WILLIS & BOWRING
Solicitors

ESTATE PLANNING

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MIRANDA NSW 2228
info@willisbowring.com.au
www.willisbowring.com.au

MEET
OUR TEAM

LOU POLITO
CONSULTANT

Solicitor
LLM (Applied Law) (Wills & Estates) (College of Law)
Lou was admitted as a Solicitor in 1978 and has been a Partner of Willis & Bowring since 1997. Lou heads up the Estate Planning Division of the firm. Lou has undertaken extensive studies in this area of law and has completed a Master of Laws, majoring in Wills and Estates.
Lou also has extensive experience in commercial transactions involving property transactions, commercial leases, mortgage transactions, purchase and sale of business. Lou has completed a Diploma in Financial Markets course run by the Securities Institute Education.
Contact Lou: lpolito@willisbowring.com.au

JESSICA CALLEJA
SOLICITOR

Solicitor
LLM (Applied Law) (Wills & Estates) (College of Law)
LLB (Hons), B.A. (Dist), GDLP
Jessica joined our Estate Planning team in 2017, initially as a paralegal, and was admitted as a Solicitor in March 2019. She holds a Master of Laws, majoring in Wills and Estates. She also graduated from the University of Wollongong in 2018 with a Bachelor of Laws (Honours) and Bachelor of Arts with Distinction (Politics), which included the completion of an Honours thesis in succession law.
Jessica prides herself on her attention to detail and approachable manner. She regularly assists clients, alongside their financial advisers, to prepare tailored Estate Planning documents, as well as reviewing superannuation and business structures for Estate Planning purposes. She also provides advice on applications for Probate and Letters of Administration. Jessica also assists clients and their families with transitioning to supported accommodation, through reviewing proposed agreements with aged care facilities.
Contact Jessica: jcalleja@willisbowring.com.au

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MEET
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AIMEE COLLANTES
SOLICITOR

Solicitor
LLB, BSC (Macq)
GDLP (College of Law)

Aimee was admitted to practice as a solicitor in the Supreme Court of NSW on October 2015. Aimee graduated from Macquarie University with a Bachelor of Laws and a Bachelor of Science in September 2014. She also completed a Graduate Diploma in Legal Practice at the College of Law, Sydney in September 2015.

She is a key member of our Wills & Estates team, with expertise in probate and letters of administration applications. Aimee deploys an empathetic approach when assisting clients handle their estate administration affairs. She ensures all clients of Willis & Bowring are thoroughly informed of the estate administration process.

With extensive experience in both estate administration and estate planning, Aimee has expertise in the following:

- Probate
- Letters of Administration
- Complex Deceased Estate Administration & Distribution
- Testamentary Trust Wills & Simple Wills
- Enduring Powers of Attorney
- Enduring Guardianship Appointments; and
- Complex Succession Planning.

Contact Aimee: acollantes@willisbowring.com.au

ESTATE PLANNING
THE BARE MINIMUM

Incapacity

Death

ENDURING POWER OF ATTORNEY

(Legal & Financial Decisions)

Will

(Distribution of Estate)

5

Death Benefit Nominations

(Distribution of Superannuation)

Enduring Guardianship

Medical & Lifestyle decisions)

Assets not covered by Will

- Joint Assets
- Trust Assets
- Company Assets

WILLIS & BOWRING Solicitors

INCAPACITY

POWER OF ATTORNEY & APPOINTMENT OF ENDURING GUARDIAN.

Along with making a Will, appointing an Enduring Power of Attorney and Enduring Guardian is a very important part of any Estate Plan. These appointments allow you to nominate a person, or persons, that you know and trust to make important decisions on your behalf in the event that you lose capacity.

It is a common misconception that these documents are only for the elderly. As any person may sustain a brain illness or injury at any time, it is recommended that anyone over the age of 18 years (that has the mental capacity to do so) considers putting these documents in place.

It is too late to appoint an Enduring Power of Attorney and/or Enduring Guardian once you have lost capacity. The Guardianship Division of the NSW Civil and Administrative Tribunal ("NCAT") may appoint someone to act on your behalf, which may be a natural person or a government body (such as the Public Guardian or the NSW Trustee & Guardian).

By planning ahead now, you can decide who is to step into your shoes to make important decisions on your behalf in the event that you are not able to do so yourself.

