

The Law Handbook

YOUR PRACTICAL GUIDE TO THE LAW IN NEW SOUTH WALES

15th EDITION



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Wills, Estates and Funerals

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Wills

[40.10] A will is a written document that sets out how a person wants their assets (their *estate*) divided after their death.

The law about wills affects people when they make their own will and when they are managing the affairs of someone who has died.

In both cases, there are many legal requirements to be met.

This chapter is not detailed enough to be a do-it-yourself guide to will-making.

Making a will

[40.20] Legislation

Like most other legislation in Australia, succession law differs from state to state. In NSW, the legislation dealing with the formal requirements of making a will is contained in Ch 2 of the *Succession Act 2006* (NSW), which commenced on 1 March 2008.

The *Probate and Administration Act 1898* (NSW) applies (with some exceptions) to wills made before 1 March 2008 and to the administration of estates. It was anticipated that the provisions relating to the administration of estates would be incorporated into the *Succession Act* over time. That has not happened so far.

Chapter 3 of the *Succession Act* deals with family provision matters since 1 March 2009 (see [40.310]).

Chapter 4 of the *Succession Act* deals with intestacy (dying without a will) since 1 March 2010 (see [40.180]).

[40.30] Why make a will?

Everyone over 18 should have a will. It is the only way to make sure that your estate is distributed in the way you would like, and that this is done as quickly and cheaply as possible.

A will can also make life much easier for family and friends after your death.

When someone dies, all existing arrangements with or on behalf of that person – for example, withdrawals from accounts or payment of bills under a power of attorney – usually cease. Accounts in the person's sole name are likely to be frozen on their death, except to allow payment of funeral expenses, and in some cases, the probate/administration filing fee may be withdrawn by a cheque payable to the Supreme Court.

A will may make it easier for beneficiaries to gain access to funds in an estate, particularly a small estate where probate may not be required.

Same-sex couples

It is especially important for lesbians and gay men to have a will. Although legislative changes allow same-sex partners to share in the distribution of an estate where there is no will, it may still be difficult to prove that the relationship was a *de facto* relationship (see Chapter 34, *Same-sex Couples and Their Families*).

[40.40] Who can make a will?

A will made by a minor (a person under 18) is not valid unless:

- it is made in contemplation of a marriage that takes place; or
- the minor is married.

The court has approved it under s 16 of the *Succession Act*. The registrar must be one of the witnesses to a court authorised will for a minor and it must be deposited with the registrar after execution, but a failure to do so will not invalidate the will.

Mental capacity

Will-makers must have the mental capacity to know who their family is, the assets they own, and to be able to make decisions about how to distribute their property according to their own wishes. However, court-authorized wills may be made for people lacking testamentary capacity. Under ss 18–26 of the *Succession Act*, the court may, on the application of any person, authorise that a will be made, altered, or partially or fully revoked on behalf of a person lacking capacity either through

immaturity or a particular incapacity. The person on behalf of whom the application is made must be alive at the time the order is made. The will, when executed, must be deposited with the registrar, but a failure to do so will not invalidate the will.

See Chapter 16, Disability Law, for more about will making for people with intellectual disability or mental illness and providing for a person with intellectual disability.

[40.50] Who can draft a will?

There are no formal requirements about who can draft a will. You can write one yourself (see Example of a simple will at [40.70]). However, the will must be signed and witnessed properly, otherwise your executor may have difficulties when applying for probate (see [40.60]).

In practice, most people consult lawyers about making wills and administering estates.

Unless your will is very simple, it is best to use a lawyer, the NSW Trustee and Guardian or a private trustee company.

The NSW Trustee and Guardian

The NSW Trustee and Guardian (NSW Trustee) is a NSW government body set up under the *NSW Trustee and Guardian Act 2009* (NSW). It commenced operation on 1 July 2009 merging the Public Trustee and the Protective Commissioner. Its main business is drafting wills and administering estates.

Drafting wills

The NSW Trustee now charges to make a will in certain circumstances and allows you appoint it to act as the executor of your estate or a private person. You should make your own enquiries of the NSW Trustee.

Administering estates

The NSW Trustee administers the estates of people who have:

- made a will with it;
- left no will;
- chosen an executor who does not wish to act.

Private trustee companies

Private trustee companies make wills and administer estates for a fee. They are listed in the *Yellow Pages* under “Trustee services”.

[40.60] Requirements for a valid will

A will should comply with the legal requirements for a valid will, which are found in s 6 of the *Succession Act*. A will is not valid unless:

- it is in writing and signed by the will-maker or some other person in the presence of, and at the direction of, the will-maker; and the signature is made or acknowledged by the will-maker in the presence of two or more witnesses present at the same time; and at least two of those witnesses sign the will in the presence of the will-maker (but not necessarily in the presence of each other);
- the signature of the will-maker or of the other person signing in the presence of, and at the direction of, the will-maker must be made with the intention of executing the will, but it is not essential that the signature be at the foot of the will.

However, s 8 of the Act sets out when the court may dispense with the formal requirements (see Informal wills at [40.120]).

These provisions do not apply to a will made by order of the court under s 18 of the *Succession Act*.

Attestation clauses

An attestation clause in a will records that the formal requirements of making a will have been complied with.

Attestation clauses are not essential. However, it is a good idea to include such a clause in the will to show that the formal requirements were complied with.

Can a beneficiary be a witness?

A beneficiary under a will should not witness the will. If they do, the beneficiary may lose their entitlement under the will (although *Succession Act*, s 10 allows a beneficiary to be a witness in certain circumstances).

Section 10 of the *Succession Act* now allows the spouse of a beneficiary to be a witness.

A person who is unable to see that a will-maker has signed a document cannot act as a witness to a will. That includes someone who is temporarily unable to see (*Succession Act*, s 9).

Wills made overseas

A will made in another country will be accepted in NSW if it is valid under the law of that country.

If the will is not written in English

Wills can be written in any language, but when the will-maker dies a certified translation is required.

If the will-maker does not speak English

If the will is in English and the will-maker does not read or speak English, an interpreter should read it out in the appropriate language, and ask whether the person understands and approves it. The details should be recorded either:

- in an attestation clause (see Attestation clauses at [40.60]) in the will, signed by the interpreter; or
- in a statutory declaration by the interpreter, witnessed by a lawyer or justice of the peace.

Recommended procedures for executing a will

- The will-maker should read the will and make sure they understand and are happy with everything in it.
- There should be two adult witnesses who are not beneficiaries under the will.
- The will-maker should date the will before signing.
- In the presence of the witnesses, the will-maker should:
 - sign the will at the bottom of each page;
 - sign the attestation clause, if there is one (see Attestation clauses at [40.60]);
 - initial any alterations.
- In the presence of the will-maker and each other, each witness should:
 - sign the will at the bottom of each page;
 - sign the attestation clause, if there is one;
 - initial any alterations.

The witnesses should print their names and addresses below their signatures.

Copies of the will, with the names of the will-maker and the witnesses printed on them, should be made and marked "Copy: Original kept at ...".

Points to note

- The copy should not be signed or it may become the "original".
 - The will-maker and the witnesses should all use the same pen as evidence that they were all together when the will was signed.
 - No pins or paper clips should be attached.
 - No alterations should be made to the will after it has been signed.
-

If a will is not formally executed

A document may be recognised as being a will if the court is satisfied (on a range of evidence) that this is what the deceased person intended (see Informal wills at [40.120]). To avoid problems, however, it is strongly recommended that when you make your will you comply with the formal requirements and follow the procedures in the box above.

[40.70] Other considerations

Residuary clauses

The residuary clause covers the distribution of your residuary estate, that is:

- any assets not specifically gifted in the will;
- any gifts that have lapsed (because, eg, the named beneficiary died before or within 30 days of the will-maker).

It is extremely important to have a residuary clause in your will, otherwise your residuary estate will be administered under the intestacy rules (see [40.180]) – which may not be what you want.

What if a beneficiary dies first or within 30 days of your death?

Section 35 of the *Succession Act* states that if a gift is made to a person who dies within 30 days after the will-maker's death, the will is to take effect as if the person died immediately before the will-maker. It is possible to exclude that provision from your will or to lengthen or shorten the 30-day period.

If you leave a specific legacy

Generally, if you leave a specific legacy – for example, a sum of money or a particular asset – to a person who dies before you, or within 30 days, the legacy will lapse unless the beneficiary was a child of the deceased (see below), and the asset will pass under the residuary clause in your will (see above).

