FACT SHEET

IMPORTANT – This Document only provides general information.
It is not intended to be a substitute for you getting your own specific legal advice.

Wills for people with Intellectual Disability

1. Does a person have to make a will?

No. In fact many people choose not to make a will. The decision is a personal and private one.

If the property value is small a signed written note of who will get it may be all that is required when there is a close friend or carer who can be trusted to keep the note and carry out its terms.

If the property value is larger it is usually better for a person to make a will so that his or her wishes are recorded and obeyed.

2. What happens if a person dies without making a will?

If a person does not make a will their property is divided according to the law (called the Succession Act 2006). This usually means the property goes to the person's

nearest relatives. It is only if there are no people entitled to the property according to the law that the property goes to the government.

3. Can a person with an intellectual disability make a will?

Many people with intellectual disability can make a will. It is important to explain carefully to a person with intellectual disability what a will is. It is also important to test their understanding of the will they have made at the time that they make it.

In order to make a will, the will maker must have "Testamentary Capacity" which means that the will maker:

- knows a will says what happens to his or her property after they die
- knows in general terms what property he or she owns
- knows the people who may have a claim on his or her property
- is able to consider and weigh the claims of these people

4. Is evidence of capacity required?

A formal assessment of testamentary capacity is not required to make a will.

However, if someone is unhappy about the distribution of property under the will, that person may challenge the will on the grounds that the will maker did not have sufficient testamentary capacity.

When deciding whether or not evidence of testamentary capacity should be obtained the following factors should be considered:

- the will maker's own views
- the level of the will maker's disability
- the likely value of the estate, and
- the likelihood of a challenge to the will.

'I would really like my will to be written in plain language'

Evidence of testamentary capacity may simply require written notes recording the understanding of the will maker at the time of making the will. Other evidence may be from a support worker, or the family doctor, who have been involved with the will maker for a long time and who are present when the will maker gives instructions for the drafting of the will or when the will is explained and signed.

If it is felt that more evidence of testamentary capacity is required and the will maker is willing to see a psychologist, this should be arranged.

A statutory declaration should be obtained from the support worker, doctor, or psychologist verifying the testamentary capacity of the will maker.

Any written notes or statutory declarations of testamentary capacity should be kept with the will.

Even if there is doubt about the will maker's capacity, the will maker should still make a will if he or she wants to do so. A will is usually presumed valid unless and until someone challenges it.

5. Can someone else make a will for a person with intellectual disability?

No. no-one can make a will for another person. Guardians, trustees, parents and people under a power of attorney have no power to make a will on another's behalf.

6. Is a solicitor required to prepare a will?

No, a will does not need to be prepared by a solicitor.

If the property is valuable, we recommend using a solicitor because the solicitor is better placed to obtain evidence of testamentary capacity, make sure there is no undue influence by the carer, keep records, and advise on matters that should be considered by a will maker with intellectual disabilities.

7. How much will it cost to have a solicitor write a will?

Community Legal Centres (including the Intellectual Disability Rights Service) are not able to help people with wills.

The fees charged by private solicitors to write wills vary greatly. The Law Society of NSW (9926 0300) will be able to give you the names of solicitors who prepare wills in your local area.

Alternatively, the NSW Trustee and Guardian and some private trustee companies, do prepare wills. If there is no fee or a small fee it is usually because these bodies require the will maker to name them as the executor under the will. They then charge

a percentage of the estate to administer it when the will maker dies; (for example the Public Trustee charges 4% of the value of the estate for the first $100,000.00).

Ask for a fixed quote for fees upfront for preparing a will. Ask whether charges will be made for administering the estate (how much and why), when the will maker dies.

8. How can you find out whether a person has been left anything in a will?

Ask for a copy of the will. The Succession Act 2006 says that a copy of the will of a deceased person must be given to certain persons (including family members) by the person who has possession or control of the will. The right to have a copy of the will applies even before probate. You can ask a family member, or solicitor, or any other person who has the deceased's will for a copy of it.

A copy of the will can also be obtained from the NSW Supreme Court once probate is granted. You need information about the deceased including the full name, date of birth, address, date of death, date of probate, etc. Also look at the legal notices section of the newspaper.

Once you have a copy of the will you should seek legal advice about your rights.

9. Where can I get further information?

Intellectual Disability Rights Service.

Phone 9318 0144 (Sydney) or 1800 666 611 (Free call) weekdays for legal advice.

Community Legal Centres.

For information about the legal centre closest to you contact the Combined Community Legal Centre's Group.

Phone 9212 7333.

Law Access NSW

Law Access NSW is a NSW wide telephone information, referral and advice service.
Phone 1300 888 529

www.lawaccess.nsw.gov.au

Legal Aid

Contact numbers for Local Legal Aid offices are on the Legal Aid Website at www.legalaid.nsw.gov.au, or contact the central office on 9219 5000.

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