transporting stock in his Hilux truck. At most he would earn approx. \$60 pw.
 - (j) Warren will be dependent on the rental income for his livelihood.
 - (k) He gave up work to look after his parents and all the evidence points to him being a devoted son to his parents. This included personal care and attention. He also did a lot of work at home and on the rental properties. He was provided substantially with Albion Park by his parents.
 - (l) Suffers from some problems and unlikely to work again.
- 1.13 His Honour said that Judith's claim for a house has to be seen in the context of the now small size of the estate and the pressing needs of Warren.
- 1.14 His Honour considered that Warren had a real need for accommodation and the family home would be ideal as it also earns some rent. Judith was fortunate to have a Housing Commission home. The attitude which the court should take in relation to the provisions of State accommodation and pensions was discussed by HH in *Chan v Tsui* [2005] NSWSC 82. His Honour considered that it was appropriate to take into account a pension entitlement but did not think the consideration of the pension entitlement of the plaintiff and its continuance in the future could assist in the formulation of proper provision for the plaintiff.

- 1.15 His Honour referred to *King v Foster* (Court of Appeal, unreported, 7 December 1995) in which Sheller JA referred with approval to the discussion by Bryson J in *Whitmont v Lloyd* (unreported, 31 July 1995) on the subject. At p 14 his Honour said:

‘The protection of public funds from claims by indigent persons is not a purpose of family provision legislation but they are incidentally protected by the legislation, which was not enacted solely for protection of private interests and serves public policy: see *Dillon v Public Trustee of New Zealand* [1941] AC at 303, 304 and observations, not uniform in their import in judgments in *Lieberman v Morris* [1944] HCA 13; (1944) 69 CLR 69. In my opinion, the availability of Age Pensions and other social benefits is a circumstance which should be regarded, and particularly in small estates it may be appropriate to leave an applicant wholly or partly dependent on them or to mould the provision made so that their availability is preserved in whole or in part. The acceptance of benefits for which statute law provides is in every way legitimate, involves no social stigma and incurs no disapproval from the Court. It is not the Court’s task to be vigilant to throw burdens off public funds and on to private estates. Still it is true that the legislation has a public policy purpose and it is not appropriate that where there is wealth in an estate it should be directed away from the less fortunate and successful of the eligible persons so as to enhance their claims to social benefits and maximise the resources of others; the Court should not disregard the interest of the public in public funds, which can receive incidental protection from the workings of this legislation. Where wealth is available it should be used to meet needs for maintenance, education and advancement of eligible persons. The significance of social benefits is related to the available resources. In my understanding this expresses the view on which this Court administers the legislation. See my observations in *Wentworth v Wentworth* (14 June 1991, unreported at 132) which appears not to have attracted criticism in the Court of Appeal (3 March 1992): “The testator should not have disposed of all the family wealth in ways of his own choosing and left the family’s economic casualty to relative penury or dependence on social agencies.” See too *Parker v Public Trustee* (Young J, 31 May 1988) and *Thom v Public Trustee* (Master McLaughlin, 2 April 1992), both noted in *Leslie’s Equity and Commercial Practice* F30: 1010.’

- 1.16 Macready AsJ decided that:

- (a) This was a small estate so it was appropriate to have regard to Judith’s lifetime entitlement to accommodation.
- (b) Warren should have the house at Hilltop Avenue, Lake Heights.
- (c) The remaining assets after payment of costs should be shared equally between Judith and Warren.

2. *Keep v Bourke* [2012] NSWCA 64

2.1 Decision by Macfarlan JA, Barrett JA and Tobias AJA on 5 April 2012.

2.2 The deceased, Joyce Winifred Keep who died on 29 August 2009 aged 82 years. She had three children – Gwendolene, Graham and Marion.

2.3 The appellants, Gwendolene and Graham, are also the executors of her will dated 7 July 1992. The deceased gave the whole estate to them in equal shares.

2.4 Marion is the respondent and had little contact with her mother over a long period of time. For that reason the deceased made no provision for Marion in her will:

“I HAVE made no provision in this my Will for my daughter MARION GAY BOURKES [sic] because of her complete lack of concern or contact with me and other members of my family over a long period of time”.

- 2.5 The estrangement existed between Mrs Keep and Marion for some 38 years and continued until Mrs Keep’s death. It resulted from Marion’s decision to marry against her parents’ wishes. Her parents did not want Marion to marry her intended husband because he had been conscripted into the army during the Vietnam war and the parents said they were opposed to her marrying someone who ran the risk of injury or premature death. The parents were also worried about the cost of a wedding. They also expressed an opinion that Marion, as the younger daughter, should not marry before Gwendolene.
- 2.6 Marion and her mother saw one another on only five occasions after Marion left the family home shortly before her marriage in November 1971.
- 2.7 The estate consisted of the deceased’s house at Hurstville and some cash. The net value was about \$623,000.
- 2.8 In the first instance, Macready AsJ awarded Marion a legacy of \$200,000 from the deceased’s estate. That amount was reduced on appeal to \$175,000.
- 2.9 Marion divorced – 4 adult children.
- 2.10 Gwendolene and Graham – never married.
- 2.11 All three parties had significant health problems and all three children are of very modest means.
- 2.12 The grounds of appeal were that the primary judge erred:
 - (a) In failing to find, as a matter of jurisdiction, that Marion was not entitled to provision under s 59, having regard to:
 - i. the estrangement;
 - ii. the statement in the will set out above; and
 - iii. the overriding competing claims of Gwendolene and Graham on Mrs Keep’s testamentary bounty;
 - (b) In holding, notwithstanding the estrangement, that Marion was not barred from making a claim because Mrs Keep had “stridently refused to make any attempt at reconciliation on at least two opportunities when this could have occurred”;
 - (c) In failing to reduce the provision in favour of Marion by reference to a finding that there was “a sense of a child treating her parent callously by not taking any steps to end their estrangement”; and
 - (d) In the context of the value of the estate, in fixing the quantum of Marion’s entitlement at \$200,000 when
 - i. there is no principle that the community expects a parent to leave her child in a position to own a home;
 - ii. the claims of Gwendolene and Graham to remain in the deceased’s house should have been taken into account; and

iii. regard was not had to the absence of evidence that Gwendolene and Graham would be able to acquire alternative accommodation with the balance of the estate remaining to them.

