



## Releasing the right to contest a Will

Author: [Bridget Schultz](#)

Email: [bridget@ealawyers.com.au](mailto:bridget@ealawyers.com.au)

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In New South Wales, eligible persons have the legal right to [challenge a Will](#) if they believe that they have been unfairly left out or inadequately provided for. However, there are some circumstances where a person may explicitly agree **not** to make a family provision claim. This agreement may be made legally binding with the approval of the Supreme Court of NSW.

This blog will explain how this process works, when a release is appropriate, and the important role of the Supreme Court of NSW in approving these agreements.

### Eligible persons

Before exploring how the right to contest a Will can be released, it is helpful to understand who can bring a claim as an eligible person.

Under section 57 of the *Succession Act 2006* (NSW) ("**the Act**"), the following people are considered "eligible persons" to contest a Will:

- The deceased's spouse at the time of death;
- A former spouse of the deceased;
- A child of the deceased;
- A person who was wholly or partly dependant on the deceased and lived with them;
- A dependant grandchild;

- A person in a close personal relationship with the deceased.

These individuals may apply to the Supreme Court for a Family Provision Order if they believe that the will did not provide adequate provision for their proper maintenance, education, or advancement in life.

## Conditions for releasing a right to contest the Will

Section 95 of the Act allows an eligible person to release their right to make a family provision claim on the following conditions:

1. The release is contained in the appropriate form, such as a Deed of Release;
2. The release is approved by the Supreme Court of NSW;
3. The Supreme Court is satisfied that the person giving the release has made an informed and voluntary decision free from any duress; and
4. The release is considered proper and adequate in the circumstances.

The release can relate to the following:

- A specific estate; or
- Present or future entitlements.

## When would a release be used?

The most common scenarios where a release under section 95 of the Act would be used are:

- During family law property settlements where the matter has been finalised and all financial ties have been severed.
- During blended family estate planning where a parent wants to protect their future inheritance for the children of the first marriage; and
- where a child or spouse has received substantial assets during the deceased's lifetime.

## Why would a release be used?

The benefit of a Deed of Release in the abovementioned common scenarios is to bring certainty to the parties and to prevent future litigation.

In family law matters, a Deed of Release can help finalise property and inheritance arrangements, both during a person's lifetime and after their death. It provides clarity for all parties and can prevent disputes over assets left in a Will.

Where a child or spouse has received substantial assets during the deceased's lifetime, in essence an "early inheritance", the Deed of Release would be helpful to document this for the remainder of the beneficiaries and to ensure that there was no future litigation regarding an attempted second helping.

# How would a release be used?

For the release to be considered by the Supreme Court of New South Wales, the following procedure is usually followed.

1. The Deed of Release is drafted by a lawyer with the requisite knowledge and skill. The Deed should clearly set out the following:
  1. The intention to release the rights of the eligible persons;
  2. Contain details of any consideration or settlement involved;
  3. Details that legal advice has been received by the releasing party regarding the effect, advantages, and disadvantages of proceeding with the Deed of Release.
2. The Application is then prepared. An application to the Supreme Court (at the time of the writing of this blog) must include:
  1. A copy of the Deed of Release duly executed by the parties;
  2. An Affidavit providing evidence about the background and circumstances of the agreement; and
  3. Confirmation that the releasing party has received independent legal advice.
3. The Court will then review and, if appropriate, grant the approval. The Court will consider the following:
  1. Whether the person was an eligible person;
  2. Whether the release was made with full understanding of the consequences;
  3. Whether the release is just and equitable, considering the nature and value of the estate; and
  4. Whether the releasing party had the benefit of independent legal advice.

It is important to note that approval is discretionary. The Supreme Court will not approve Deeds of Release that appear to be unfair or exploitative.

## Family law relevance of a Deed of Release

In many family law matters, separating spouses often resolve their property matters amicably by way of Consent Orders or Binding Financial Agreements. These settlements will detail the distribution of property, assets, liabilities, superannuation and, if applicable, spouse maintenance.

Consent Orders and Binding Financial Agreements do not automatically prevent one party from making a claim on the estate of the other party after their death as an eligible beneficiary. A Deed of Release under the Act can prevent that occurring in the future.

## Get help from an estate planning lawyer

A Deed of Release provides a useful mechanism for preventing future estate litigation. However, they must be entered into only after careful consideration.

If you are considering entering into a Deed of Release, it is critical to obtain independent legal advice and understand the long-term implications of entering into such an agreement.

## Contacting E&A Lawyers

For more information or to arrange a consultation with a lawyer, you can call or email us.

[02 9997 2111](tel:0299972111)

[info@ealawyers.com.au](mailto:info@ealawyers.com.au)

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