

Was it a Will... ...or was it Intestacy?

Was there a Will...or was it an intestacy? First of all let us consider what amounts to an intestacy and what the requirements are for a valid Will?

If a person dies without leaving a valid Will the rules of intestacy apply. This means the Court grants Letters of Administration and appoints an Administrator to pay debts and collect and distribute the estate according to the intestacy formula.

The requirements for a valid Will include:

- In writing this can be either handwritten, typed or printed;
- Signed - your signature is required, and any alterations made before you sign must be initialled by you and your two witnesses;
- Witnesses - two must be present when you sign your Will and they must sign in your presence, but they do not have to be present together at the time they sign.

If a Will is not made in this way it may not be enforceable.

However there is provision made in the law for the Court to recognise a document as a person's Will even though it has not been validly executed as set out above. If the document appears to contain a deceased person's wishes and the Court is satisfied on the evidence before it that this is what the person intended, then the document may be accepted as the deceased's Will.

Let us consider the facts of a 2004 NSW Supreme Court case, *Phillpot v Olney*.

The deceased, Tracey Aubin died as a result of suicide in 2002. Two documents were found near her when she died. Both were handwritten by the deceased and requested everything she owned be given to her godson, Callum. One of the documents gave asset details, asked for her sister Janelle Phillpot, (the mother of Callum) to organise her affairs and was signed.

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The sister asked the Court to accept both, or either one of, these informal documents as the Will of the deceased even though they were not validly created as a Will. It was confirmed the deceased had left no Will. The deceased's husband alleged the deceased lacked testamentary capacity at the time she made these documents.

If the Court accepted either of the informal documents to Probate the godson would claim as beneficiary and the deceased's husband would have made a claim on the estate under the terms of the Family Provision Act. If the Court rejected the informal documents the deceased died intestate, without a Will. Under the rules of intestacy as there were no children, the whole of the estate would have passed to the deceased's husband. Joint property would have passed to him by survivorship as well.

The more detailed informal document on its face may have satisfied the Court. However any trial proceedings would have revolved around the issue of whether or not the deceased had the necessary legal capacity to make the document at that time. Suicide was noted as not giving rise to a presumption of testamentary incapacity.

The Court found that the circumstances surrounding the deceased's suicide raised a substantial doubt as to whether she had the capacity to comprehend the claims on her estate to which she should have given effect, including the claim of her husband.

The trial would have involved painful evidence on the part of the claimants to resolve conflicting evidence. The parties agreed to orders by consent. The sister's application to have the informal documents admitted to probate and the husband's cross-claim of a FPA claim were dismissed. The godson would receive a payment and certain personal items of the deceased would be given to the sister. In consequence of the intestacy, Letters of Administration were granted to the deceased's husband.

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