If you leave a share of your residuary estate

However, if you leave a beneficiary a share of your whole estate or residuary estate and he or she dies before you, or within 30 days of your death and you have not named a substitute beneficiary, that person's share will be distributed according to the intestacy rules (see [40.180]).

The only exception is if the beneficiary was a child of the deceased will-maker who has living

children, in which case the deceased child's share will pass to his or her children under s 41 of the *Succession Act* and not to the estate of the deceased person as previously happened.

Section 42 states how a gift of residue will be construed. Legal advice should be sought if you have concerns about the wording of a residuary clause in a will.

Property owned by joint tenants

Property owned by the deceased and another person as joint tenants generally goes to the surviving co-owner regardless of a will or the intestacy rules.

If people die at the same time

If two or more people die at the same time and their order of death cannot be determined, the law in NSW presumes that the oldest died first, and the estates are divided accordingly.

Appointing a guardian for children

A parent can nominate someone in their will as the guardian of their children under 18, although a surviving parent generally takes this role initially.

If there is a dispute about who will be the guardian, the court makes the appointment. The court may consider what you put in your will.

Half-sisters and brothers

Reference to a sister or brother in a will generally includes half-sisters or half-brothers.

Appointing an executor

What do executors do?

The executor of a will is responsible for:

- seeing that its terms are carried out;
- applying for probate, if necessary (see Applying for a grant of probate at [40.150]);
- defending the terms of the will if someone seeks a family provision order.

Who can be an executor?

You can choose anyone over 18 to be an executor. Usually one of the beneficiaries is nominated; otherwise it can be a lawyer or other trusted person, depending on the complexity of the estate.

If no executor is named in the will, the court will appoint an administrator.

Payment

You may wish to leave your executor a cash legacy under your will as compensation for the time involved in being an executor. An executor may also apply to the court for payment from the estate for the work they have done.

Where to keep a will

Your will should be easy to find after you die, otherwise the court may presume that you destroyed it and you may die intestate.

Your original will should be in a safe place (such as with your bank or a lawyer, a trustee company or the NSW Trustee), and a copy kept at home among your personal papers with a note saying where the original is. You should also tell your executor where the original is kept.

What to keep with the will

It will make the executor's or administrator's task easier and quicker if you keep with your will:

- a list of your assets, including details of where documents such as insurance policies, passbooks and title deeds can be found;
- a list of people, firms and organisations to be notified of your death (eg, particular relatives or friends, your superannuation fund, clubs you belong to, Centrelink, or the Department of Veterans Affairs).

What is in a simple will?

The sample will in the box below gives some idea of what could be in a straightforward will.

Remember, unless your will is going to be very simple, it is always best to get legal help.

Example of a simple will

This will dated 10 December 2010 is made by me, Malcolm Smith, of 3 Brown Street, Jonesville, New South Wales.

1. I revoke all former wills and testamentary dispositions.

2. I appoint my wife Tamie Smith ("Tamie") executor of my will but if she is unable or unwilling to act I appoint my children Sue Brown ("Sue"), John Smith ("John") and Sally Smith ("Sally") in her place.

3. I give the whole of my estate to Tamie if she survives me by 30 days.
4. If Tamie does not survive me by 30 days I give my whole estate to those among Sue, John and Sally who survive me by 30 days and if more than one in equal shares.

..... [testator signs here]

We saw Malcolm Smith sign this Will and now sign as witnesses in his presence and in the presence of each other ... [witnesses sign here, and print their names and addresses below their signatures]

Changing or revoking a will

[40.80] If the will has not been signed

The will-maker can change the words of the will before it has been signed. The will-maker and witnesses must then sign or initial each change in the margin or near the alteration – otherwise the court may assume the alteration was made after the will was signed and it will not be effective.

[40.90] If the will has been signed

Once a will has been signed, it cannot be altered by crossing out clauses or writing in new ones. Such alterations will have no effect. The only way to update the will is by a codicil or a new will.

Codicils

A codicil is a written document added to a will, which must meet all the formal requirements of a will discussed earlier. It may be easier to make an entirely new will.

The codicil must not contain a clause cancelling previous wills, otherwise it will cancel the will that it is intended to update.

[40.100] Revoking or cancelling a will

Section 11 of the *Succession Act* sets out an exhaustive and expanded list of the means by which a will or part of a will may be revoked. The means are:

- a will made by order of the court under ss 16 and 18 (discussed later);
- marriage to the extent set out in s 12 (see below);
- divorce or annulment of the marriage, but only to the extent set out in s 13 (see below);

- making a new will;
- a declaration of intention to revoke a will, which must be witnessed in accordance with s 6 by the will-maker or someone in his or her presence and at his or her direction;
- dealing with the will in such a manner that the court is satisfied that the will-maker intended to revoke it.

Marriage

A will is automatically revoked when the will-maker marries, unless the will was made in anticipation of marriage (whether a particular marriage or marriage in general) (*Succession Act*, s 12).

There are exceptions if you are married at your death to the person to whom you have made a disposition under your will.

If you are making a will in anticipation of marriage, you should consult a lawyer.

If you marry after making a will that was not made in anticipation of the marriage, you should make a new will, even if it is the same.

Divorce

A divorce will not revoke the whole will. It *will* revoke:

- any gift to your former spouse;
- the appointment of your former spouse as an executor, trustee or guardian (*Succession Act*, s 13) unless you express a contrary intention in your will.

A divorced person should not rely on the partial revocation provisions, but make a new will.

Court-authorised wills for people lacking testamentary capacity

Under ss 18–26 of the *Succession Act*, the court may, on the application of any person, authorise that a will be made, altered, or partially or fully revoked

on behalf of a person lacking capacity either through immaturity or a particular incapacity. The person on behalf of whom the application is made must be alive at the time the order is made. The will, when executed, must be deposited with the Registrar, but a failure to do so will not invalidate the will.

Wills for minors

Section 16 of the *Succession Act* also allows the court to authorise minors to alter or revoke a will. The registrar must be one of the witnesses to a court-authorised will for a minor and it must be deposited with the registrar after execution, but a failure to do so will not invalidate the will.

Providing for future incapacity

[40.105] A person may want to provide for the possibility that in the future they will be unable to make certain decisions for themselves as the result of an incapacitating illness or loss of mental capacity.

This area of the law is being reviewed now. In November 2015, the then Attorney-General of NSW requested that the Law Reform Commission of NSW (Commission) conduct a review of the *Guardianship Act 1987* (NSW). The Commission issued a final consultation paper in November 2017, and the final report may be imminent.

On 26 February 2018, the Commonwealth Attorney-General, Christian Porter, announced a national prevalence study into elder abuse. He committed the Federal Government to a national plan to ensure the protection of older people in the community.

Reform has largely centred on calls for the implementation of supported decision-making over the current substitute decision-making model. The end result may be that the current arrangements for the separate appointment of enduring powers of attorney and enduring guardians would be combined and replaced with a single scheme of the appointment of enduring representatives through representative agreements.

The following is the law as it exists at the date of publication.

Power of attorney (enduring or general)

A power of attorney enables you (the Principal) to authorise someone else (the Attorney) to carry out financial transactions on your behalf. You must have mental capacity when you make the power of attorney. The *Powers of Attorney Act 2003* (NSW) and its Regulations were amended from 13 September 2013 to create two different forms for a power of attorney: a general power

of attorney, which is automatically terminated if you lose mental capacity; and an enduring power of attorney, which will remain valid if you lose mental capacity.

Both forms are in Sch 2 of the *Powers of Attorney Regulation 2016* (NSW). A general power of attorney may be useful if you are away for a short time. It does not need to be witnessed by a prescribed person, such as an Australian legal practitioner (solicitor or barrister). An enduring power of attorney must be witnessed by a prescribed person such as an Australian legal practitioner, Registrar of the Local Court or a licensed conveyancer. For background and more extensive information, you can refer to power of attorney in Chapter 1, About the Legal System.

Enduring guardianship

The *Guardianship Act 1987* allows a person to appoint someone to make decisions on their behalf about such matters as where they will live and what health care they will have, and to consent to medical or dental treatment. It only becomes operative if you are unable to make decisions yourself (a power of attorney covers only financial decisions).

Both the person making the appointment and the guardian must sign an *appointment of enduring guardian* form, and it must be witnessed by an Australian legal practitioner (solicitor or barrister) or Registrar of the Local Court or overseas-registered foreign lawyer.