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ENDURING POWER OF ATTORNEY

1. What is an Enduring Power of Attorney?

The appointment of an Enduring Power of Attorney formally gives another person, or persons, the authority to manage your legal and financial affairs in the event that you lose the capacity to do so yourself. Depending on what you direct, this may include buying and selling assets, operating your bank accounts, and spending money on your behalf.

The Attorney is required to exercise their powers in your best interests. It is important that you are confident in the ability of the person(s) that you appoint to exercise their powers, as you cannot revoke the appointment once you lose capacity.

2. Is there any special procedure to make an Enduring Power of Attorney effective?

Yes, to be effective as an Enduring Power of Attorney, the document must contain the prescribed wording which is in the form appearing in the Powers of Attorney Regulation 2016. The document has to be endorsed with a certificate by the attesting witness, not being an Attorney under the power, that he or she explained the effect of the document to the principal before it was signed. The prescribed class of witnesses includes a Solicitor, Barrister, or Registrar of a Local Court.

ENDURING POWER OF ATTORNEY

Continued

3. How is an Attorney limited in their actions?

An Attorney is required by law to adhere to the following responsibilities in managing your legal and financial affairs:
Keep their own money and property separate from your money and property;

- Keep reasonable accounts and records of your money and property;
- Unless expressly authorised, they must not gain a benefit from being an attorney;
- Always act in your best interests;
- Always act honestly in all matters concerning your legal and financial affairs.

You can also place as many or as few additional limitations or powers on your Attorney's authority. For example, you may give your Attorney the authority to view your Will, update your superannuation Binding Death Benefit Nominations, or withdraw superannuation proceeds from your fund.

APPOINTMENT OF
ENDURING GUARDIAN

1. What is an Enduring Guardian?

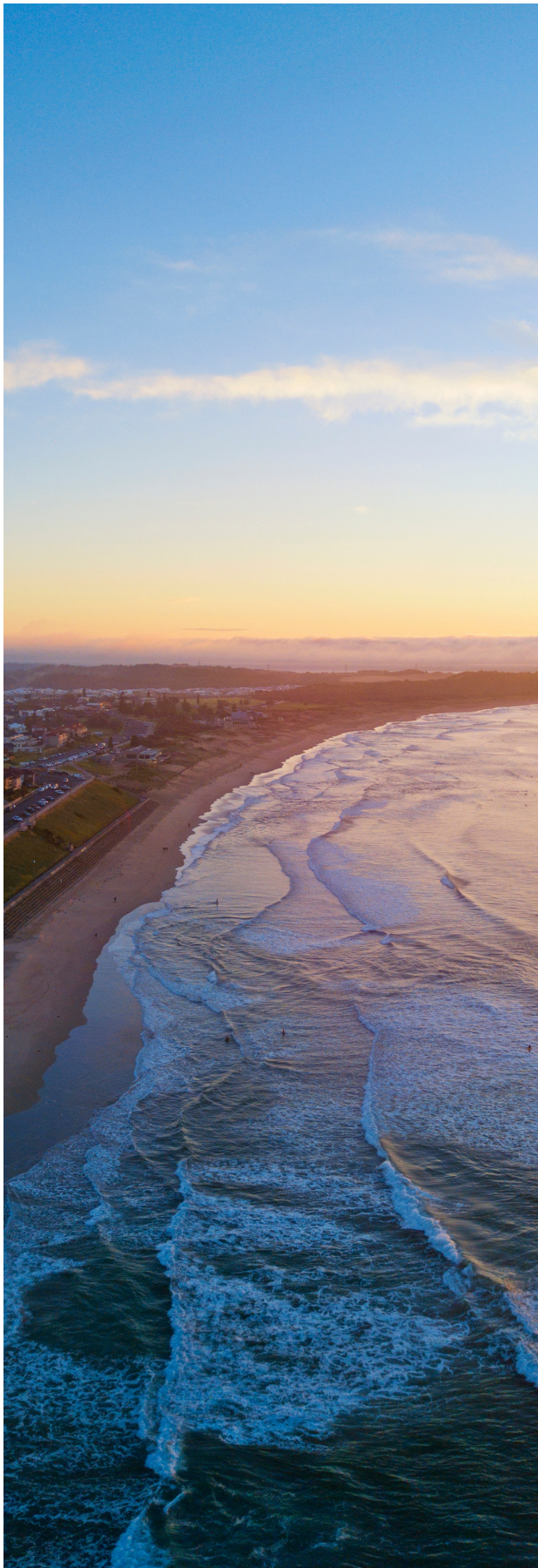
An Enduring Guardian is someone you choose to make medical and lifestyle decisions on your behalf in the event that you lose the capacity to do so yourself. Depending on what you direct, this may include deciding where you should live, what medical treatment you should receive, and whether you should be administered life sustaining measures if you are in a persistently vegetative state.

