



Inspecting a Will

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Overview

Since the *Succession Act 2006(NSW)* introduced a provision that certain people are entitled to access Wills, even before Probate is granted and without court order, advisers have to ensure that there are processes in place to promptly and properly comply with their obligations to provide access to Wills.

What follows is an overview of issues to consider when on death a prospective beneficiary wishes to review a Will before Probate.

Access to a Will upon Death of the Deceased Person

A person who has possession or control of a Will of a deceased person must allow certain persons to inspect or be given copies of the Will¹, which includes the final unrevoked Will, any previous Wills, any documents purporting to be a Will, as well as a copy of any such Will or document².

The new statutory right created under the Succession Act may expand the number of persons seeking access to a Will:

- the right now applies before probate - a person may apply for access if there is a potential dispute about who should apply for probate or administration, such as if there is a possibility that the Will is unclear (for example, a named executors may have died);
- the statutory right will make it administratively easier to inspect or obtain copies of the Will, particularly in country communities;
- the right applies to a Will even if probate is not granted, so it will apply to small estates; and
- the right applies to previous Wills, even if they have been revoked. This led the Public Trustee's principal legal officer to say that the new provisions "may provoke in those practitioners who provide a repository service to clients a rethink on whether or

not they physically destroy revoked Wills"³.

Who can apply to Inspect a Will?

The classes of people who can apply to inspect or obtain copies of the Will are:

- any person named or referred to in the Will, whether as a beneficiary or not;
- any person named or referred to in an earlier Will as a beneficiary of the deceased person;
- the surviving spouse, de facto partner (whether of the same or the opposite sex) or issue of the deceased person;
- a parent or guardian of the deceased person;
- any person who would be entitled to a share of the estate of the deceased person if the deceased person had died intestate;
- any parent or guardian of a minor referred to in the Will or who would be entitled to a share of the estate of the testator if the testator had died intestate;
- any person (including a creditor) who has or may have a claim at law or in equity against the estate of the deceased person;
- any person committed with the management of the deceased person's estate under the NSW Trustee and Guardian Act 2009 immediately before the death of the deceased person;
- any attorney under an enduring power of attorney made by the deceased person; and
- any person belonging to a class of persons prescribed by the regulations.

Person seeking inspection and copies of a Will

Solicitors acting for potential beneficiaries and creditors of deceased estates may also consider whether it is prudent for their client to request a copy of the Will, before probate is granted.



A person eligible to make a family provision claim⁴ may want to promptly discover whether the deceased has made adequate provision for them, so they can consider whether they should make a claim. A family provision claim must be made within 12 months of the date of death unless the court gives leave⁵.

A person seeking to challenge the Will or the appointment of certain persons as executors may want to look at the face of the Will to see if there are any grounds to challenge the Will and/or the appointment before probate is granted.

A person seeking to challenge the Will on grounds of testamentary capacity or undue influence may wish to access previous Wills to see if the last unrevoked Will is consistent with previous Wills. The person can now do so without starting proceedings and issuing a subpoena.

A person who is entitled on intestacy may want to check whether the Will has a valid residuary provision.

A creditor may wish to know whether the deceased had particular assets and to whom the assets Will be distributed.

Person in possession of a Will

Section 54 of the *Succession Act 2006* provides that the person who applies to inspect or obtain a copy of a Will must do so at their own expense⁶.

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¹ s.54(2), *Succession Act 2006*.

² s.54(1), *Succession Act 2006*.

³ R. Pollard, "Testamentary Intentions: New Laws on wills and probate commence", *LSJ* March 2008, p.53.

⁴ Chapter 3, *Succession Act 2006*.

⁵ s.58(2) *Succession Act 2006*.

⁶ s.54(2) *Succession Act 2006*.

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