Advance Care Directives (sometimes called living wills)

People sometimes make written directions about their future treatment if they are incapacitated. Although such documents are often called living wills, they have nothing to do with the sort of will being discussed in this section.

They are more accurately called *Advance Care Directives*. The law relating to Advance Care Directives has been evolving over recent years, although, unlike some other States, there is no legislation about them in NSW. However, a valid

Advance Care Directive will be recognised under common law.

For more about enduring guardianship and living wills, see Chapter 16, Disability Law.

ESTATES

When someone dies

[40.110] After someone dies, there are a number of enquiries the executor, family members or close friends should make in relation to the person's estate.

[40.120] Is there a will?

One of the first things that must be done after someone dies is locating the will. It may have been left with the NSW Trustee and Guardian, formerly the Public Trustee, a private trustee company, or the deceased's lawyer or bank. A thorough search of the person's home should be made if it is not easily located.

If no will is found, it is usually presumed that the person died without a will (*intestate*).

Informal wills

Under s 8 of the *Succession Act*, a document that appears to contain the deceased person's wishes, even if it is not executed in accordance with the formal requirements set out in s 6 of the Act, can be considered to be their will, or an amendment to or revocation of their will, if the court is satisfied that this is what the person intended.

If you are not sure whether a document is a valid will, refer it to a lawyer.

[40.130] Is formal administration required?

If the deceased owned assets (the estate), a decision must be made whether formal administration of the estate is required.

Where formal administration is not required

Formal administration is *not* required if:

- all assets are in joint names with someone else. In this case, the estate goes to that person;
- the institution holding the person's funds does not require formal administration to release them. It will consider such things as:
 - who the beneficiary is;
 - whether there is a will;
 - the size of the estate. Most institutions will not release the funds without probate or administration if it is over a set amount.

Where formal administration is essential

Formal administration is always required if real estate was held by the deceased in their own name or as a *tenant-in-common* with someone else.

[40.140] Who makes the enquiries?

As the person chosen by the deceased to administer the estate, the executor should make these enquiries and decisions.

If there is no executor

If there is no executor (whether there is a will or not), a family member or close friend may make enquiries. If formal administration is required, the court will appoint an administrator – normally the beneficiary with the largest entitlement to the estate.

Formal administration

[40.150] If there is a will and an executor

If there is a will and an executor, formal administration involves the executor applying for a grant of probate from the Equity Division of the Supreme Court.

What is probate?

Probate is an order from the court stating that the will is valid and clearing the way for the executor to begin administering the estate.

If the executor renounces probate

An executor may renounce probate of the will and the substitute executor will then take on the role. If no substitute executor has been appointed by the will, the court will appoint an administrator who is one of the beneficiaries or the executor can appoint the NSW Trustee in their place. This means that the executor has no more say in the administration of the estate. However, it will not affect any beneficial entitlement the executor may have under the will. The NSW Trustee is then entitled to charge (*NSW Trustee and Guardian Act 2009*).

Otherwise, the executor may wish to appoint a private trustee company to act in their place.

Applying for a grant of probate

Advertising the intention to apply

Fourteen days before applying for a grant of probate, it is necessary to publish a notice indicating the intention to do so. Before 21 January 2013, the notice was published in a newspaper. Since that date, the notice can only be published on the Supreme Court online registry.

Making the application

To apply for the grant of probate, the executor (or their lawyer) should file certain documents with the court. The minimum documents are:

- a *summons*, signed by the executor or their lawyer;
- an *affidavit of executor*;
- the original will.

Other documents may be required if it is a complex application.

The affidavit of executor

This affidavit is made by the executor, and it should include:

- a statement as to whether the deceased person left any other document attempting to set out their testamentary intentions;
- the date the online notice was published;
- details of the liabilities.

It should *annex* (have attached to it):

- a certified copy of the original death certificate (see below);
- a list of the person's assets (called the inventory).

The affidavit must also state that:

- the executor will administer the estate according to law; and
- there is no reason why the executor should not be granted probate of the will.

Go to the Supreme Court website for information about probate, probate forms and online notices. A draft Probate document, in duplicate should also be filed with the other documents plus a self-addressed stamped envelope for the court to return the Probate to you.

The death certificate

A death certificate may be obtained in person for \$58 from the Registry of Births, Deaths and Marriages which includes postage charges within Australia. If it is required urgently, the fee is \$85.00 (current at 2 October 2018).

The death certificate is often ordered by the funeral director and the cost added to the account.

Filing fees

There is no filing fee where the estate is less than \$100,000, and \$748 \$761 is charged where the estate is worth between \$100,000 and \$250,000, increasing by stages to \$5860 where the estate is worth more than \$5,000,000 (current at 11 July 2019).

Grant of probate

Where there is no dispute about the will, the court grants probate *in common form*.

If there is dispute as to whether or not the will was the last will of the deceased and a court case

ensues, the court makes a grant of probate *in solemn form*.

[40.160] If there is a will but no executor

If the will does not appoint an executor, or the sole executor dies before the deceased or renounces probate of the will, an application must be made to the Equity Division of the Supreme Court for a *grant of administration with the will annexed*.

The court then appoints an administrator for the estate.

Applying for letters of administration with the will annexed

Documents required

The documents that must be filed for a simple application for letters of administration with the will annexed are:

- the summons;
- an *affidavit of applicant for administration with the will annexed*. The statements and documents to be included and annexed to this are the same as those required to be annexed to an affidavit of executor (see The affidavit of executor at [40.150]).

What else must be in the affidavit?

Where the names of everyone who may be entitled to a share in the estate do not appear in the will (because the will does not dispose of all the assets, or a gift has lapsed causing partial intestacy), the facts establishing their entitlement must be stated in the affidavit.

Who makes the application?

The application is usually made by the beneficiary entitled to the biggest share of the estate, who then becomes the administrator.

What does the administrator do?

The administrator distributes the estate in accordance with the terms of the will. If the will does not dispose of all the deceased's assets, or a gift lapses causing partial intestacy, the administrator distributes that part of the estate according to the intestacy rules (see [40.180]).

[40.170] If there is no will

If there is no will, the court grants letters of administration and appoints an administrator

to deal with the estate, which is distributed in accordance with the rules of intestacy.

Applying for letters of administration

Documents required

The documents required in a simple application for a grant of letters of administration are:

- the summons;
- an *affidavit of applicant for administration* (see below for what this must contain);
- in some circumstances, an *administration bond* (see The administration bond at [40.170]);
- an affidavit:
 - stating that the deceased was not living in a de facto relationship; or
 - if the application is being made by the de facto spouse, setting out the circumstances of the relationship.

Affidavit of applicant for administration

The statements and documents required to be included and annexed are the same as those required for an affidavit of executor (see The affidavit of executor at [40.150]). The affidavit must also:

- identify the deceased's next of kin and supply the birth, marriage and death certificates to establish the entitlement;
- describe the searches made for a will or other document setting out the person's intentions.

The administration bond

Before December 2001 (unless the application was made by all the beneficiaries in the estate), the applicant had to lodge an administration bond securing the entitlements of next of kin who:

- were not parties to the application; and
- had not consented to it.

Now, an adult beneficiary who is not a party to the application need only be served with notice of it.

A bond may still be required in some cases; for example, when there are beneficiaries under 18. It is best to consult a lawyer in such cases.

If the applicant is the de facto spouse

There are other requirements in addition to those outlined above if the applicant is the de facto spouse. It is recommended that a lawyer be consulted in such cases.

The intestacy rules

[40.180] When there is no will, the estate is distributed according to Ch 4 of the *Succession Act*, commonly known as the *intestacy rules*. It is still preferable to make a will and decide on your own beneficiaries rather than allow the intestacy rules to decide for you.

This chapter does not set out all of the new provisions. You should either refer to Ch 4 of the Act or a lawyer for more detailed information.

[40.190] Statutory order of distribution

The statutory order basically divides eligible relatives (those who are entitled to inherit the estate of a deceased person who died without a will) into two parts – spouses and other relatives. If the deceased is an Indigenous person, the statutory order is subject to exclusion or modification by a distribution order under Pt 4.4 of the Act.

Spouse's entitlements

If the deceased leaves a spouse and no children, the spouse is entitled to the whole estate.

If the deceased leaves a spouse and children and the children are the spouse's children, the spouse is entitled to the whole estate.