2. What sort of decisions is an Enduring Guardian unable to make?

An Enduring Guardian cannot make a Will for you, vote on your behalf, consent to marriage, manage your finances or override your objections, if any, to medical treatment.

While a Guardian is permitted to give consent to certain major and minor medical treatments on your behalf, only the NSW Civil and Administrative Tribunal can consent to the following treatments:

- Sterilisation – including vasectomy and tubal occlusion;
- Termination of pregnancy;
- Use of an aversive stimulus – including mechanical, chemical or physical;
- Any new treatment that has not yet gained the support of a substantial number of medical practitioners or dentists specialising in the area of practice concerned;
- Use of medication that affects the central nervous system when dosage, duration or combination is outside accepted norms;
- Androgen-reducing medications for behavioural control.



WILLIS & BOWRING Solicitors

APPOINTMENT OF
ENDURING GUARDIAN

Continued

3. Who can be an Enduring Guardian?

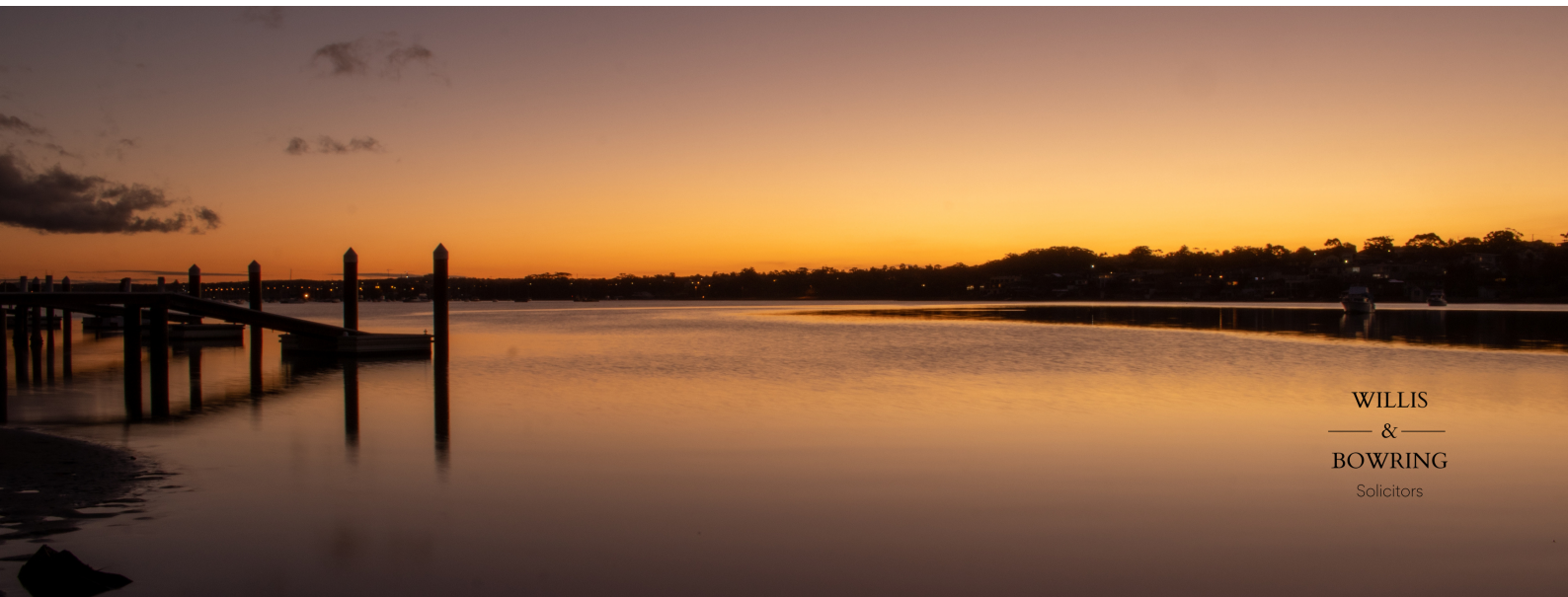
The person you appoint as your Enduring Guardian must be at least 18 years old. Your chosen Guardian should be someone you trust to make decisions in your best interests if you are not capable of making decisions for yourself. The person(s) or a close relative of theirs must not be providing medical treatment, accommodation or support services to you on a professional basis at the time that you make the appointment. Your Guardian must act in your best interests and within the law. You cannot give your Guardian a function or a direction which would involve them in an unlawful act.

