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A court may not find a way where there's no will, says solicitor

By Keeli Cambourne, Deputy Editor SMSF Adviser and Matthew Burgess, Director, View Legal

Even if an individual satisfies all the criteria needed to get a court-ordered will, the final decision is at the discretion of a court as to whether it will approve the application, says a leading superannuation solicitor.

Matthew Burgess, director of View Legal, said there are circumstances when a person who does not have testamentary capacity can have a court make a will for them.

However, before that is done, there are a number of issues that need to be addressed.

"The first thing is there needs to be confirmation that the will-maker lacks the required capacity [to make their own will]," Mr Burgess said.

"There needs to also be a complete summary of the reasons for the application, together with details of all wealth of the will maker."

He added the applicant will also need a comprehensive draft of the intended court-ordered will as well as any details of any previous estate planning exercises in which the will maker was involved.

"With this there needs to be evidence about their intentions historically and what their probable intentions would be if they did not lack capacity," he continued.

"And there needs to be supplied all details of the wider factual matrix, including whether there is any realistic prospect that someone may look to challenge the deceased estate."

However, Mr Burgess said, the court will only approve an application in relatively limited circumstances.

"There are a number of key issues that a court must be satisfied about before allowing a statutory will to be created," he said. "They include that anyone who may have a potential interest in the estate must have the opportunity to address the court ... the person applying for the court-ordered will must be deemed by the court to be the most appropriate person ... finally, the court must be satisfied that it is appropriate in all the circumstances to approve the will."

Mr Burgess said this means the court must be satisfied the proposed will is reflective of what the will maker would have made if they had the required capacity.

A relevant legal case on this matter was heard in 2022, Wills v NSW Trustee [2022] NSWSC 1098.

"The main asset in this case was a property at North Bondi, valued at more than $7 million. The sole owner had lost capacity and had no relatives and no will, meaning on death her estate would pass to the State Government under the intestacy rules," Mr Burgess said.

The facts of the case were that a neighbour at North Bondi, named Wills, brought an application for a statutory or court-ordered will for the entire estate to pass to Wills, which was rejected.

In this case, the court confirmed that there was evidence to support the sole owner had a preparedness to die intestate even if that meant that the government took the benefit of her estate.

“Also, there was insufficient evidence to support a conclusion that the proposed statutory will was one that was reasonably likely to have been made, if the sole owner were to have had capacity,” Mr Burgess said.

An informal will, produced by Wills, that gave the entire estate to her, did not assist the court in the application for a statutory will.

“It was noted that this will was prepared and signed in circumstances sufficiently 'suspicious' to require proof that the sole owner 'knew and approved' the contents of it,” Mr Burgess said.

“A point reinforced by the fact that Wills was the sole owner's guardian and provided care and assistance and therefore owed fiduciary duties.”

The court ruled that Wills' application for a court-ordered will was not in any material way for the benefit, and in the interests, of the sole owner.

It stated that it was an attempt to legitimise the informal will, with the veracity of that document held by the court to be best tested following the death of the sole owner, assuming a court application was then made for the informal will to be admitted to probate.