If the deceased leaves a spouse and children, but the children are not the spouse's children, the spouse is entitled to:

- the deceased's personal effects (s 101);
- a statutory legacy of \$350,000 plus adjustment for CPI plus interest if legacy not paid within one year of date of death;
- one half of the remainder (if any).

Multiple spouses

If the deceased leaves more than one spouse refer to ss 122–126 of the Act.

More about spouses

Spouses' entitlements are set out in Pt 4.2 of the Act.

Definition of spouse

A spouse is a person who was married to the deceased immediately before the death or who was a party to a domestic partnership immediately before the intestate's death (s 104).

A domestic partnership is a relationship between the intestate and another person that is a registered relationship, or interstate registered relationship, within the meaning of the *Relationships Register Act 2010* (NSW), or a de facto relationship that:

1. has been in existence for a continuous period of two years; or
2. has resulted in the birth of a child (s 105).

Spouse's preferential right to acquire property from the estate

The spouse's preferential right to acquire property from the deceased's estate is detailed in ss 114–121 of the *Succession Act*. It does not apply if there is more than one spouse. If you wish to preferentially acquire property, it is recommended that you consult a lawyer as there are various conditions.

Distribution among other relatives

In basic terms, the order of relatives who can inherit if there is no spouse is as follows:

- children;
- parents;
- brothers and sisters;
- grandparents;
- aunts and uncles;
- cousins.

Each "category" must be exhausted before moving on to the next, and once an eligible relative is found, the process stops.

Who is a child of the deceased?

The answer has become more complex since the introduction of surrogacy law, artificial insemination and in vitro fertilisation procedures and the right of same-sex couples to adopt children. A lawyer may be required to advise you in these situations. Adopted children are specifically included (*Succession Act*, s 109).

What if there are no eligible relatives?

If there are no relatives closer than second cousins, the estate passes to the State (Crown).

Application to share in the estate

A second cousin or close friend or a charity for whom the deceased might reasonably have

been expected to provide can apply to the State for a share in the estate. Such applications are

considered on merit. Part 4.5 of the Act deals with this situation.

Dealing with the estate

[40.200] Who owns the estate?

A beneficiary does not own the property until the executor distributes the estate. Before distribution, the executor or administrator owns the property.

After probate has been granted (or letters of administration with or without the will annexed obtained), the executor or administrator must:

- collect the assets of the estate;
- pay any debts including income tax;
- distribute the rest of the estate in accordance with either the terms of the will or the intestacy rules.

[40.210] Collecting assets

Schedule of assets

Part of the grant of probate or letters of administration is a photocopy of the Inventory of Property (schedule of assets) that formed part of the applicant's affidavit filed at the court.

Liability of financial institutions for assets not in the schedule

The bank or other body holding assets of the deceased person must check that an asset is in the Inventory before dealing with it on the instructions of the executor or administrator. Unless the institution has agreed that it does not require formal administration, its failure to check that an asset is listed in the Inventory may result in its being liable to a beneficiary.

Banks and building society accounts

Joint accounts

Money in an account held in joint names generally passes automatically to the survivor on the death of the other account holder.

Small balances

A small balance in an account in the deceased person's own name may be released without the

bank requiring probate or letters of administration. The bank may require:

- the will;
- the death certificate;
- sometimes, consent and indemnity forms from members of the person's family.

Or it can be used to pay the funeral account or part of it.

Where formal administration is required

Where there is formal administration, the only documents required by the bank to release the funds should be:

- probate or letters of administration; and
- a withdrawal form.

Other personal property

For assets such as shares or money deposited with institutions other than banks, you will need to ask what documentation is required.

Real property

Joint tenancies

Where the deceased person held property as a joint tenant with someone else, a Notice of Death is required.

Other real property

For property held by the deceased as a sole tenant or tenant-in-common, a Transmission Application is required.

With eConveyancing becoming mandatory for most transactions from 1 July 2019, it is suggested you contact the Office of the Registrar General or visit its website at <https://www.registrargeneral.nsw.gov.au/> although it is likely you may need to use a solicitor or licensed conveyancer to prepare and lodge these documents electronically.

Life insurance

Many life insurance policies mature on the holder's death. Generally, insurance companies are prepared to pay out these policies without formal administration when the sum is under

\$10,000. The company that issued the policy should be contacted about its requirements.

Superannuation

Most superannuation funds are established by way of a trust deed. Most funds provide that on a member's death, a benefit is payable to the member's dependants.

Who is a dependant?

The trustee of the fund has a discretion to decide who will qualify as a dependant (subject to the rules of the fund and legislation).

Same-sex partners

Different funds may have slightly different definitions of dependants, and their definitions may not include same-sex partners.

Superannuation is generally covered by the *Superannuation Industry (Supervision) Act 1993* (Cth). That Act was amended to expand the definition of a dependant to include any person with whom the member has an *interdependency relationship*, which can include same-sex couples.

The *Same Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008* (Cth) commenced on 4 December 2008 and recognising a same-sex couple and their children has been made simpler.

What if there are no dependants?

If there are no dependants, the trustee usually has a discretion to pay the benefit to the estate.

Member nominations

Most funds allow members to nominate who they wish to receive the benefit. That person must, however, qualify as a dependant under the rules of the fund, and the trustee is still not bound by law to pay them the benefit.

Binding nominations

Since 1999, the trustee of a fund has been able to amend its trust deed to allow members to make a binding nomination. If a member does so, the trustee's discretion is removed and the benefit must be paid in accordance with the nomination.

There are strict requirements involved in making a binding nomination. The nomination must be witnessed by at least two adults and may have to be updated at least every three years. You should check the fund's requirements.

If your fund does not allow binding nominations

If your superannuation fund does not allow binding nominations, it is important to keep your death benefit nomination form up to date. It is also a good idea to deal with the benefit in your will in case your fund pays it into your estate.

Cars

Probate or letters of administration are not needed for dealing with a car. It should be sold or formally transferred to the beneficiary (not left in the deceased's name). No stamp duty is payable on transfer of a car to a beneficiary in an estate.

Personal goods

There are no special requirements for distributing personal goods.

[40.220] Paying debts

Funeral expenses

Most banks allow funds to be withdrawn from the estate to pay the person's funeral expenses before formal administration is obtained usually by way of a cheque to the funeral director.

Other creditors

Other creditors must wait to be paid until the assets of the estate are available to the executor or administrator (ie, after the grant of probate or letters of administration and after expiry of the "notice to creditors" which may be published after the grant).

Insolvent estates

If the person had more debts than assets, the estate must be dealt with differently, particularly where there is property out of which some debts could be paid.

Making the estate bankrupt

In this case, the estate may be made bankrupt in the same way as a person may be made bankrupt (see Chapter 6, Bankruptcy) and be administered by a trustee in bankruptcy (such as a liquidator). This method may improve the position of an unsecured creditor against the estate, because the recovery of

any preferential payments may increase the size of the estate.

Role of the executor in a bankrupt estate

If the estate is administered by a trustee in bankruptcy, the executor or administrator does not generally have any part to play.

Protected assets

Some assets are protected from being used to pay outstanding debts.

Life insurance

Unless a contrary intention is expressed in the will, the proceeds of any life insurance policy are protected from payment of estate debts except for funeral and testamentary expenses and may be distributed by the executor in accordance with a will or the intestacy rules (*Life Insurance Act 1995* (Cth), s 205).

Superannuation

Superannuation benefits under some government funds are protected by legislation, and the protection cannot be revoked by a will.

[40.230] Distributing assets

The distribution of the estate depends on:

- whether there is a will; and
- the nature of the estate.

If there is no will, the administrator should distribute the estate according to the rules of intestacy discussed at [40.180].

If there is a will, the executor should distribute the assets according to the instructions in it. Items such as personal belongings may be distributed soon after death, once their value has been assessed, if there is no dispute about the will.

If the will is disputed

If it is later found that the will is not the last will of the deceased or it is invalid for some other reason, the executor could be held responsible for the value of items that have been given out. If there are any concerns, distribution of personal items should be delayed until at least after the grant is made by the court.

If the executor is not diligent

If the executor or administrator does not act diligently, the beneficiaries may complain to the Supreme Court – the only right a beneficiary has before distribution.

Executor's statement of account

It is a good practice for the executor to prepare a statement of account with details of all funds received and expenses paid. A list of what each beneficiary has received is also useful.