2.13 The Court said that “An appeal court can alter a trial judge’s decision concerning the jurisdictional question in a Family Provision Act application only in the same circumstances as it can alter a discretionary decision by a trial judge: *Singer v Berghouse* (No 2) [1994] HCA 40; (1994) 181 CLR 201 at 212; *Vigolo v Bostin* [2005] HCA 11 ; (2005) 221 CLR 191 at [82] 220; *Clifford v Mayr* [2010] NSWCA 6 at [67]- [74]. The conventional statement of the principles for appellate review of discretionary decisions is that in *House v R* [1936] HCA 40; (1936) 55 CLR 499 at 504-5.”

Campbell JA then set out this well-known passage in the judgment of Dixon, Evatt and McTiernan JJ in *House v The King* [1936] HCA 40; (1936) 55 CLR 499 at 504-505:

“It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.”

2.14 The Court said: “The judge’s findings favourable to Marion’s claim at the jurisdictional stage were made after a full consideration of the circumstances of both Gwendolene and Graham. His Honour recognised that neither of them works, that both are in bad health and on social security support and that they have lived in the Hurstville house all their lives and wish to continue doing so. In addition, each is single, has no dependants and is of very modest means. That assessment was made in company with a like assessment of Marion’s situation: that she is divorced with four children one of whom is a son with disabilities who lives mainly with his father (although Marion wishes to have him stay with her periodically), that she too is of very modest means and lives in a small rented house on the Central Coast which is in poor repair, that she receives some social security support and that she too has health problems. At the time of trial, Marion was in part-time employment but, as I have said, evidence received without objection on the appeal was that an injury has made it necessary for her to give up that employment.

It is sufficiently shown, in my opinion, that the primary judge had appropriate regard to all these matters, as well as the estrangement, in approaching the matter as a whole; and that he therefore could not have failed to take them into account in making the inquiry that was necessary at the “jurisdictional” or “first stage”.”

2.15 The court decided that: “In summary, the primary judge addressed all relevant matters going to jurisdiction. His assessment was made by way of appropriate “multi-faceted evaluative judgment” taking those matters into account (including the situations of Gwendolene and Graham). The estrangement and its circumstances were correctly viewed as not excluding Marion’s claim on

jurisdictional grounds and the conclusion that the jurisdictional condition was satisfied was one warranted by the evidence. His Honour's decision that adequate provision for the proper maintenance or advancement of Marion was not made by Mrs Keep's will is not one calling for appellate intervention in accordance with the principles explained by this Court in *Hampson v Hampson* (above). The first two grounds of appeal are therefore not made out."

2.16 In deciding what order should be made for Marion the court had to consider the matters in s.60(2) of the Succession Act 2006.

2.17 The court agreed that Marion was entitled to some provision from the estate but that there must be a reduction in that amount of that provision recognising Marion's contribution to the estrangement, but given the factors mentioned by Macready AsJ at [78] of the judgment and the hurtful way in which her parents expelled Marion from the family, the court believed that the reduction should not be great. On that basis, the court reduced the original legacy of \$200,000 awarded by Macready AsJ, to \$175,000.

2.18 Marion, the respondent, was order to pay the appellant's costs of the appeal.

Collins v Mutton [2012] NSWSC 548

3.1 Decision by Hallen AsJ on 24 May 2012

3.2 Family provision claim by deceased's daughter, Judeth (sic) Collins.

3.3 Executor = Deceased's son, Gregory Mutton.

3.4 Facts:

- The deceased died on 30 November 2010. He was then aged 90 years.
- He married Doris Patricia Mutton in about 1943. She predeceased the deceased. However, despite remaining married to the deceased until her death in August 2005, they had separated, when the deceased met another woman, Gloria Walsh, with whom he lived until the mid-1990's.
- There were five children of marriage, namely Judeth, Gregory (born January 1953), Paul Francis Mutton, born in May 1948, Trevor Anthony Mutton, born in June 1950, and Richard Keith Mutton, born in April 1958.
- When Doris suffered a stroke, in about 1999, she moved back into the deceased's property at Long Jetty, which was then occupied by the deceased and Richard. The real property that she then owned (in which she had lived) was sold and the proceeds of sale were divided equally between Doris and the deceased.)
- Following Doris' death, the deceased and Richard continued to live together, until about September 2009. During this period, Richard was the deceased's primary carer (to the extent that he required care). Richard continued to live in the Long Jetty property after that time.
- Doris' estate (approximately \$360,000) was divided between her five children equally.
- The deceased left a Will dated 19 May 2010, Probate of which was granted to Gregory on 23 February 2011.

- The deceased's Will gave his property at Long Jetty to Richard; a bequest of the deceased's share in three racehorses to Gregory absolutely; and the rest and residue of his estate to be divided, equally, between his five children.
- 3.5 The gross value of the estate was approx. \$409,286 consisting of the property at Long Jetty (\$220,000) and funds in bank, or in financial institutions, on deposit (\$179,286). It also revealed that the deceased held an interest, as tenants in common in unequal shares, with Gregory, in a number of racehorses (\$10,000).
- (The deceased purchased a property at Bateau Bay for his son Gregory (valued at approx. \$505,000) – not an estate asset).
- 3.6 The actual net distributable estate, after the payment of costs and expenses of sale of the Long Jetty property and the legal costs of the proceedings, was about \$363,091.
- 3.7 The deceased's former partner, Gloria Walsh, could not be located at the time of the proceedings.
- 3.8 The plaintiff sought an order that the burden of any provision in her favour be borne out of the proceeds of sale of the Long Jetty property, devised to Richard absolutely.
- 3.9 Richard, despite being served with notice of the proceedings, took no part in the matter. Consequently, the court had no information in relation to his financial resources (including earning capacity) and financial needs, both present and future. It however relevant to note that Richard was his father's primary carer after Doris' death.
- 3.10 Trevor and Paul also did not take an active part in the proceedings.
- 3.11 His Honour said that “even though the value of the estate is quite small, all the relevant circumstances have to be considered before the court's decision is made. As has been said, “the smallness of the estate neither excludes jurisdiction nor full consideration”: *Re Clayton* (dec'd) [1966] 1 WLR 969 at 971-2, per Ungood-Thomas J.”
- 3.12 His Honour then considered:
- whether the plaintiff was an eligible person –s.57 Succession Act 2006 (the Act);
 - whether adequate provision for the proper maintenance, education and advancement in life of the applicant has not been made by the will of the deceased, or by the operation of the intestacy rules in relation to the estate of the deceased, or both (s 59(1)(c) of the Act);
 - if satisfied of the inadequacy of the provision made for the plaintiff, the court then considers whether to make a family provision order (s 59(2)), having regard to the matters referred to in s 60(2) of the Act;
 - the court considered the meaning of “provision”, “maintenance” “advancement in life”, “support” “proper” and “adequate”.
- 3.13 His Honour said “Whether the applicant has a ‘need’ is a relevant factor at the first stage of the enquiry. It is an element in determining whether ‘adequate’ provision has been made for the ‘proper’ maintenance education and advancement in life of the applicant in all of the circumstances: *Collins v McGain* [2003] NSWCA 190 at [42] (Tobias JA, with whom Beazley and Hodgson JJA agreed).”
- 3.14 When considering the applicable legal principles, the court said, at [89]: “Bryson J noted in *Gorton v Parks* (1989) 17 NSWLR 1, at 6, in relation to the former Act, that it is not appropriate,

to endeavour to achieve a ‘fair’ disposition of the deceased’s estate. It is not part of the court’s role to achieve some kind of equity between the various claimants.

