



## Can informal Wills be valid?

***Having a valid Will is an essential component of estate planning. What constitutes a valid Will in NSW is specifically defined in legislation however the law also provides that documents that do not satisfy these formal requirements may in some circumstances also be confirmed as a valid Will.***

### The Valid Will Test

Section 6 of the NSW Succession Act provides that a will is not valid UNLESS:

- (a) it is in writing and signed by the willmaker or by some other person in the presence of and at the direction of the willmaker; and
- (b) the signature is made or acknowledged by the willmaker in the presence of two or more witnesses present at the same time; and
- (c) at least two of those witnesses attest and sign the will in the presence of the willmaker (but not necessarily in the presence of each other).

The section also states that the signature of the willmaker 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. It is also not essential for a Will to have an attestation or signing clause. A Will that satisfies these requirements is known as a Formal Will.

### What is an Informal Will?

An Informal Will is a Will that doesn't strictly satisfy the provisions of section 6 of the Succession Act. While the Act doesn't provide a definition of "Informal Will" in most instances an Informal Will will be a document which while containing the wishes of the willmaker doesn't satisfy the Valid Will Test under the Act. Some common examples are:

1. a Will that has been witnessed by only one person.
2. an unsigned note made by a patient in hospital.
3. a partially burnt signed and dated Will.
4. an envelope containing money on which a note has been scribbled giving the contents to a nominated person.
5. a signed noted contained in a personal diary.

Traditionally it was the case that Informal Wills must be in some type of written form as in a "document". However, in more recent decades with advances in technology the definition of what can constitute a "document" has been extended on a case by case basis to include other non-written forms such as:



- a document created and stored in an iPhone.
- a file saved on a computer hard drive.
- a video recording on a DVD.
- an unsent text message on a mobile.
- an audio recording on a Dictaphone.

## When will a Court accept an Informal Will as being a Valid Will?

Section 8 of the NSW Succession Act allows the Court to dispense with the specific requirements of a Formal Will under section 6 of the Act if:

- (a) there is a document or part of a document that appears to contain the wishes of how the deceased person wanted to distribute their assets but has not been signed in accordance with the Act; and
- (b) the Court is satisfied that the person intended that the document form his or her will.

Many matters that come before the Court in applications made under Section 8 of the Act involve disputes over “competing Wills”. That is where there are two or more documents in existence appearing to contain the wishes of a deceased person, one of which may be an earlier made Formal Will and another a subsequently made Informal Will. Disputes of this nature can result in lengthy and costly court proceedings to determine which of the documents is considered by the Court to be the deceased’s valid Will.

In making a decision under section 8 of the Act as to the validity of an Informal Will the Court may, in addition examining the document itself, have regard to any evidence relating to the manner in which the document was signed. It will also regard any evidence of the testamentary intentions of the deceased person including evidence of statements made by the deceased person to others. There is however no prescribed limit on the matters that the Court may have regard to when making a decision to dispense with the strict requirements of section 6 of the Act.

If the Court accepts an Informal Will as being a valid Will it will override any prior Wills that the deceased may have made. The Court will issue a Grant of Probate of the Will to the person or persons nominated in the Will as the deceased’s executors giving them the power to distribute the estate assets in accordance with the terms of the Will. If the document constituting the Will does not appoint an executor the Court will issue a Grant of Letters of Administration to the person or persons who have applied to the Court to be appointed as the Administrators of the deceased’s Will enabling them to then distribute the estate assets.

## The Lesson

While the law in NSW provides that in some circumstances an Informal Will may be accepted as a deceased person’s valid Will, it is by far a better option to have your Will prepared by an experienced lawyer thus minimising significant legal expenses being incurred by your estate and also ensuring that your actual wishes for the distribution of your assets after death are fulfilled.

***If you would like further information about Informal Wills or wish to discuss making a Will or having your current Will reviewed please , please contact [Lisa Delalis](#) or [John Bateman](#) of our office 02 4731 5899 or email [willsestates@batemanbattersby.com.au](mailto:willsestates@batemanbattersby.com.au).***