



Can gifts in a will be changed after death? Understanding Deeds of Family Arrangement in NSW

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When someone passes away, their Will sets out how their estate should be distributed. Or, if there is no Will, the Succession Act NSW 2006 determines how the assets of the deceased person are distributed by intestacy. In most cases, the executor simply follows the instructions contained in the Will or the outcome determined by intestacy and distributes the assets accordingly.

Sometimes, the outcome of the distribution of assets might be varied from that defined in the Will or by intestacy, where all the interested parties agree and by the relevant parties entering into an agreement. There may also arise some issues as to the interpretation of the Will and, to avoid costly Court proceedings, the relevant parties enter an agreement on how the estate assets be dealt with irrespective of the express words of the Will. Such an Agreement is often referred to as a Deed of Family Arrangement.

What Is a Deed of Family Arrangement?

A Deed of Family Arrangement is a legally binding agreement between the beneficiaries of a deceased estate that allows them to alter the way estate assets are distributed.

In simple terms, it records an agreement among beneficiaries to distribute the estate differently from what the Will or intestacy originally provided.

Examples of where a Deed of Family Arrangement might be used

- Where the beneficiaries wish to alter the outcome of the distribution of assets as set out in the terms of the Will

A common example is where the Will might provide for all assets to be distributed equally among three beneficiaries, but one of them wishes to take a certain asset for their share of the estate.

The agreement among the parties may be that the beneficiary may take the property and the other beneficiaries take different assets, but overall each receives their equal one third share of the value of the estate.

The Deed is used to identify what was agreed to be done, what the value of the assets was at the time and the treatment of tax consequences (particularly Capital Gains Tax). A Deed of Family Arrangement allows the beneficiaries to design a new plan for the distribution of assets.

Care should be taken in these circumstances as it can affect the tax consequences for the estate.

•Where the beneficiaries wish to distribute some of their entitlement to persons who were not included in the Will

For example, a Will may leave the entire estate to the deceased's two adult children, but the family may feel it is appropriate for a grandchild, a child born after the Will was signed, a stepchild or a long-term carer to receive some benefit from the estate.

Rather than challenging the validity of the Will or commencing court proceedings, the beneficiaries who are entitled under the Will can agree to vary the distribution by entering into a Deed of Family Arrangement outlining the amount they will provide to the additional person. Through this agreement, they may allocate a portion of their entitlement to the additional person, allowing the estate to be distributed in a way that better reflects the family's wishes while avoiding the time, cost and uncertainty of litigation.

A Deed of Family Arrangement may also be used to reflect a change in circumstances that were not recorded in the Will, such as the spouse of a second marriage or long-term de facto spouse.

•Alter the outcome of applying the rules of Intestacy

Where a person passes [without leaving a Will](#), the rules of intestacy decide who are entitled to receive a share of the Estate typically by reference to the relationship to the deceased. Beneficiaries may wish to vary the outcome of the rules of intestacy and come to their own arrangement as to how the estate assets are divided.

For example, where the deceased leaves a second spouse and children from a previous marriage, the rules of intestacy would entitle the spouse to receive the deceased's personal effects, a statutory legacy and half of the remainder of the estate with the other half passing to the children equally. In this situation, the beneficiaries may instead decide to divide the estate equally and record this arrangement in a Deed.

•Where a party seeks to challenge a Will

Where a party is left out of a Will or is unhappy with what they have received, they may seek to challenge the Will, typically by commencing [a family provision claim](#).

A Deed may be used as a mechanism to record an enforceable settlement of the dispute without resorting to costly and lengthy Court proceedings.

What should I consider before entering into a Deed of Family Arrangement?

Before an Executor or beneficiary enters into a Deed, there are several considerations to take:-

•Consent and Agreement by all Parties

All parties who are entitled under the Will or under intestacy must consent and agree to the terms of the Deed. For that reason, a Deed cannot be entered into where parties entitled are under the age of 18 or suffering from a mental incapacity.

•Release and Indemnity for the Executor

The beneficiaries should be prepared to release the Executor from any future claims against the estate. The Deed will include a release and indemnity to protect the Executor.

You can learn more about the executor's role in our earlier blog, ["Executor duties when dealing with property of a deceased estate"](#).

•Capital Gains Tax (CGT) and Stamp Duty Implications

Changing how an estate is distributed can have tax implications.

CGT and stamp duty may apply where the Executor transfers assets, such as property, to newly nominated beneficiaries or where a beneficiary receives less than or more than their entitlement under the Will or under the rules of intestacy. The Deed itself may, in some cases, be liable for stamp duty.

The parties will need to carefully consider the taxation and duty implications of the new arrangement.

•Obtaining Independent Legal Advice

The parties to the Deed should obtain independent legal advice. This is to ensure that the parties fully understand the legal implications of entering into the Deed and are provided with objective advice as to the merits of entering into the Deed.

Benefits of a Deed of Family Arrangement

When used appropriately, a Deed of Family Arrangement can provide several benefits to the executor and beneficiaries, including:

•Flexibility

It allows families to adjust estate distributions to reflect their current circumstances and record their agreement.

•Avoiding Court Proceedings

Resolving disputes by agreement can avoid lengthy, expensive and stressful litigation.

•Protecting the Executor

A properly drafted deed can provide protection for the executor by recording the beneficiaries' agreement regarding the distribution of the estate.

•Preserving Family Relationships

Estate disputes can cause significant conflict between family members. Reaching an agreed solution can help maintain relationships.

How do I prepare a Deed of Family Arrangement?

Once the parties have agreed to alter the outcomes of the deceased's Will or the outcomes arising from intestacy, it is important that a solicitor is involved to draft the Deed as an incorrectly drafted Deed can lead to unintended negative outcomes.

A solicitor can provide advice regarding the terms of the Deed and the proposed distribution. An accountant might also need to be engaged to provide advice regarding any taxation implications of the arrangement.

The most important thing is that the arrangement is documented accurately and completely before the Executor finalises administering the assets of the Estate.

Final Thoughts

While a Will generally takes effect exactly as written once someone dies, there are situations where families may agree that a different distribution is more appropriate.

A Deed of Family Arrangement allows beneficiaries in New South Wales to formally record that agreement and adjust how an estate is distributed.

Used carefully, it can provide flexibility, resolve disputes and help families move forward without unnecessary conflict.

Get in touch with our [Sydney Wills & Estates Lawyers](#) today

If you need advice about a Deed of Family Arrangement or any aspect of estate administration, our experienced team at E&A Lawyers is here to help. We are located in Mona Vale, Northern Beaches Sydney NSW - contact us today for a consultation.

Contacting E&A Lawyers

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

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