The court’s role is not to reward an applicant, or to distribute the deceased’s estate according to notions of fairness or equity. Rather, the court’s role is of a specific type and goes no further than the making of ‘adequate’ provision, in all the circumstances, for the ‘proper’ maintenance, education and advancement in life of an applicant.”

- 3.15 In relation to a claim by an adult child, the court noted the following general principles as providing useful assistance in considering the relevant statutory provisions [94]:
- “(a) The relationship between parent and child changes when the child leaves home. However, a child does not cease to be a natural recipient of parental ties, affection or support, as the close bonds of childhood are relaxed.
 - (b) It is impossible to describe in terms of universal application, the moral obligation, or community expectation, of a parent in respect of an adult child. It can be said that, ordinarily, the community expects parents to raise, and educate, their children to the very best of their ability while they remain children; probably to assist them with a tertiary education, where that is feasible; where funds allow, to provide them with a start in life - such as a deposit on a home, although it might well take a different form. The community does not expect a parent, in ordinary circumstances, to provide an unencumbered house, or to set their children up in a position where they can acquire a house unencumbered, although in a particular case, where assets permit and the relationship between the parties is such as to justify it, there might be such an obligation [McGrath v Eves [2005] NSWSC 1006; Taylor v Farrugia [2009] NSWSC 801].
 - (c) Generally, also, the community does not expect a parent to look after his, or her, child for the rest of the child’s life and into retirement, especially when there is someone else, such a spouse, who has a prime obligation to do so. Plainly, if an adult child remains a dependent of a parent, the community usually expects the parent to make provision to fulfil that ongoing dependency after death. But where a child, even an adult child, falls on hard times and where there are assets available, then the community may expect a parent to provide a buffer against contingencies; and where a child has been unable to accumulate superannuation or make other provision for their retirement, something to assist in retirement where otherwise they would be left destitute: Taylor v Farrugia.
 - (d) If the applicant has an obligation to support others, such as a parent’s obligation to support a dependent child, that will be a relevant factor in determining what is an appropriate provision for the maintenance of the applicant. (Re Buckland Deceased [1966] VR 404 at 411, per Adam J; Hughes v National Trustees Executors and Agency Co. of Australasia Pty Ltd [1997] HCA 2; (1979) 143 CLR 134 at 148, per Gibbs J; Goodman v Windeyer [1980] HCA 31; (1980) 144 CLR 490 at 498, 505, Per Murphy J). But the Act does not permit orders to be made to provide for the support of third persons to whom the applicant, however reasonably, wishes to support, where there is no obligation to support such persons. (Re Buckland Deceased at 412, per Adam J; Kleinig v Neal (No 2) [1981] 2 NSWLR 532 at 537, per Holland J in Equity; Mayfield v Lloyd-Williams).

- (e) There is no need for an adult child to show some special need or some special claim: *McCosker v McCosker*; *Kleinig v Neal (No 2)*; *Bondelmonte v Blanckensee* [1989] WAR 305; and *Hawkins v Prestage* (1989) 1 WAR 37, per Nicholson J at 45.
- (f) The applicant has the onus of satisfying the court, on the balance of probabilities, of the justification for the claim: *Hughes v National Trustees, Executors and Agency Co of Australasia Ltd* at 149, per Gibbs J.
- (g) Although some may hold the view that equality between children does not discriminate between children according to gender, character, conduct or financial and material circumstances, the Act is not consistent with that view. To the contrary, the Act specifically identifies, as matters that may be taken into consideration, individual conduct, circumstances, financial resources, including earning capacity, and financial needs, in the Court's determination of an applicant's case.
- (h) In all cases under the Act, what is adequate and proper provision is necessarily fact specific.
- (i) The Act is not a "Destitute Persons Act", and it is not necessary, therefore, that the applicant should be destitute to succeed in obtaining an order: *In re Allardice, Allardice v Allardice* (1910) 29 NZLR 959, per Chapman J at 966.
- (j) The lack of reserves to meet demands, particularly of ill health, which become more likely with the advancing years is a relevant consideration: *MacGregor v MacGregor* [2003] WASC 169, per Templeman J at [182]; *Crossman and v Riedel* [2004] ACTSC 127, per Gray J at [49]. Likewise, financial security and a fund to protect against the ordinary vicissitudes of life, is relevant: *Marks v Marks* [2003] WASCA 297, per Wheeler J at [43].
- (k) In a small estate, as this one is, it is important to remember what Salmond J said in *In re Allen (Dec'd)*; *Allen v Manchester* [1922] NZLR 218, at 221:

"Applications under the Family Protection Act for further provision of maintenance are divisible into two classes. The first and by far the most numerous class consists of those cases in which, owing to the smallness of the estate and to the nature of the testamentary dispositions, the applicant is competing with other persons who have also a moral claim upon the testator. Any provision made by the Court in favour of the applicant must in this class of case be made at the expense of some other person or persons to whom the testator owed a moral duty of support. The estate is insufficient to meet in full the entirety of the moral claims upon it, in the sense that if the testator possessed more he would have been bound to do more for the welfare of his dependants. In such a case all that the Court can do is to see that the available means of the testator are justly divided between the persons who have moral claims upon him in due proportion to the relative urgency of those claims."
- (l) Where the Court is satisfied that provision ought to be made, then it is no answer to a claim for provision under the Act that to make an order would be to defeat the intentions of the deceased identified in the Will. The Act requires, in such circumstances, for the deceased's intention in the Will to be displaced: *Kembrey v Cuskelly* [2008] NSWSC 262, per White J at [45]."

3.16 Judeth did not have a particularly close relationship with the deceased. Gregory and Richard were closer to their father.