You can appoint more than one person. If you appoint more than one Enduring Guardian, you can direct them to act jointly or separately.

You need to discuss the appointment with your chosen Guardian and make sure they are willing to take on this responsibility if you can no longer make decisions for yourself. It would be wise to discuss the functions in detail and ensure that your Guardian clearly understands your wishes and any direction associated with any function. You may also wish to discuss the appointment with other significant people in your life.

4. When does it take effect?

The appointment of your Enduring Guardian takes effect only if you become unable to make your own personal or lifestyle decisions. Your Guardian may wish to seek the opinion of a medical practitioner about your capacity to make decisions before acting on your behalf.



WHAT HAPPENS TO "YOUR" ASSETS UPON DEATH

Personal Assets

↓

Will

Joint Assets

↓

Survivor

Superannuation Assets

↓

Subject to terms of superannuation trust deed and death benefit nominations.

Limited to superannuation dependents (prescribed under legislation) - includes:

- Spouse
- Children
- Estate (i.e generally through your will)

Controlled Assets
(e.g. company or family trust)

↓

Entity continues to hold assets

Control of entity may be passed (e.g. transfer of role of appointor or trustee)

WILLIS & BOWRING
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WILLS

1. Should I make a Will?

Yes. It is essential to make a Will if you are concerned about who will receive your assets and belongings after you die. It is particularly important to make a Will if you have a family or other dependants.

2. What is a Will?

A Will is a legal document that sets out who will receive the things you own, such as your property and possessions, in the event of your death. These people are known as beneficiaries. Your property and possessions include everything you own, such as your home, car, cash, shares, jewellery, pictures, furniture etc. Making a Will is the only way you can ensure your assets will be distributed in the way you want after you die.

3. What happens if I don't make a Will?

If you die without a Will, the legal distribution of your assets is more complicated and time consuming and may cause expense, worry and even hardship to your family. The law provides a formula that sets out who is entitled to the property of a deceased person who dies without leaving a Will. This formula may not distribute your assets in the way you would have wanted.

WILLS
Continued

4. Can I alter my Will if I change my mind?

Yes. You are free to alter your Will at any time. If your circumstances change in any way, you can and should alter your Will. However, you cannot make an alteration by, for instance, crossing something out on the original Will and writing in your new wishes.