If a beneficiary has no other income

No beneficiary has a right to any assets of the estate until the executor distributes it. This causes problems if the major beneficiary is a spouse with no income other than from the will-maker (the same difficulty arises if the person died without a will). In such cases, the spouse can:

- apply for a pension (see Chapter 36, Social Security Entitlements);
- seek a loan, using the estate as security.

Section 92A of the *Probate and Administration Act* allows the executor or administrator to make a payment to a beneficiary who will be entitled to all or part of the estate if the beneficiary was wholly or substantially dependent on the deceased person and has survived the deceased person by 30 days.

Joint accounts

The situation will not arise if the spouses have a joint bank account. As with real estate held by joint tenants, on the death of either of the account holders, the right to the whole account generally passes to the survivor.

For some people, however, joint accounts create problems of their own, and the best solution in this case may be for spouses to have their own accounts with a reasonable amount in them.

Delays in payment

If a gift of money is not paid within 12 months, the legatee is entitled to interest on the money.

Executor or administrator's application for payment

The executor or administrator may apply to the Supreme Court for payment out of the estate for work they have done in relation to it (*Probate and Administration Act*, s 86). That payment is called commission.

How to apply for commission

To apply for payment, the executor or administrator must file with the court the accounts of the estate by affidavit verifying accounts and file another affidavit in support of their claim setting out details of the work carried out (see [40.320]).

Trustees

[40.240] Usually a person is appointed in a will as an executor and a trustee. There is a difference in function between the two.

[40.250] What the trustee does

In simple terms, the executor's role ends when they have collected and distributed the assets of the estate. Where the terms of the will create continuing duties, such as supporting and maintaining children or administering a sum of money or real property for someone's benefit, these duties are carried out by the trustee.

Where an administrator becomes a trustee

An administrator will become a trustee if funds have to be retained until children reach 18.

[40.260] Duties and responsibilities

The trustee's duties and responsibilities are set out in the *Trustee Act 1925* (NSW), and in the will. Trustees have a duty to act honestly and in good faith.

Section 14 allows a trustee (unless expressly forbidden by a will) to invest in any form of investment. Section 14C of the Act sets out a list of matters the trustee must consider when investing funds and some of the duties and powers of a trustee.

The Act applies unless the will says otherwise.

Getting help

Obviously, a trustee's role is not to be undertaken lightly. A trustee of an estate with ongoing duties, such as a life estate or an estate with beneficiaries under 18, should seek legal and financial advice.

Contesting the will

[40.270] An important change which came about under the *Succession Act* is s 54, which sets out the persons entitled to inspect the will of a deceased person. Previously, a copy of the will of the deceased person could not be obtained without the consent of the executor, until Probate had been granted, which was often refused. Now, there is a list of entitled persons including: a person named in the will, whether as a beneficiary or not; a person referred to in an earlier will as a beneficiary; the surviving spouse, including de facto and same sex; and a person who would be entitled to the estate if the deceased had died without a will.

There are several ways of questioning a will. Each requires legal advice.

[40.280] Is the will valid?

It may be claimed that the will presented for the grant of probate was not intended by the person to be their final will, on the grounds that:

- it was not the last will made by the person;

- the person lacked the mental capacity to make it;
- it was altered after it was signed;
- the person was unduly influenced, or tricked;
- it had been revoked.

Undue influence

Where a person who has helped someone to draw up a will also stands to gain a great deal from it (eg, a relative or lawyer who is also a beneficiary), that person may have to prove to the court that there was no trickery and no pressure, force or fear involved in the making of the will.

Persuasion

Flattery and persuasion by someone who stands to gain from a will is not unlawful as such, but when it becomes a force that overpowers the judgment and wishes of the will-maker, the court may find it to be a form of undue influence.

The court may be suspicious where there has been obvious persuasion by the person who drew up the will and that person would benefit from it.

[40.290] Is the will clear?

If the will is unclear, the executor, or a party interested in the estate, may apply to have the court determine what was meant. For example, a woman with two grandsons called Jack left something to “my grandson Jack”. Who did she mean?

[40.300] Is there a mistake in the will?

The common law power of the courts to remedy a mistake in a will is severely limited, in contrast to the remedies available for matters involving living people. However, s 27 of the *Succession Act* gives the court the power to rectify a will if it fails to express the will-maker’s intentions or a clerical error was made in the making of the will.

Evidence

The court will not accept evidence seeking to establish the direct intention of the deceased, such as a statement that the deceased *told* someone they were to receive a certain gift. Only the fact that the beneficiary had a certain relationship with the deceased would be accepted by the court.

Interpreting the will

The Equity Division of the Supreme Court interprets wills made or contested in NSW.

[40.310] Family provision orders

The *Family Provision Act 1982* (NSW) was repealed when the *Succession Amendment (Family Provision) Act 2008* (NSW) commenced on 1 March 2009; however, it still applies to deaths before that date. The new provisions form Ch 3 of the *Succession Act*, titled Family Provision Orders, and contain some differences to the previous Act. Although some of the terminology has changed, the rationale of the provisions remains the same, which is to ensure that adequate provision is made for certain defined eligible persons, whether or not there was a will and whether or not the eligible person was mentioned in it. The main changes are:

- a reduction of the period in which an application can be made, from 18 months to 12 months after the death;
- making a separate category for a person in a close personal relationship with the deceased as an eligible person. Previously he or she was included in the category of a person in a domestic relationship with the deceased. Now persons in a close personal relationship must establish that there are factors which warrant them making a claim.

Time limits

An application must be made within 12 months of the death. There is no longer an express power to shorten the period if circumstances warrant.

The applicant can ask the court to have the period extended, and the parties to the proceedings can consent to the application being made out of time.

Who can apply?

Those eligible to apply under the *Succession Act* from 1 March 2009 are:

- a person who was the wife or husband of the deceased person at the time of the deceased person’s death;
- a person with whom the deceased person was living in a de facto relationship at the deceased person’s death;
- a child of the deceased person;
- a former husband or wife of the deceased person;
- a person who was:
 - at any particular time, wholly or partly dependent on the deceased person, and at any time a member of the same household as the deceased person;
 - a grandchild who was at any particular time wholly or partly dependent on the deceased person;
 - a person with whom the deceased person was living in a close personal relationship at the time of the deceased person’s death.

An eligible person can forgo their rights under the Act if the court approves. This could happen on a property settlement following a divorce.

A de facto relationship is now defined in s 21C of the *Interpretation Act 1987* (NSW).

It includes same sex relationships, persons in registered relationships, including interstate relationships (*Relationships Register Act 2010* (NSW)) and “a person in a de facto relationship” which is further defined as “having a relationship as a couple living together who are not married to one another or related by family”.

A close personal relationship is defined in the *Succession Act* as a close personal relationship (other than a marriage or a de facto relationship) between two adult persons whether or not related by family, who are living together, one of each of whom provides the other with domestic support and personal care. Specifically excluded is care provided for a fee or reward or on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation).

What the court takes into account

The court bases its decision on whether adequate provision for a person’s maintenance, education or advancement in life was made by the deceased. It considers circumstances at the date of the hearing, not the date of death, and takes community standards into account.

Section 60(2) of the *Succession Act* now sets out 16 matters which may be considered by the court in making its decision, including:

- the character and conduct of the eligible person before and after the death;
- any contribution made by the eligible person towards the deceased’s property or welfare;
- anything else it considers important.

Mediation

Section 98 now requires compulsory mediation before any hearing unless there are special reasons, such as the risk of violence.

Costs

[40.320] Lawyers

An executor or administrator is not required to use a lawyer. However, for all but the simplest estates, it is recommended.

Interim orders

The court can make interim orders which can later be confirmed, changed or withdrawn.

The notional estate

Sometimes a person disposes of assets while they are alive in a manner intended to prevent eligible people from receiving them on their death. To overcome this, the court can make orders against the *notional estate* of the deceased.

The notional estate includes assets that the deceased person had owned but disposed of for less than market value (*relevant property transaction*). Examples of relevant property transactions are set out in s 76.

Relevant property transactions

Relevant property transactions must have occurred:

- within three years before the person’s death, if it was done with the intention of denying an eligible person provision from the estate;
- within a year before the death, if at that time the person had a moral obligation to make proper provision for the eligible person;
- on or after the person’s death.