- 3.17 Judeth was in receipt of the aged pension. She was 66 years old. She rented her home. Her circumstances could only be described as very modest. Her adult son, who was in receipt of a disability pension, lived with Judeth.
- 3.19 The plaintiff sought a lump sum sufficient to enable her to purchase accommodation. She also sought an additional amount for the exigencies of life.
- 3.20 After considering the matters in s.60 (2) of the Act the court decided a family provision order should be made in favour of Judeth.
- 3.21 The court decided that it would not make an order giving Judeth the property at Long Jetty because that property had been Richard's home since about 1999 and the court did not wish to deprive Richard and his family of their home.
- 3.22 Alternatively, the Plaintiff submitted that she should receive, in lieu of her entitlement under the deceased's Will, a lump sum of \$150,000 which she could use this amount to purchase a mobile home (about \$135,000) and would have a small capital sum remaining to provide for exigencies of life.
- 3.23 The court formed the view that Judeth, in lieu of the provision made for her in the deceased's will, should receive a lump sum of \$135,000 to be paid from the residuary estate. This would enable Judeth to purchase a modest mobile home or, would provide her with capital and income to meet exigencies of life.

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PRESENTATION SLIDES



THE LAW SOCIETY
OF NEW SOUTH WALES

Law Society of NSW Will Awareness Day 2012

Should parents provide for their
adult children in their wills?

Should parents provide for their adult children in their wills?

What do you think?

YES? Your children are always your children.

NO? Your children should make their own way
in the world and you should be able to exclude
them if you want to.

IT DEPENDS? What if the parent has remarried?
What if the parent and child are estranged?

Should parents provide for their adult children in their wills?

What is the law?

Children of any age can apply to the Court for
provision to be made for them from a parent's
estate.

Whether the Court will order provision for a child
depends on a number of factors, including the
child's needs, the needs of other family members,
and the relationship between the parent and child.

Why bother making a will if it can be challenged?

This question is often asked of solicitors when
they are advising a client who wants to exclude
someone.

It is important to understand that:

- without a will you lose any say in how your
assets are distributed, and
- even if a challenge is successful the court does
not disturb a will more than it needs to to
make provision.

Testamentary Freedom – reality or myth?

Testamentary freedom is the idea that a person is free to set out, in a
will, their intentions for the distribution of their assets after death.

- In Australia – if certain people are not adequately provided for they
can make a claim.
- NZ, Canada, UK are similar to Australia.
- In many other countries (eg. in Europe and Asia) there is no
absolute testamentary freedom and forced heirship applies to
decide how a person's assets are shared between spouses and
children, often defined by legislation, or by custom.

Contest between testamentary freedom and testamentary duty

The concept of testamentary freedom was a feature of the 19th century
British empire.

In Australia, NZ and Canada, in the late 19th century, there were cases
where very wealthy men, left their widows and children unprovided for
in their estates. These cases generated public outrage and agitation for
legislative interference with testamentary freedom.

NZ introduced the *Testator Family Maintenance Act* in 1900.

The idea of legislation to ensure proper provision for family members
subsequently spread throughout Australia and eventually to Canada
and the UK.

NSW Family Provision

1916 - *Testator's Maintenance and Guardianship of Infants Act*

1982 - *Family Provision Act*

2009 - *Succession Act*

Over the years the class of persons entitled to make a claim has broadened, eg to include ex nuptial children and defacto partners. All Australian states and territories have family provision legislation. Some states refer, in the legislation, to "*proper maintenance and support*". NSW uses the term "*proper maintenance, education and advancement in life*".

Who is eligible to make a claim?

- a spouse
- a defacto partner
- a child of any age
- a former spouse
- a grandchild who has been dependent on the deceased
- a person who was a member of the same household with and dependent on the deceased
- a person who was living in a close personal relationship with the deceased at the time of death.

Eligible is not the same as entitled

Just because an adult child is an eligible applicant does not mean that he or she will be entitled to share in the estate.

The Court may decide to make provision for an adult child, but it may also decide not to disturb the deceased's will.

Relevant factors include

- the child's relationship with the deceased parent
- the deceased's obligations or responsibilities to the child
- size of the estate
- financial resources and needs of the child
- financial circumstances of child's spouse
- any physical, intellectual or mental disability the child may have
- the child's age
- any contribution by the child to the parent's assets
- any provision made for the child by the parent
- any evidence of the testamentary intentions of the parent, including evidence of statements made by the parent
- whether the child was dependant on the parent before the parent's death,
- whether any other person is liable to support the child, the child's character and conduct

The Court's role

It is **not** the Court's role to:

- completely rewrite the will to make it fair
- ensure equality between siblings
- correct hurt feelings or sense of wrong

It **is** the Court's role to:

- ensure that adequate provision is made for proper maintenance and support

So how much is adequate provision for an adult child?

No simple answer – it comes down to what the Court thinks the community would expect.

If the child is financially secure and the estate is small the answer might be zero.

