

Could there be an informal will?

When a person dies the Executor named in the Will is responsible for ensuring that the terms of the Will are carried out. If probate is required, an application is made to the Supreme Court of NSW for probate of the Will.

The existence and location of any Will should be identified quickly after a person dies. If a Will is not readily located in the deceased's personal papers or in the hands of the deceased's solicitor, accountant or bank, thorough and extensive searching is required. If no Will is found the person will be presumed to have died intestate.

However it is vital to also consider the *possibility of the existence of any informal Will*.

The strict statutory interpretation of a Will as being a document formally executed before witnesses *need not apply* in all situations. There is provision under the Wills, Probate & Administration Act for a document that appears to contain the deceased's wishes to be considered as their Will even if this document was not a validly executed Will. The Court must be satisfied:

- That first of all there must be a 'document'
- This 'document' must contain the testamentary intentions of the deceased, and
- The deceased did intend that 'document' to be his or her. It should be noted that this informal document may also amend or revoke a Will.

If a document is accepted by the Court as an informal Will, this can resolve the situation where the estate would otherwise be administered as an intestacy. The beneficiaries in the informal Will accepted for Probate would then inherit instead of the beneficiaries listed in the statutory order of beneficiaries on intestacy.

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Consider the following cases where an informal Will was submitted to the Court:

- The deceased had written his 'will' on a plasterboard wall. What amounts to a *document* is not necessarily a formal piece of paper. The Court accepted the wall within the definition of a document and this informal Will was admitted to probate.
- The 'document' had been signed by only one witness and could not be produced in Court because it had been lost. The Court accepted evidence that the document had existed and being lost was not a bar to being admitted to probate. The Court further accepted that the lost informal Will had been intended to operate as the deceased's Will.
- The deceased left a written note in 2004 when he was very ill leaving everything to his wife. He had signed the note and printed his name. He died the following day. Previously he had made a formal Will in 1999 appointing different executors and beneficiaries. The informal Will was accepted by the Court as representing the last testamentary wishes of the deceased in preference to the 1999 formal Will.

This area of succession law is very complex. Inheritance rights are often at issue. If you believe there may exist a testamentary 'document', no matter how unconventional this may be, you may wish to contact us immediately for specific advice regarding the estate.

The information contained in this article is provided by way of information only and not intended to be legal advice. You should always obtain individual legal advice.

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