Cost of the application

Generally, the costs of a successful application under the *Family Provision Act* are paid out of the estate, though the court retains the power to order payment of costs as it sees fit (s 99). Section 90(2) also enables regulations to be made in respect of costs, including the fixing of maximum costs for legal services which may be paid out of the estate or notional estate of the deceased.

A lawyer must charge in accordance with the scales set by the Legal Fees and Costs Board for work carried out up to the grant of probate or letters of administration.

Costs for work carried out after that have been deregulated, but the court will only allow “reasonable” legal costs to be paid from the estate.

[40.330] Professional executors

Sometimes a person’s lawyer or accountant is appointed as executor. The will should indicate how that person can be reimbursed for professional work done for the estate. The professional executor, like any other, may also apply to the court to be paid for their work.

The cost of a professional executor may be higher than that of a non-professional.

A lawyer-executor will generally employ their own firm to do the work.

[40.340] The NSW Trustee and Guardian

From 1 July 2016, NSW Trustee and Guardian will charge for a will and other documents unless

the client is on a full Centrelink pension. Private executors and attorneys can now be appointed.

What the NSW Trustee charges

The NSW Trustee’s charges are set by legislation. The rate, set on asset values is currently 4.0% of the value of the estate up to the first \$100,000, 3.5% on the next \$100,000, 2.5% on the next \$100,000 and 1.5% thereafter. Additional fees may be charged for various other services such as the preparation of taxation returns, valuations of property, estate management, account keeping and investment. GST is added to these fees. For full details of fees, which may be charged, see *NSW Trustee and Guardian Regulation 2017* (NSW).

The fees for wills, powers of attorney and enduring guardianship vary depending whether the client has an existing document with the department. Examples are \$300 for a will and \$200 for an enduring power of attorney or appointment of enduring guardian where it is a new document or \$200 and \$150 where it is an update of an existing document made by the NSW Trustee.

Compensation to relatives

If a death occurs at work or as a result of a motor vehicle accident, legal advice should be sought from a lawyer, community legal centre or Legal Aid. Compensation may be payable under the *Compensation to Relatives Act 1897* (NSW) or the *Workplace Injury Management and Workers Compensation Act 1998* (NSW).

Compensation for personal injury is discussed in Chapter 3, Accidents and Compensation.

Legal action of the deceased

Legal actions by and against the deceased may (with some exceptions) continue after the death (*Law Reform (Miscellaneous Provisions) Act 1944* (NSW), s 2).

FUNERALS

Precaution

[40.350] There is no set time limit for when a funeral must occur following a death. If the deceased left no instructions, the next of kin should take their time to decide what sort of

funeral they want and what they can afford. The next of kin should then approach several funeral directors to ask for an itemised account before engaging one.

What must be done when someone dies

[40.360] The executor

Arranging the funeral

If the deceased person's will names an executor, it is their responsibility to arrange a funeral. The executor can access the deceased person's assets to pay for the funeral.

Disputes about body ownership

The deceased's body belongs to the executor or to the next of kin if no executor is appointed. Disputes over ownership of the body and decisions about funeral arrangements may be referred to the Supreme Court.

[40.370] Role of the doctor

When a person dies, a doctor must be called to pronounce the person dead and if they know the cause of the death, they will issue a medical certificate.

Calling a funeral director

When a medical certificate of cause of death has been issued, the family should contact a funeral director of their choice (see [40.350]) to remove the deceased to a funeral home and prepare the body for viewing (by embalming) and for the funeral.

If the person died in a hospital, the deceased will be kept in that hospital's morgue until a funeral director is engaged.

If a medical certificate cannot be issued

In cases where the doctor cannot issue the certificate, the doctor notifies the police (see [40.580]). These cases are referred to the coroner. The deceased is identified to the police by anyone who knew him or her. The police in turn identify the deceased to the coroner. A coronial post mortem is then performed to determine the cause of death. When this is known, a medical certificate of cause of death can then be issued.

Keeping the body at home

Some families will want to dress the body themselves and have the deceased at home for viewing until the funeral. The funeral director must ensure that all health regulations are met and will transport the body.

[40.380] Registering the death

Irrespective of whether the coroner is involved or not, the funeral director or next of kin must provide personal details of the deceased to the Registrar of Births, Deaths and Marriages within a month of the death so that it can be registered.

If there is no next of kin

If no next of kin is available, anyone who knows the facts can be asked to provide the information.

[40.390] Role of police

If no next of kin is immediately available to arrange the funeral, the assistance of the police may be obtained to help locate next of kin or friends who may wish to make the arrangements. Police can also be asked to determine if the deceased had assets (*NSW Health Policy no. PD2008_012, s 7*).

If the deceased had no assets and there are no next of kin or family/friends are unable to pay the cost of a funeral, the procedure for a Destitute Funeral is commenced

See [40.570].

If the deceased had assets, and no next of kin, irrespective of where they died

In these circumstances, the case can be referred to the NSW Trustee and Guardian which arranges the funeral and pays for it from the estate. There is a fee for this.

[40.400] Obtaining a death certificate

After a medical certificate of cause of death has been issued by the doctor, the family, the doctor, the coroner or the funeral director sends it to the Registrar of Births, Deaths and Marriages for the death to be registered. A death certificate can then be issued for a fee. Applications can be lodged at a Service NSW office.

The registrar will advise what information is required in order to issue a death certificate.

[40.410] Organ donation

Consent

The *Human Tissue Act 1983* (NSW) allows the removal of tissue (including organs) from a deceased person who had consented to this or expressed a wish for it or expressed no objections to donation before they died, and the senior available next of kin gives their consent (ss 23, 24).

Organ Donor Register

A person who wishes to be an organ donor needs to register with the Australian Organ Donor Register (Donatelife). This can be done online.

Advising next of kin

Anyone who wishes to donate organs should let their family know of their decision. However, family can still veto and override this request. Donation will not proceed in the presence of strong and sustained family objection despite all information having been given to them.

The practicalities of organ donation

Except for the cornea of the eye, for organs and tissue to be suitable for transplant, the donor needs to have died in hospital after being on a life support system.

[40.420] Stillborn babies

Registering the birth

A stillborn child exhibits no sign of respiration or heartbeat or any other sign of life after birth (*Births, Deaths and Marriages Registration Act 1995* (NSW)). The baby must also be at least 20 weeks gestation or, if the period of gestation cannot be reliably established, weigh at least 400 grams at birth.

The birth must be registered in the usual way. If the parents wish, "Baby" can be used as a given name. The Registrar of Births, Deaths and Marriages will then issue a birth certificate.

Arranging a funeral

[40.440] What the funeral director does

Funeral directors are usually responsible for:

Funeral arrangements

The law requires that funeral arrangements be made for a stillborn baby. The parent(s) should approach a funeral director to arrange burial or cremation. If the parents request a cremation, the doctor must write a letter saying that it can be performed. Parent(s) can decide whether or not they wish to have a service and if they wish to attend.

Different cemeteries have different facilities for stillborn babies. Parents should discuss their needs with the funeral director.

Parents may have access to Centrelink's bereavement payment (stillborn baby payment) to assist with the cost.

[40.430] Miscarriages

Miscarriages are also referred to as "products of human conception" or "human tissue" or "foetal tissue".

Although not legally required, some parents want to arrange a burial or cremation for their miscarried baby. For a cremation, or burial in a cemetery, a funeral director must be engaged.

Parents can choose to have a burial on private land without engaging a funeral director. In this case, local council considerations may need to be met. Parents also need a tissue release form and a travel certificate certifying that they are travelling with human tissue in their possession. This is issued by the hospital. Parents should also consider whether they might not always live at that address. They must be advised to comply with the regulations as set out in *NSW Health PD2016_001*.

Recognition of loss certificate

NSW Registry of Birth Death and Marriages will issue on request a free "recognition of loss" certificate for women who miscarry before 20 weeks. It is not a legal document. Parents can include a name or "baby of the parents" name. It is available through the Registry's website.

- collecting the documents required for funeral (see below);
- removing the body;
- supplying the coffin or casket;

- preparing the body;
- purchasing the burial plot and arranging for it to be opened and closed;
- providing a hearse (limited mileage is usually included in the cost);
- arranging a service at a crematorium, graveside, church, or whatever is required.

A funeral director may also:

- engage clergy;
- arrange a pre-burial service;
- provide a funeral home or chapel for viewing the deceased person;
- arrange cars for the mourners;
- order flowers and place advertisements.

Funeral directors will accommodate people who wish to do things differently; for example, dress the deceased themselves and have home viewings.