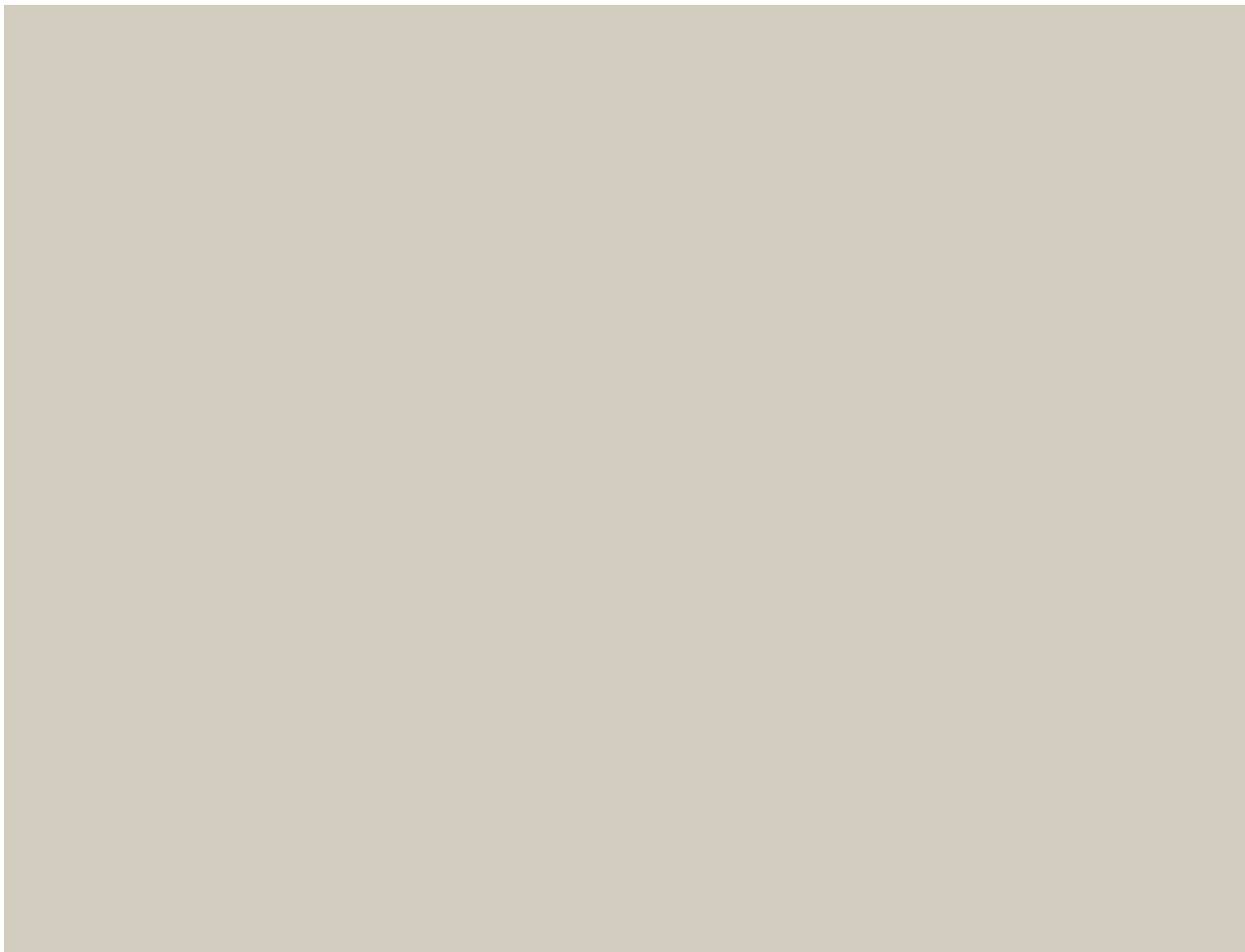
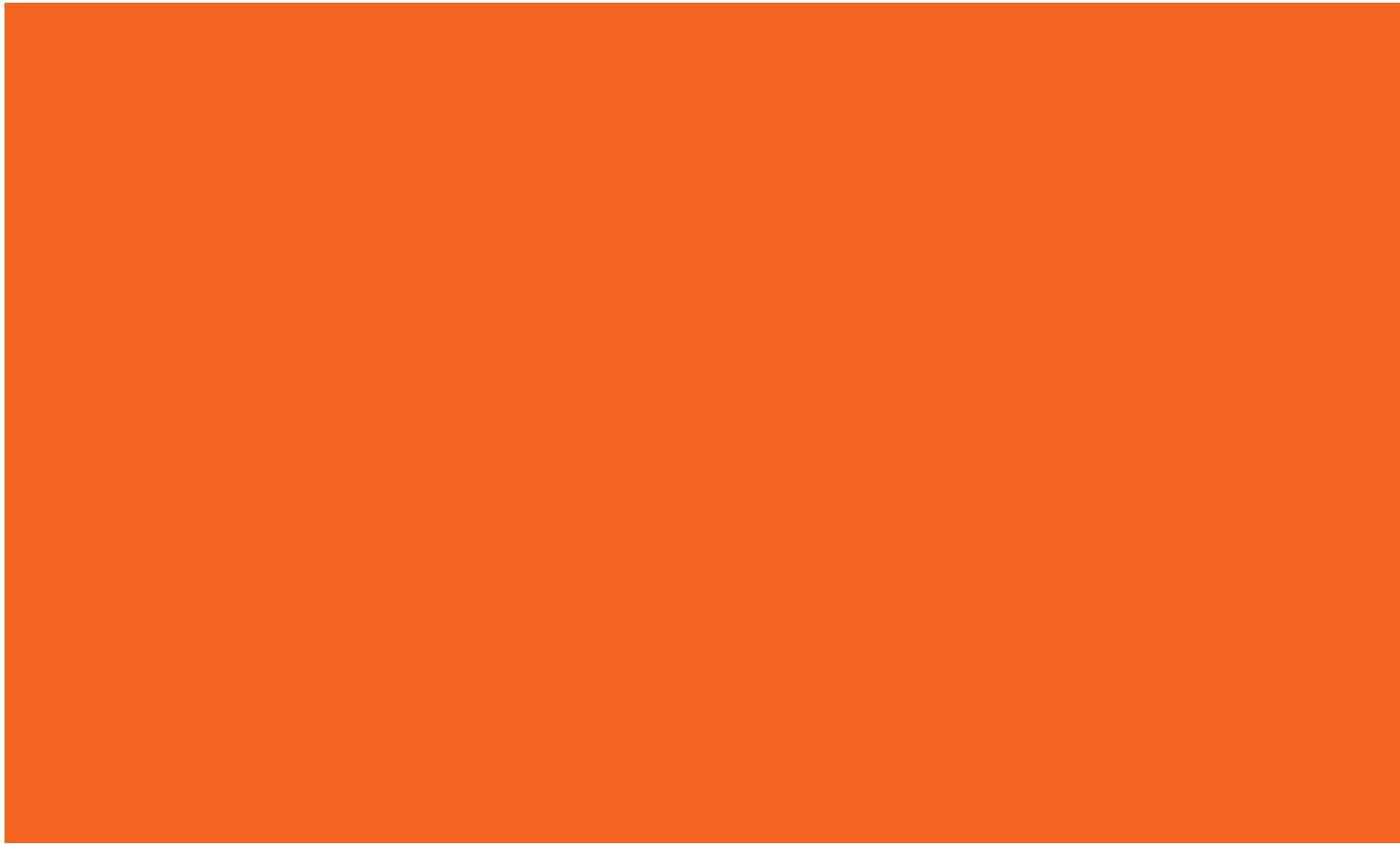
If the child is in financial need and the estate is large the answer might be a great deal.

Summary

You can make a will dividing your estate according to your wishes.

If you do not make provision for an adult child, that child will be eligible to make a claim.

If the Court decides that provision should be made for that adult child it will vary the terms of the will only to the extent necessary to make that provision.