5. How can Willis & Bowring help me?

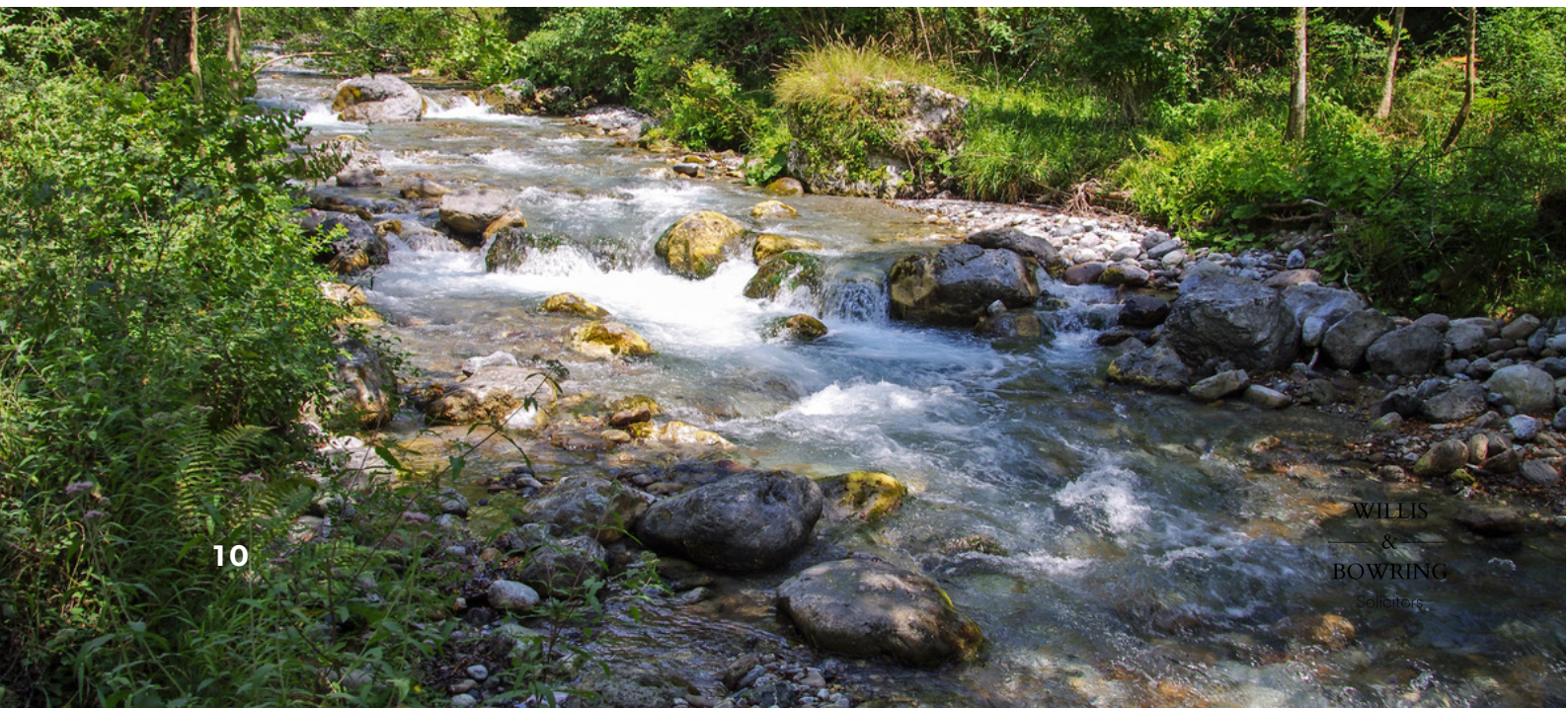
Willis & Bowring can:

- Make sure your Will is valid i.e. properly drawn, signed and witnessed;
- Make sure your wishes are clearly expressed in the Will;
- Advise you regarding adequate provision for your spouse and children, or for any former spouse or any dependants;
- Advise you on choosing an Executor;
- Advise you on the best way to arrange your affairs; and
- Keep the Will in a safe place.

6. Is a Testamentary Trust Will relevant to me?

Consult with Willis & Bowring to consider whether a Testamentary Trust Will would be of benefit in your circumstances.

There are many types of testamentary trusts, including **discretionary trusts** (where the trustee controls who and when distributions are made) and **protected trusts** (when the rules about distribution are set out and cannot be amended). These structures can be of particular benefit where there are vulnerable beneficiaries.



TESTAMENTARY **TRUSTS**

1. What is a Testamentary Trust?

A Testamentary Trust comes into existence by direction of your Will after you have died. In effect, the trust becomes the owner and manager of all assets that are passed to it by the instructions in your Will. These assets can include your real estate, your cash and your investments. The trustee has the discretion, according to the terms defined in your Will, to distribute the income and capital of the trust to those people whom you have nominated to be beneficiaries.

2. What are the advantages of a Testamentary Trust Will?

Some of the advantages of a Testamentary Trust Will may include:

- Greater flexibility for your beneficiaries, including the ability to decide whether or not they wish to take their share in the Estate absolutely or via a trust structure;
- A Testamentary Trust may offer a level of asset protection against claims from creditors, in the event of a separation, divorce or bankruptcy; and
- The ability to split income to take advantage of more favourable tax rates for some beneficiaries, such as children, who are currently able to receive a total annual income of $18,200 per year tax free. Therefore, if the trustee of a Testamentary Trust decided to distribute income to four beneficiaries who were non-income-earning students under the age of 18 years, a total of $72,800 in trust income could be distributed tax free.