Charges depend on the services provided.

Documents

The forms that must be completed before the funeral are:

- a medical certificate of cause of death (form PR315), which is completed by a doctor or issued by the coroner in coronial cases;
- a form of information of death (form PR13), which must be lodged with the Registrar of Births, Deaths and Marriages within seven days of the death. The next of kin normally provides the information, and the funeral director completes and lodges the form;
- if the body is to be cremated, the family completes an application for a cremation permit:
 - the doctor completes a medical certificate;
- a medical referee completes a cremation permit. In Coroner's cases, the coroner completes the cremation permit.

There is a fee for the certificates.

[40.450] Basic funeral notice

A basic funeral is the lowest cost funeral service package the funeral director is able to provide. Not all funeral directors provide a basic funeral option.

The *Fair Trading Amendment (Funeral Goods and Services) Regulation 2008* (NSW) prescribes that funeral directors itemise the cost of goods and services to consumers. Funeral directors who provide a basic funeral must provide:

- information about their basic funeral option, if they have one, its cost and what it covers, by giving a "basic funeral notice". Funeral directors

may request that customers sign a statement that they have received a basic funeral notice (signing it does not commit them to engaging that funeral director);

- an itemised quote before entering into any funeral arrangement;
- an itemised statement with the final invoice detailing the cost of all components of the funeral and a final total price before accepting final payment.

Items included in a basic funeral notice

- funeral director's services;
- transportation;
- storage;
- preparation of body;
- coffin;
- medical certificates;
- permits (cremation);
- burial/cremation;
- total cost inc GST.

Direct committal

This is a burial or cremation without anyone in attendance. It is a cheaper option than a basic funeral.

[40.460] Headstones and monuments

People wanting a headstone or monument erected should contact a monumental mason (they are listed in the *telephone book or search on line*). Costs vary depending on the material used, size, shape and detail inscribed.

Before making arrangements, it is important to contact the cemetery to ensure compliance with their requirements.

[40.470] Embalming

Embalming involves the removal of bodily fluids and their replacement with formalin. This preserves the body for a long time and reduces bacterial action.

This is very important if the body is to be viewed or transported to another place for burial.

When embalming is essential

Bodies leaving or coming into Australia and bodies being entombed in an above ground vault or mausoleum must be embalmed.

[40.480] Infectious diseases

Health regulations apply to people who handle the bodies of those who have died from certain infectious diseases. Workers must wear protective clothing, and the body must be placed in a double body bag, which is heat-sealed so that it cannot be opened. Embalming is not permitted in these circumstances.

Only in very exceptional cases can the body be sent overseas. Ashes can be taken overseas, so cremation could be an acceptable option for people who wish to send the remains to another country.

[40.490] Costs

The person who arranges the funeral is responsible for paying for it. There are no set fees. Costs vary, depending on the cemetery or crematorium, the service requested and the facilities offered.

It is worth contacting a few different funeral directors to get quotes as it is often possible to negotiate services requested and fees.

Funds from the estate

Funds from a deceased person's estate or from their superannuation fund can be released to pay funeral expenses.

Financial assistance

Assistance may be available from:

- Centrelink;
- the Public Health Unit of the Local Health District;
- the Department of Veterans' Affairs;
- pensioner associations and registered clubs;
- charitable institutions;
- trade unions;
- health insurance schemes;
- financial institutions or insurance companies, for example, SafeWork NSW (for deaths attributed to a person's work) or the State Insurance Regulatory Authority (SIRA) (previously the Motor Accidents Authority) (for deaths as a result of a motor vehicle accident).

Funeral funds and benefits

Funeral funds are subject to the *Funeral Funds Act 1979* (NSW). Clients contribute to the fund during their lifetime, and part or all of the cost of the pre-arranged funeral is paid at the time of

death, depending on what contract was made with the fund.

There are several government registered funeral funds. Different funds offer different services, so people should compare them before making a decision. A list of funds is available from NSW Fair Trading.

[40.500] Making your own arrangements

The entire system in NSW is set up around funeral directors and the traditions they have established. This means that while there are no legal barriers to people handling funeral arrangements themselves provided they have the required documents, it can be extremely difficult to complete the whole process; for example, newspapers may only accept death notices from funeral directors, or coffin manufacturers may not sell to the public. All this makes the procedure frustrating and probably the last thing that most people wish to deal with at such a time.

Non-religious funerals

Private registered celebrants can assist to arrange a non-religious memorial event, or families may prefer to arrange their own.

[40.510] Different cultural traditions

People who wish to follow particular cultural and religious practices should choose a funeral director who can provide a funeral according to their specific needs, including, if necessary, sending the remains overseas.

[40.520] Aboriginal and Torres Strait Islanders

There are no set practices following the death of an Aboriginal or Torres Strait Islander. Each family has their own individual requirements and cultural practices. Families who require assistance should be referred to the hospital's Aboriginal Liaison Officer or to the local Aboriginal medical service, local Land Council or Aboriginal community organisation.

[40.530] Burial on private property

NSW Health Document No GL2013_016 “*Guidance on Burying a Body on Private Land – Public Health regulation 2012*” contains guidelines to assist local authorities in approving burial locations on private land. The document lists conditions that must be considered by authorities, including:

- approval must be sought from the local authority;
- the land area must be more than five hectares, and fenced to delineate the boundaries and secure the location;
- the burial must not be likely to contaminate drinking water or a domestic water supply;
- there must be a minimum soil cover of 900 mm;
- the grave must be permanently marked;
- the owner must provide access to the site;
- records of the burial are kept by the local authorities.

[40.540] Bequeathing the body for research

People who want to bequeath their body to a university for research purposes need to make a formal agreement with that university for the future bequest of their body. Medical schools have different requirements so prospective donors should contact the university of their choice which will provide full details and a copy of the consent form.

Bodies are only accepted if they are required at the time of death and if certain criteria are met.

People making these arrangements should inform their family, nursing home or hospital about the agreement.

Relatives may wish to hold a memorial service after the death. Some universities from time to time may hold thanksgiving services for all donors. The university arranges a burial or cremation later (in accordance with the donor’s wishes). Relatives can be advised of these arrangements if they wish.

[40.550] Transporting bodies overseas

Funeral directors can arrange to send bodies to other countries. Each country has its own consular

and health regulations for receiving bodies, and these must be followed.

It is very expensive both to prepare the body and to transport it (by air freight) overseas. Cremating the body, then sending the ashes, is a cheaper option.

If carrying ashes overseas, that county’s consular requirements must be adhered to. Ashes should be carried in hand luggage with the Death Certificate and a statement from the crematorium.

[40.560] Burials at sea

Burials at sea are regulated under the *Environment Protection (Sea Dumping) Act 1981* (Cth), which is administered by the Department of the Environment. A permit is required only for sea burial of bodies not for scattering ashes.

Permits, for which there is a fee, are usually only granted to those who can demonstrate a connection to the sea such as long serving navy personnel or fishermen. Locating a burial site at sea is difficult. The burial site must be away from shipping lanes and trawling areas and be at a depth greater than 3,000 m. There may be logistical difficulties in arranging the burial as the burial site may be a long distance off shore and the vessel must be a certified commercial vessel with GPS to locate the designated burial site.

Burials at sea are organised by a funeral director to ensure the body is prepared in accordance with the “*Ship Captain’s Medical Guide*”. For example, the body must not be embalmed, not placed in a coffin and the shroud weighted to ensure rapid sinking.

Scattering ashes at sea

When scattering ashes at sea, permission only from the captain of the vessel is required.

Collecting ashes

The person who lodges an application for cremation can collect the ashes. They can be buried in the cemetery or placed in a niche wall, or kept at home in a suitable receptacle.

Scattering ashes

Ashes can be scattered at a place significant to the deceased or family. If a public place is used, permission must be sought to ensure adherence to the *Protection of the Environment Operations Act 1997* (NSW) in terms of air and water pollution.

Councils will set a time and place and can impose conditions when this can occur.

[40.570] Destitute funerals

NSW Health PD2008_012 deals with destitute funerals. When no next of kin is immediately available to make arrangements for a funeral, the police can be asked to locate them and inform them of the death. If none is found, or they are unable to make funeral arrangements, and the deceased has no assets, procedures for a destitute funeral (usually a cremation) are commenced.

If the coroner is not involved and the death took place in hospital and there are no next of kin and the deceased had no assets

In this situation, the hospital arranges for a cremation through the government contractor. The hospital pays for the account.