THE LAW SOCIETY
OF NEW SOUTH WALES

**2013
WILL AWARENESS DAY**

SPEAKERS NOTES

Length of presentation:

The Elder Law & Succession Committee (“Committee”) suggests the Will Awareness Day talks run for no longer than 25-30 minutes. Speakers might adopt the approach of providing information about wills in the body of the talk, and then address issues of Powers of Attorney, Enduring Guardianship and other estate planning matters as they arise in questions.

Suggested form of introduction:

The Committee suggests starting the talk by introducing yourself, and your practice. Your introduction might also include something to the effect of the following:

Many people think that making a will is a simple exercise and that it is something that you can do for yourself. With the availability of will kits and online wills it would be easy to be lured into thinking that there is nothing much to it. In fact, there are a lot of things that can and do go wrong with homemade wills, and a small saving on the cost of having a will properly drafted by a solicitor can lead to much bigger problems. As lawyers we see how often the result of a homemade will is that there is delay and uncertainty for the person’s family as well as unexpected and often substantial legal expenses because the problems cannot be sorted out without Court proceedings.

This presentation deals with wills in general and some of the pitfalls of homemade wills in particular. The information to be covered includes:

1. What is a will and why is it important to have one?
2. Some of the pitfalls of home-made wills
 - problems with signing and witnessing
 - problems with identifying who gets what
 - problems with failing to give away everything
3. Conclusion

I intend to speak for about XX minutes, and leave time at the end for your questions.

Background information for the talk

The information provided below is intended to be basic information, and the Committee leaves it up to you to determine the exact content and style of presentation that will be appropriate for your audience. You may not be able to cover all of the material provided below in a 30-40 minute talk.

1. MAKING A WILL

What is a will?

A valid will is a document that distributes the deceased’s property to people or to organisations upon the death of the testator. That document must meet certain formal requirements under the Succession Act 2006 (NSW).

Do I need a will?

A will is required when a person wants his or her property to be dealt with in a particular way upon his or her death. In the event that a person dies without a valid will, his or her property is distributed

according to the legislative rules of intestacy, and the order in which next of kin take may not be the way that person would have liked his or her estate distributed. For example, if a person dies without a will leaving a de facto spouse and children from a previous marriage the rules of intestacy provide for a formula to work out how much goes to the de facto spouse and how much to the children. The formula does not take into account the needs of the different family members or the quality of their relationship with the deceased person.

Dying without a valid will can cause particular problems if the person leaves dependants who are not covered by the intestacy provisions. However, even if family members or dependants, such as a de facto spouse, are not provided for in the deceased's will, they may still have a claim against the estate under the Succession Act or if the rules of intestacy do not adequately make provision.

As well as setting out who is to receive your property after death, your will also nominates your executor – this is the person who will stand in your place after your death and make sure that your will is carried out properly. If you have young children you may also use your will to nominate someone to be their guardian.

Do I have to have a solicitor?

It is possible to make your own will without consulting a solicitor but it is not recommended. As lawyers we see how often homemade wills lead to significant and expensive problems for family members after the will maker has died. Some of the common problems that come up with home-made wills include problems with signing and witnessing, problems with identifying who gets what, and problems with not effectively giving away all of the will maker's assets.

2. WHAT PROBLEMS CAN ARISE WITH HOME-MADE WILLS?

A. Problems with signing and witnessing

Even though will kits usually contain detailed instructions about how a will needs to be executed it is not unusual for these instructions to be overlooked or misinterpreted which can create real difficulties for the family after the person has died.

The formal requirements for executing a valid will are set out in section 6 of the Succession Act 2006. To be formally valid a will has to be in writing and signed by the will maker or (if for some reason the will maker is unable to sign) by someone else at the direction of the will maker. The signature of the will maker must be made or acknowledged in the presence of at least two witnesses who are both present at the same time, and at least two of those witnesses must sign the will in the presence of the will maker.

If the formal requirements have not been met, then the document can only stand as the person's will if the Court is prepared to exercise its power to dispense with the formal requirements. It will usually be up to the executor to bring an application to the Court to seek an order dispensing with the formal requirements, and it will be necessary to serve documents on any people who might have an interest in the estate if the document is or is not the person's will. This may involve checking for earlier wills and tracking down people who would be entitled to inherit if the person died without a will at all. Evidence needs to be put before the Court to show that the document contains the person's testamentary intentions and that the person intended it to form his or her will even though it was not properly executed. Even if there is no-one arguing that the document should not be the person's will the process can be lengthy and expensive compared to a situation where there is a validly executed will. If there is a beneficiary under an earlier will or a family member who wishes to argue that the document should not be the person's will then the expense and delay will be considerably more.

Some examples of situations where problems with signing and witnessing can come up with home-made wills include the following:

1. A will kit form is filled out but not signed or witnessed. This is quite a difficult scenario for the Court to assess, as it might be argued that the document was just a draft that the will maker was considering but that it was not intended to be his or her will until it was actually signed and witnessed. An example is Estate of Smith [2009] NSWSC 907. A stationer's form of will was completed in the hand writing of the deceased. It was not signed or witnessed, and it was only because the deceased made statements that he had made a will that the Court concluded that the document was a intended as the deceased's will. A Court hearing was required even though the Court's conclusion was not opposed by all persons interested in the deceased's estate.
2. The will is signed by the will maker and two witnesses but there are alterations that have been made to the will after it was signed and witnessed. In this instance there might be a valid will but there is a question over whether the alterations are to be treated as effectively changing the terms of the will.

This problem presented itself in In the estate of O'Dell [2010] NSWSC 678. Between January 2005 and about February 2008 Deborah O'Dell once attempted to make, and twice attempted to change, a home-made will. She died on 28 November 2008. On 25 June 2010 the Supreme Court decided that all her efforts had failed. The problem started when she was given a will form by a funeral director when she made a funeral plan. She filled it in by hand and she didn't sign before two witnesses – she signed before one person and a second person later added her name as a witness. After the birth of her second grandchild, Deborah changed the will, by handwritten additions. Those alterations created these potential problems:

- a. The changes were not signed, initialed or witnessed,
- b. An alteration provided that “money to be given evenly to LJOD, DJOD & invested till age 25”. There was no amount specified as “money”. LJOD and DJOD were not defined but were presumably her grandchildren.
- c. To a gift “of money: from Life Insurance” was added “\$100,000 – put any extra” but nothing indicated the beneficiary of that gift or the meaning of “extra”.

