TASCAT
TASMANIAN CIVIL & ADMINISTRATIVE TRIBUNAL

Statutory Will

What is a statutory will?

In Tasmania, a 'statutory will' is a will that is made by the Supreme Court of Tasmania or by the Tasmanian Civil and Administrative Tribunal, Guardianship stream (the Tribunal) in circumstances where a person lacks the required level of mental capacity to independently make a valid will.

If a person dies without a valid will, they are said to have died 'intestate,' or to have created an 'intestacy,' meaning that there is no will to guide how their estate will be distributed after their death. Legislation establishes rules of inheritance under an intestacy. Because immediate family members generally inherit under an intestacy, in many circumstances distribution of an estate under an intestacy may be adequate and there is no need to apply for a statutory will. If an intestacy would not represent the wishes of a person with a disability, a statutory will might be considered.

What level of mental capacity is required for a person to make a will?

A person making a valid will must:

1. Understand the nature and effect of a will, and
2. Understand the nature and extent of their property, and
3. Have an awareness of the persons who may have reasonable claim on their estate, and
4. Not be suffering from any delusions or mental disorders that would influence the making of the will.

If a person does not meet this test of mental capacity, it is said that they lack "testamentary capacity" and they cannot make a valid will. Where there is doubt about a person's testamentary capacity, medical and psychological evidence will be important to establish whether or not the person can make a valid will.

Making an application to the Tribunal for a statutory will

The Tribunal can make a statutory will for a person who lacks testamentary capacity and has not made a prior will or purported will.

The Supreme Court of Tasmania can make a statutory will for a person who lacks testamentary capacity and who has made a prior will or purported will. If you are making an application for a statutory will to the Supreme Court, you are strongly advised to seek independent advice from a legal practitioner.

This fact sheet relates only to applications for a statutory will made to the Tribunal.

Evidence required in an application

The person about whom an application is made is called the 'proposed testator'. An application for a statutory will must be made while the proposed testator is alive.

The Tribunal must be satisfied that the person making an application for a statutory will is an 'appropriate person' to do so. Persons who have only limited association with the proposed testator should not make an application.

The person applying for a statutory will must satisfy the Tribunal that:

(a) the proposed testator is incapable of making a will; and
(b) having made reasonable enquiries, that the proposed testator has not made a will or any purported will; and
(c) adequate steps have been taken to allow representation of all persons with a legitimate interest in the application, including persons who have reason to expect a benefit from the estate of the proposed testator; and
(d) it is appropriate to make an order for the execution of a will for a proposed testator; and
(e) the proposed will is or is reasonably likely to be one that would have been made by the proposed testator if he or she had had testamentary capacity

The applicant is also required to submit extensive information in the application about the proposed testator, his or her estate, potential beneficiaries and persons who might benefit under an intestacy or a claim for testator's family maintenance.

The Tribunal will conduct a hearing and if the tests in the legislation are satisfied, it will make a statutory will. If the tests are not satisfied, the application will be dismissed.

More information

Please refer to the application forms.