If there are next of kin, they can choose a burial or cremation and attend the service.

If the coroner is not involved and the death did not take place in hospital and there are no next of kin and no assets

In this situation, the police must submit a destitute burial/cremation form to the appropriate Local Health District's Public Health Unit who authorise the government contractor to proceed with the funeral. It is paid for by the Local Health District via its Public Health Unit.

If the coroner is involved irrespective of where the person died

In this case, the police must submit a destitute burial/cremation form to the coroner, who authorises the government contractor to conduct the funeral.

Again, the Local Health District via the Public Health Unit pays the account.

If the person has no next of kin but has assets irrespective of whether the coroner is involved or where the person died

In this situation, the case is referred to the NSW Trustee and Guardian who arrange the funeral from the estate.

Notifying next of kin

NSW Health has a policy of notifying any next of kin of funeral arrangements so they can attend if they wish. Next of kin can check information about the funeral with the government contractor in their area. The hospital or the officer in charge at the police station can give them the contractor's details.

Type of service

The usual method of service is cremation. However, next of kin can request a burial.

If there is a burial, it will be in an unmarked shared grave. The grave is identified by a number.

In a cremation, the next of kin can collect the ashes.

Coroner's cases

[40.580] Role of the coroner

The role of the coroner is to ensure that all deaths where the cause is unknown or suspicious are properly investigated and concluded.

Notifiable deaths (refer to NSW Health "Coroners Cases and Coroners Act PD 2010_054")

Under the *Coroners Act 2009* (NSW), the coroner must be notified when a person dies, or it is suspected that they died:

- a violent or unnatural death;

- a sudden death with an unknown cause;
- under suspicious or unusual circumstances;
- not having seen a doctor within six months before death, or where a doctor attended after death but did not issue a certificate at the time as to cause of death;
- while in, or temporarily absent from:
 - a mental health facility as per the *Mental Health Act 2007* (NSW); or
 - a detention centre, correction centre or a lock up;
- while in the custody of police including while being escorted by police to certain institutions;

- in the course of a police operation;
 - in circumstances where the person's death was not the reasonably expected outcome of a health related procedure;
 - escaping or attempting to escape from the custody of a police officer or other lawful custody.
- Under s 24 of the *Coroners Act*, the coroner must also be notified of the death of:

- a child in care;
- a child reported to the Department of Communities and Justice (previously known as the Department of Family and Community Services) within the last three years;
- a sibling of a child reported to the Department of Communities and Justice within the last three years;
- a child whose death is due to abuse or neglect, or occurs in suspicious circumstances;
- a child in detention;
- a disabled person living in, or temporarily absent from, residential care provided under the *Disability Services Act 1993* (NSW), or a residential centre for disabled persons;
- a person who received assistance from a service provider under the *Disability Services Act* to live independently in the community.

A death is not reportable if it follows an accident occurring at home, in hospital or aged care facility, that is attributable to old age (over 72 years). This must be stated on the certificate. Families can appeal this decision.

What must be done?

If a death occurs in any of these circumstances:

- nothing must be done to the body and access by family for compassionate reasons must be supervised;
- the doctor or hospital must notify the police;
- the deceased must be formally identified to the police by the next of kin or someone who knew them;
- a post mortem examination must be conducted.

Post mortem

A post mortem is done to determine the cause of death. It involves the examination of all organs and testing of tissue. The next of kin have access to all medical and post mortem reports if they request it.

The coroner can dispense with a post mortem if, after receiving advice, he is satisfied that the person died of natural causes and the next of kin agree with this decision.

Objecting to a post mortem

Next of kin can object to a post mortem or organ retention by writing to the coroner explaining their reasons.

A person who is dissatisfied with the coroner's decision can appeal to the NSW Supreme Court.

Funeral arrangements

Consent for the funeral is usually given straight after the post mortem, even if the results are not yet available.

If an inquest is required, however, there is likely to be a delay (sometimes up to six months).

Should an inquest be held?

What is the purpose of an inquest?

When an unnatural death occurs, an inquest is generally required to:

- determine the time, date, place, manner and cause of death;
- confirm the identity of the deceased;
- decide if there is a *prima facie case* against anyone in relation to the death.

When an inquest is not required

Coroner's cases do not always involve an inquest. The coroner dispenses with a formal inquest if:

- the post mortem establishes that death was from natural causes; or
- the cause and manner of death are clear following an investigation.

Asking for an inquest

Even where an inquest would normally not be held, the next of kin has a right to ask for one. Relatives should find out all they can about coronial inquiries and their advantages and disadvantages before making a decision. They should contact staff in the Coronial Information and Support Program located in the Office of the NSW State Coroner, Lidcombe.

[40.590] The Coroner's Court

Inquests are held in the Coroner's Court. The coroner normally hears all the evidence alone. The normal rules of evidence and procedure do

not apply. Relatives have a right to appear and to be legally represented. Legal aid is not generally available in Coroner's cases.

If the coroner decides that there is a case against anyone for a serious offence, the inquest will be terminated and a report with a recommendation is sent to the Attorney-General.

If the Attorney-General decides to proceed against a person or persons, they will be charged with an offence and tried by a judge and jury in the usual way.

The Coronial Information and Support Program (CISP)

The Office of the State Coroner in Lidcombe has the Coronial Information and Support Program (CISP). The staff assist families and friends through the coronial system. They provide information about the status of an investigation, manage objections to a post mortem and provide court support.

Grief counsellors

At the Department of Forensic Medicine at Lidcombe, Wollongong and Newcastle, Social

Workers are available for families and friends of deceased persons referred to the coroner to assist with emotional and practical support. They provide information, support and bereavement/trauma counselling.

Complaints

Complaints about funerals and funeral directors in the first instance should be directed to the funeral director involved. If no satisfactory solution is achieved, then refer to the Australian Funeral Directors Association (AFDA) if the funeral director is a member. If the funeral director is not a member of the AFDA, then referral to NSW Fair Trading should occur. The Office will want to hear both sides.

If the complaint is about costs, again the person should complain to the funeral director before paying the bill, although an itemised account would have been issued and signed at the time of arranging the funeral. If the matter is still not resolved, a hearing can be held before NSW Civil and Administrative Tribunal (NCAT) (formerly the Consumer, Trader and Tenancy Tribunal).

Contact points

[40.600] If you have a hearing or speech impairment and/or you use a TTY, you can ring any number through the National Relay Service by phoning **133 677** (TTY users, chargeable calls) or **1800 555 677** (TTY users, to call an 1800 number) or **1300 555 727** (Speak and Listen, chargeable calls) or **1800 555 727** (Speak and Listen, to call an 1800 number). For more information, see www.communications.gov.au.

Non-English speakers can contact the Translating and Interpreting Service (TIS National) on **131 450** to use an interpreter over the telephone to ring any number. For more information or to book an interpreter online, see www.tisnational.gov.au.

Changes are expected to the websites for many NSW government departments that were not available at the time of printing. See www.service.nsw.gov.au for further details.

Australasian Legal Information Institute (AustLII)

www.austlii.edu.au

Australian Funeral Directors Association

www.afda.org.au
ph: (03) 9859 9966

Bereavement Care Centre

www.bereavementcare.com.au
ph: 1300 654 556 or 9804 6909

National Centre for Childhood Grief

childhoodgrief.org.au/
ph: 1300 654 556

Coroner's Court

www.coroners.justice.nsw.gov.au
NSW State Coroner's Court, Lidcombe
ph: 8584 7777

Funeral Directors' Association of NSW

www.fdansw.com.au
ph: 9746 9366 or 1800 613 913

Law Society of NSW

www.lawsociety.com.au
ph: 9926 0333

NSW Trustee and Guardian

www.tag.nsw.gov.au
ph: 1300 364 103

Branches

Bathurst: 6324 5000
Broken Hill: (08) 8084 3500
Lismore: 6626 3200
Newcastle: 4929 8900
Parramatta: 8688 2600
Port Macquarie: 5525 2400
Sydney City: 9240 0732
Wagga Wagga: 6932 7800
Wollongong: 4201 2500

Probate

www.supremecourt.justice.nsw.gov.au/

Service NSW

www.bdm.nsw.gov.au
ph: 13 77 88 for all NSW

Registry of Funeral Funds

www.fairtrading.nsw.gov.au
ph: 1800 502 042