About nine months before her death, Deborah made further changes. These changes contained further problems:

- d. The changes were not signed, initialed or witnessed.
- e. After the reference to the house “NOT TO BE SOLD”, Deborah wrote “If sold invest money either of the kids – Mick, Mel can live in”. What did this mean?
- f. Deborah added a gift: “Any – Super – other – finance & pay any debts”. What did this mean?
- g. She added to the gifts from the life insurance: “DJO \$50,000.00 Mick”, but there was nothing to indicate its meaning.
- h. In a gift of the remainder of the estate, Deborah made the changes in italics: “As to 1/3rd DOD Mick % to son – MJ O'Dell Decoda Jay O'Dell”. There was nothing to indicate the meaning of this change.

The judge in the Supreme Court made these findings:

- i. the deceased intended the will form, without alterations, to constitute her will. This allowed for a dispensation from the formal requirement of two witnesses.
- ii. the deceased did not intend either of the alterations to constitute her will.
- iii. because the alterations showed the deceased's dissatisfaction with the original, unaltered will form, the alterations constituted a full revocation of the will contained in the will form.
- iv. Deborah O'Dell died intestate, ie without a valid will.

A similar problem arose in *Newman v Brinkgrieve*; the estate of Verzijden [2013] NSWSC 371, this time with 'alterations' contained in notes that were separate to and made after the will. The deceased made hand written notes whilst in Hospital indicating a wish to change the writer's will. The notes were signed, but contained alterations and crossings-out. The court reflected that "It is always difficult to assess the intentions of a person who has left no specific directions, or indications, relating to his, or her, will. All that the Court can do, in those circumstances, is to look at such facts as are available, in order to determine what was more likely to have been intended by the deceased in respect of the document concerned". Ultimately the court considered that the alterations showed that the writer took care to ensure that the notes correctly reflected her wishes, and that that fact with others were sufficient to constitute the notes an amendment to the writer's earlier (2004) will.

3. The will refers to a list setting out who is to receive what, but the list has been changed since the will was made and the list has not been signed and witnessed. Again there is a problem with determining whether the person intended the latest version of the list to form part of his or her will. In *Slack v Rogan* [2013] NSWSC 522 the will-maker signed her solicitor's note saying "I do not want to change my will". After a four day contested hearing the court found that by that note the deceased changed her will by reviving an earlier will which had subsequently been revoked. The position may be different if the note was made before the will and is referred to in the will: *NSW Trustee and Guardian v Hansey; estate of Skala* [2012] NSWSC 872.
4. The will is signed by the will maker and two witnesses, but one of the witnesses is a family member who is a beneficiary under the will. In this instance the will is formally valid, but the witness-beneficiary rule operates to make any gift under the will to the person who witnessed it invalid. Unless all the other beneficiaries agree (which may not be possible if any of the beneficiaries is under 18 or suffers from a disability) or an application is made to the Court for an order that the will maker knew and approved and freely gave the gift, then the beneficiary who witnessed the will misses out.

In all of these situations there will be delay and additional expense which will usually come out of the estate of the deceased person, reducing the amount which can be given to the persons intended beneficiaries.

B. Problems with identifying who gets what

A solicitor drafting a will uses language carefully to ensure that the meaning is clear and unambiguous. It should be possible for someone who knows nothing about the will maker's circumstance to understand exactly what is meant.

When someone writes their own will, they may use language which makes sense to them at the time of writing the will but which may be capable of being interpreted in more than one way.

For example, someone drafting their own will may say ‘I give XX to my family’ thinking that it is obvious exactly which people are meant and the proportions in which the gift should be shared between them. In fact, of course, it is not at all obvious. When the wording in a will is ambiguous, the executor generally has to make an application to the Court to have the Court determine how the will should be interpreted. This is called a construction suit and there are many construction suit cases which concern home-made wills. In a construction suit the Court will require that any people who might be affected by the way that the will is interpreted be served with notice of the Court proceedings and given an opportunity to appear in Court and argue why it should be interpreted one way or another. As well as the legal costs involved this takes time and can cause disharmony among family members.

Sometimes construction suits involve questions over who the beneficiaries are, and sometimes they involve questions over what property the beneficiaries are entitled to.

Some examples of situations where home-made wills have led to construction suits include:

1. A home made will left all the will maker’s assets to ‘my nieces and nephews’. The will maker was survived by nieces and nephews who were the children of her full brothers and sisters, but she was also survived by children of her half brothers and half sisters, and also by children of the brothers and sisters of her de facto partner. The question was whether all or only some of these people were included in the expression ‘my nieces and nephews’.

In this case (*Parry v Haisma* [2012] NSWSC 290) after hearing evidence the Court decided that the full and half nieces and nephews were included but not the nieces and nephews of the de facto partner, but it always depends on the circumstances of each will maker and so the same expression might be interpreted differently in a different will.

2. A home made will contained a gift of \$10,000 to ‘the Blind Dogs’. There were at least two organisations that might have been the intended beneficiary – the Guide Dog Association of New South Wales and ACT and

Seeing Eye Dogs Australia and an application had to be made to the Court to decide who was entitled to the gift. This particular will also contained a number of other clauses that needed construction by the Court (*Kay v South Eastern Sydney Area Health Service* [2003] NSWSC 292).

3. A home-made will left the will maker’s house to be sold and the proceeds divided between ‘Lisette, John, Matthew and my daughter Michelle and her husband John’, but the will did not specify the proportions to go to each of the named beneficiaries. If the proceeds were to be divided equally, the question was whether there were to be four equal shares or five, ie. Should Michele and her husband receive one quarter or one fifth each. In this case (*Rudge v Link* [2008] NSWSC 1104) even though Michelle’s husband agreed that he should not receive a separate share it was necessary to go to the Court to have the question determined. Again this home-made will had some other problems, including the fact that it did not include an effective gift of residue.

C. Problems with failing to give away everything

One problem which is quite common with home-made wills is that not all of the will maker’s property is effectively dealt with. When this happens, the estate or part of it may be dealt with in accordance with the rules of intestacy, which effectively can mean that the person might as well not have made a will at all.

One example of where an intestacy can arise from a home-made will is where the will maker gives away specific assets, such as a house and a bank account, but does not say who is to receive anything else they may own.

If the person still owns the house and the bank account at the time of death then those gifts will be valid but anything else will pass under the rules of intestacy to next of kin. If the house has been sold at the person's death and the bank account closed, then there may be no effective gifts under the will at all.

Another example of where an intestacy can arise from a home-made will is where the will includes a gift to a person but does not say who is to receive it if the person dies before the will maker. The will might say, for example 'I leave everything to my husband' but if the will does not specify what should happen if the will maker's husband dies first then the rules of intestacy will decide who receives the will maker's assets.

