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LAWYERS



ESTATE LITIGATION

Statutory Wills

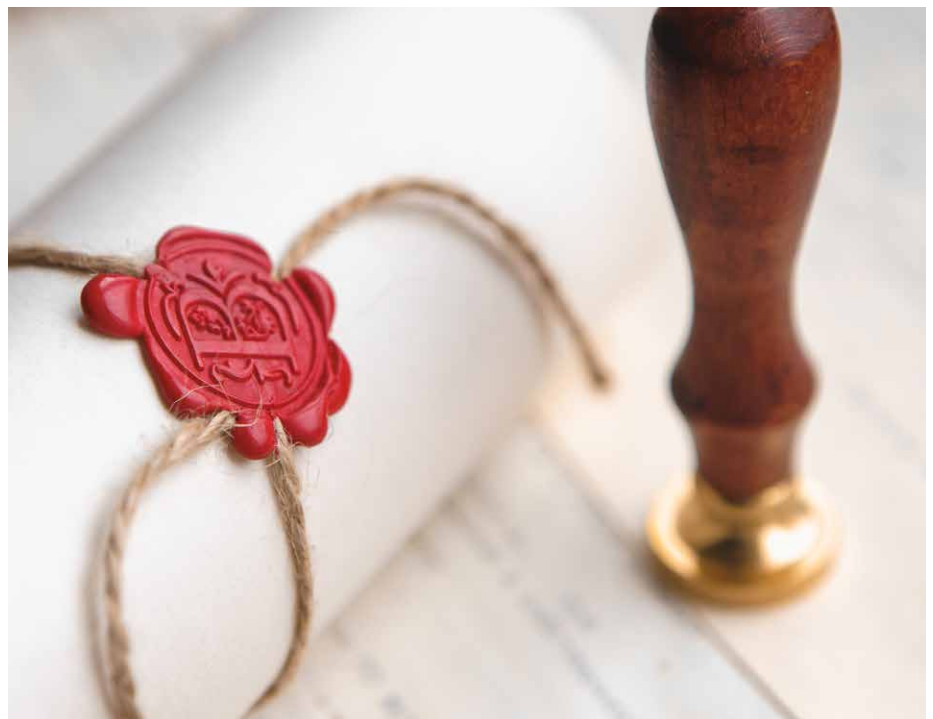


A Statutory Will application is a formal process that, if successful, can provide assurance to minors or those who lack capacity and their families, ensuring that their Will-making intentions are fulfilled.

What is a Statutory Will?

A Statutory Will is a Will made by a Court on behalf of a person that does not have the legal capacity to make a Will by themselves. Each State and Territory has enacted legislation to allow the Supreme Court in each State and Territory to make, alter or revoke a Will on behalf of a person that does not have capacity.

A person must have what we call “testamentary capacity” (that is, a person’s capacity to make, alter or revoke a Will) in order to make a valid Will. Where a person does not have testamentary capacity, a Court can be called upon to make a Will for the person if the proposed Will is a Will that the Court considers would reflect the intentions of that person if they had capacity, and the circumstances are appropriate.



Who can apply for a Statutory Will?

The general approach in the legislation in each State and Territory is that any person can bring an application for a Statutory Will, provided that leave (permission) is first obtained from the Court. There are no express restrictions on who can bring an application. However, there is a requirement that the court must be satisfied the person bringing the application is an “appropriate person” to make the application. Successful applications have been brought by:

- the financial manager or administrator of the person without capacity;
- a solicitor who has acted for the person without capacity; and
- a guardian or a family member of the person.

The fact that the person bringing the application might benefit from the proposed Statutory Will is not usually an impediment to them making the application. However, the Court will exercise caution in this situation.



Applying for a Statutory Will

A Statutory Will application should be commenced in the Supreme Court in the State or Territory where the person lacking capacity resides and holds their assets.

A Statutory Will application is a complicated Court application and it is recommended specialised legal advice is obtained in order to ensure compliance with the complex Court process and rules.

Can I contest a Statutory Will?

Whilst a Statutory Will can be contested, it would be extremely unlikely that this would occur.

One of the matters the Court will consider in making a Statutory Will is the likelihood of an application being made for a family provision order in relation to the estate of the person. This factor is important and is considered by the Court in its determination of whether it is appropriate to make an order authorising the making of a Statutory Will. If the making of a Statutory Will is likely to provoke a successful family provision claim, it may not be appropriate for the Court to authorise the making of the Statutory Will in those circumstances. Instead, the Court is likely to consider how to prevent the likelihood of a family provision claim at the time the Will is made.



What kind of evidence is considered by a Court?

The 'core test' requires that, in order to grant a Statutory Will, the Court must be satisfied that the proposed Will is one that would reflect the intentions of the testator if they had capacity to make their own Will, after considering all of the evidence. The evidence considered by a Court is as follows:

- the reasons for making the application;
- evidence of the lack of testamentary capacity of the person;
- an estimate, formed from the evidence available to the applicant, of the size and character of the person's estate;
- a draft of the proposed will, alteration or revocation in relation to which the order is sought;
- any evidence available to the applicant of the person's wishes;
- any evidence available to the applicant of the likelihood of the person acquiring or regaining testamentary capacity;
- any evidence available to the applicant of the terms of any will previously made by the person;
- any evidence available to the applicant of any persons who might be entitled to claim on intestacy;
- any evidence available to the applicant of the likelihood of an application being made for a family provision order in relation to the person;
- any evidence available to the applicant of the circumstances of a person for whom provision might reasonably be expected to be made by a will by the person in relation to whom the order is sought;
- any evidence available to the applicant of a gift for a charitable or other purpose that the person might reasonably be expected to give by will;
- any other facts of which the applicant is aware that are relevant to the application.



The process to help you make an application



STEP 1

Taking the first step.

If you would like us to help you protect the interests of an individual who does not have capacity to write their own Will, there are a number of ways to contact us:

- Call our office on 1800 621 071
- [Click here to book an appointment online now](#)



STEP 2

Initial consultation.

Our Estate Litigation Department Manager will contact you to discuss your enquiry further and arrange an obligation-free telephone consultation with one of lawyers.



STEP 3

Proceeding past consultation.

After the consultation, if you require legal representation we will send you a costs agreement outlining the work we will do on your behalf and our proposed fees. On approved cases we can arrange 'deferred fee' or 'No Win, No Fee' payment arrangements.

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Helping people and changing their lives for the better.

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Thur: 7.30am - 5.30pm
Fri: 7.30am - 5.30pm
Sat: Closed
Sun: Closed

Robina Town Centre

Shop 4135, Robina
Town Centre,
Robina
PO BOX 4358 Robina
QLD 4230

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Mon: 8.30am - 5.00pm
Tue: 8.30am - 5.00pm
Wed: 8.30am - 5.00pm
Thur: 8.30am - 9.00pm
Fri: 8.30am - 5.00pm
Sat: 9.00am - 12.00pm
Sun: Closed

Southport

Suite 10, Level 10,
36 Marine Parade
(Commercial Tower),
Southport QLD 4215

Open:

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Sat: Closed
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Kingscliff

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Mon: 8.30am - 5.00pm
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Contact Attwood Marshall Lawyers on **1800 621 071** or email info@attwoodmarshall.com.au to speak to one of our experienced lawyers today.



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