



What happens if you can't make a Will?

A person can only make a Will if they have the Testamentary Capacity to do so. Some people never have this capacity. Others may make a Will but later lose capacity and cannot change their Will. In limited circumstances, a mechanism exists for a Court to order that a Will (Statutory Will) be made for these people.

What is Testamentary Capacity?

The test to determine whether a Willmaker has Testamentary Capacity requires that a Willmaker must:

- understand the nature of the act of making a Will - what this means and its effect.
- understand the nature of the act of making a Will - what this means and its effect.
- also understand the extent of the “property” they are disposing of in the Will.
- have an understanding of the people they ought to reasonably provide for in their Will.
- not have a disorder of the mind which would affect the dispositions in the Will.

Prior to 2006 no mechanism existed in NSW for a person without Testamentary Capacity to make a Will. This led to situations where, for example, a person who developed dementia was unable to change their existing Will because they now lacked the Testamentary Capacity to do so, even if their circumstances or that of the beneficiaries named in the existing Will had changed.

Following changes to the Succession Act in 2006, the Supreme Court was given the power to make orders approving applications to make a Will or alter or revoke an existing Will which would otherwise have been made, altered or revoked by a person lacking capacity, if they had the Testamentary Capacity to do so. The Court’s power to make such an order is limited to the following case categories:

- **“lost capacity” cases** - where a person having made a Will loses testamentary capacity;
- **“nil capacity” cases** - where a person never had Testamentary Capacity because of mental infirmity from a very young age;
- **“pre-empted capacity” cases** - where a person who was still a minor and therefore lacked Testamentary Capacity was still able to form relationships and express reasonable wishes about property before losing Testamentary Capacity.

Statutory Wills

Section 18 of the Succession Act provides that the Court may authorise a Will to be made or an existing Will altered in part or revoked altogether for a person without Testamentary Capacity. The making or alteration of the Will may apply



to part or the whole of the person's property, however the Court cannot make an order under Section 18 unless the person the subject of the application is alive when the order is made.

The Court does not actually 'make' the Will as such but rather authorises a Will that is proposed in an application made to it. Any such application must satisfy the following criteria:

- The person the subject of the application lacks Testamentary Capacity; and
- The proposed Will (or alteration or revocation) accurately reflects the intentions of the person as if they had Testamentary Capacity; and
- It is reasonable in the circumstances for the Court to make orders authorising the Will.

Who can apply for a Statutory Will to be made?

Any person may make an application for a Statutory Will on behalf of another person who lacks Testamentary Capacity, however the applicant must satisfy the Court that they are an appropriate person to make the application.

Statutory Will applications are commonly made by a family member (such as a parent, child, or other relative of the incapacitated person) but this is not essential and applications can be made by a wide range of people. This can include someone who has a close connection with the person, such as a friend or a person who has formal authority to act for the incapacitated person, such as an attorney (under an enduring power of attorney), administrator or guardian. A person who stands to benefit under the proposed Statutory Will is not disqualified from making the application, although the Court will need to be satisfied that they are an appropriate applicant.

Proving Lack of Testamentary Capacity

Medical reports by experts such as a treating physician, psychologist or geriatrician provide the best evidence to satisfy the Court as to a person's lack of Testamentary Capacity. The experts can also provide an opinion as to whether the person is likely to acquire or regain capacity in the future. Evidence from family members and friends concerning capacity does hold some weight, but the independent evidence of medical practitioners is often preferred by the Court.

Determining Testamentary Intentions

In NSW, the Court will generally authorise the proposed Statutory Will if it is, or is reasonably likely to be, one that would have been made by the person if he or she had Testamentary Capacity. In determining an incapacitated person's testamentary intentions, the Court will usually examine evidence lodged in support of an application that would be expected to be taken into consideration by any person when making a Will. This can include whether any draft Will exists, other evidence concerning the wishes of the incapacitated person, evidence about who might reasonably expect to be provided for in the Will and who might make a Family Provision Claim against the estate as well as confirmation of who would be entitled to the estate if the person were to die without a Will.

Is it reasonable to make the orders?

Prior to making the orders, in addition to ensuring that the application has been made by an appropriate person, the Court will require that adequate steps have been taken to inform any persons with a proper interest in the estate about the application, including those who may have reason to expect a benefit or provision from the estate under any existing Will. If this and the other above matters are satisfied, the Court will usually make an order to authorise the proposed Statutory Will.



If you would like further information about making an application for a Statutory Will for a family member or friend who may lack the testamentary capacity to make a Will themselves please contact [Lisa Delalis](#) or [Ken Gray](#) of our office 02 4731 5899 or email willsestates@batemanbattersby.com.au.