A will prepared by a solicitor will include a residuary clause to ensure that there is no intestacy, and will reflect your instructions about who is to benefit if any of your intended beneficiaries dies before you. A solicitor can also provide you with advice about how to deal with assets that may not pass under your will, such as jointly held property, superannuation and assets that are held by companies or in family trusts. With superannuation, in particular, people who make their own wills often do not realise that their will does not govern what happens to their superannuation after they die.

D. Problems with storage and security

Keeping your original will at home can be risky. As well as the possibility of fire, there is the risk that after your death the will may be disposed of either accidentally or deliberately. One example of a homemade will going missing came up in the estate of celebrated Sydney artist Brett Whiteley. He had made a home-made will that he kept in his studio, but when his daughter went to look for the will it was not there, leading to a lengthy and very public court case to decide whether the will had been destroyed by Brett Whiteley with intention to revoke it, or whether there might be some other reason it could not be found (*Whiteley v Clune (No 2)* NSWSC Powell J, unreported, BC 9301902). Another advantage of having a will prepared for you by a solicitor is that the solicitor will generally be able to store the original will securely on your behalf while providing you with a copy for your records.

3. CONCLUSION

Just as you can, if you so choose, re-wire your own home, service your own car or pull your own teeth, it is open to you to make your own will. The real difference with making your own will is that if there is a problem it is not likely to be discovered until after your death when it will be too late for you to do anything to fix the problem. The result is likely to involve additional legal expense - often many times more than the cost of making a will with a solicitor in the first place. As well as additional expenses your family is faced with delay and uncertainty as to how your assets will be distributed.

There are a number of good reasons to consult a solicitor for advice when making a will. Your solicitor will be qualified to handle the intricacies involved in making a valid will. It is usually not an expensive service, and will be far less costly than dealing with the problems that often arise with home-made wills. Your solicitor will ensure that your wishes are translated correctly into a valid will that will be accepted by the Court. Your solicitor can also consider and advise you in relation to potential family provision claims and the protection of vulnerable beneficiaries, as well as other planning documents you may wish to put in place, such as an enduring power of attorney and an appointment of enduring guardian.

PRESENTATION SLIDES



THE LAW SOCIETY
OF NEW SOUTH WALES


The Law Society of NSW

Will Awareness Events 2013

The real cost of home-made wills


Outline of presentation

- What is a will?
- Why should you make a will?
- Home-made wills
 - Problems with signing and witnessing
 - Problems with identifying who gets what
 - Problems with failing to give away everything
 - Problems with storage and security
- Sorting out problems with home-made wills
 - Cost, delay and uncertainty of outcomes
- Conclusion




What is a will?

- A will is a document which expresses a *competent person's* wishes about the distribution of his/her *testamentary assets* on death.
- It may also:
 - Nominate an executor
 - Appoint a trustee
 - Appoint a testamentary guardian
 - Express wishes for the disposal of his/her remains.




What is a will?

- To be valid, a will has to meet certain formal requirements in the way that it is signed and witnessed
- If a document is not validly signed and witnessed as a will, it can only be a will if the Court makes a determination that it was intended to form the person's will even though it was not validly signed and witnessed



Why make a will?

- If you do not make a will:
 - The laws of intestacy will decide how your property is divided and who will receive it after death
 - Some of the people you would like to provide for may receive nothing or may end up applying to the Court for provision from your estate
 - You will not have a say in who is to be trusted to deal with your assets after death (because the court appoints the administrator) or, if you have children under 18, who should be their guardian



Do I have to have a solicitor?

- It is possible to make your own will but it is not recommended.
- Problems often arise with home-made wills which can lead to delay, uncertainty and legal costs.
- The cost of consulting a solicitor to make your will in the first place is likely to be much less than the cost of dealing with problems which may arise from home-made wills.



Problems with signing and witnessing

- To be formally valid:
 - A will must be in writing
 - A will must be signed by the will maker or by someone else at the will maker's direction
 - The signature of the will maker must be made or acknowledged in the presence of at least two witness who must sign the will in the presence of the will maker
 - The two witnesses must both be present at the same time to witness the will



Problems with signing and witnessing

- With home-made wills the formal requirements may not be strictly complied with.
- If the document is unsigned or not adequately witnessed, or there is a problem with the way the document was signed or witnessed, the Court has to make a determination as to whether the document is the person's will.



Problems with signing and witnessing

- Examples of problems with home-made wills:
 - Will kit form filled out but not signed or witnessed
 - A will has been altered and the alterations have not been signed and witnessed
 - The will refers to a list but the list has been changed since the will was made and the list is not signed or witnessed
 - One of the witnesses is an intended beneficiary under the will



Problems with identifying who gets what

- In a will it is important to use language that is clear and unambiguous.
- It should be capable of being understood by someone who does not know anything about the will maker's circumstances.
- If the wording in a will could have more than one possible meaning an application needs to be made to the Court to decide how the will should be interpreted.



Problems with identifying who gets what

- Examples of problems from home-made wills:
 - Gift to 'my family'. Who is 'my family'? How is it intended to be shared between them?
 - Gift to 'my nieces and nephews'. Does this include children of half brothers and half sisters? Does this include nieces and nephews of a spouse or de facto partner?
 - Gift to 'the Blind Dogs'. There is no organisation of that name.



Problems with failing to give away everything

- Sometimes with home-made wills, the will maker will:
 - Give away the assets owned when the will was made, eg. a house and a bank account, but will not say who is to receive anything else they may own when they die; or
 - Leave everything to one person, eg. their spouse, but fail to say what should happen if that person dies before them.
- Some assets – eg. jointly held property, superannuation – may not pass under the will and legal advice may be needed to ensure they pass as the will maker would want.



Problems with storage and security

- Keeping an original will at home can be risky
- If the will cannot be found after death, it may be assumed that the will maker destroyed it intending that it be revoked. It may be necessary for the issue to be determined by the Court.
- Solicitors will generally store wills securely, or at least keep a file copy of your will if you want to keep the original at home.



Conclusion

- If you make your own will, be aware that if there are any problems with the will:
 - The problem may not be discovered until it is too late for you to fix it
 - It may be necessary to make an application to the Court to resolve the problem
 - There will be delay in relation to sorting out your affairs after death
 - There will be uncertainty about how your estate will be distributed
 - Your estate is likely to have to pay substantial legal costs in order to resolve the problem
- The real cost of a home-made will can be many times more than the cost of consulting a solicitor about a will in the first place



THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney
ACN 000 000 699 ABN 98 696 304 966

T +61 2 9926 0333
F +61 2 9231 5809
www.lawsociety.com.au