TESTAMENTARY **TRUSTS**

Continued

3. What is the general structure of a Testamentary Trust Will drafted by Willis & Bowring?

Depending on your instructions, a Testamentary Trust Will drafted by Willis & Bowring generally gives your beneficiaries the option to decide whether they wish to take their benefits either absolutely (as under an "ordinary" Will) or to have their benefits form part of a Beneficiary-Controlled Testamentary Trust. Creating the option of a trust structure can allow your beneficiaries the freedom to decide whether a trust structure would be appropriate at the time of your death.

If the persons you name in your Will as your beneficiaries do decide to establish a Beneficiary-Controlled Testamentary Trust, each named beneficiary will hold three key powers in relation to their individual trust:

(a) The power to "hire and fire" the trustee – including the power to appoint him/herself as the trustee (or one of several trustees);
(b) The power to consent to distributions – allowing them to direct the payment or withholding of income and capital to a range of other potential beneficiaries, including their children and grandchildren; and
(c) The power to consent to ending the trust – once the trust is established, the beneficiary may choose to terminate the trust at any time and require the trust income to be paid to them absolutely. This flexibility can be beneficial if their circumstances change or adverse changes are made to the law in future.

In NSW, trusts can be run for a maximum of 80 years.

However, if a person named in your Will as your beneficiary is under the age of 25 years, our Testamentary Trust Wills generally provide that the trust structure is mandatory and that beneficiary's share of your estate is to be looked after by your Executors until they have reached the age of 25 years.

We further note that the above structure may not be suitable in all circumstances and it is important to seek expert advice from legal and financial professionals to determine whether a Testamentary Trust is at all suitable in your own circumstances. Our Estate Planning team have extensive experience in this area and can provide advice that is tailored to your individual needs.

ESTATE LITIGATION

1. FAMILY PROVISION CLAIMS

Section 100 Statement

While Will-makers have the freedom to decide who should receive a share of their estate after death, the Succession Act 2006 (NSW) contains provisions that permit “eligible persons” to make a claim on the estate if they feel that they have not been adequately provided for. These persons can apply to the Supreme Court for provision to be made for them out of the estate regardless of whether or not there was a Will, and whether or not they were mentioned in it.

The class of “eligible persons” includes:

- The wife or husband of the deceased at the time of their death;
- A de facto partner of the deceased at the time of their death;
- A child of the deceased;
- A former wife or husband of the deceased;
- A person who was at any particular time wholly or partly dependent on the deceased, and was either a grandchild or a member of the same household of the deceased; and
- A person living in a close personal relationship with the deceased at the time of their death.

When considering an application, the Court has discretion to take into account a broad range of matters, including (but not limited to):

- The applicant's relationship with the deceased;
- Any obligations or responsibilities of the deceased to provide for the applicant, any other applicant, or any beneficiary of the estate;
- The nature and extent of the estate and any liabilities or charges;
- The financial resources and needs (both present and future) of the applicant, any other applicant, or any beneficiary of the estate;
- If the applicant is cohabiting with another person - the financial circumstances of that other person;
- Any physical, intellectual or mental disability of the applicant, any other applicant, or any beneficiary of the estate;
- The age of the applicant;
- Any contribution made by the applicant to the acquisition, conservation or improvement of the deceased's estate, or to the welfare of the deceased or their family, for which adequate consideration was not received;
- Any provision made by the deceased during their lifetime or from their estate for the applicant;
- Any evidence of the deceased's testamentary intentions; and
- The character and conduct of the applicant before and after the deceased's death.

Section 100 of the Succession Act 2006 allows the Court to take into consideration any statement made by you when making its decision as to whether a claim against your estate has merit and whether the applicant should be successful in their claim.

While such a statement is not binding on the Court, it can allow you to express your reasons why you have chosen to provide, or not provide, for an eligible person in the manner effected under your Will. It would then be open to the Court to take into account these reasons in the event of a family provision claim on your estate.

ESTATE LITIGATION

Continued

2. CONTESTED PROBATE APPLICATIONS

It is possible to object to a Will on the basis that you believe the deceased did not have capacity to make their Will, had no knowledge or approval of the contents of the Will or was coerced into making a Will contrary to their testamentary intentions.

The action is usually commenced by lodging a caveat on the probate application. The caveat will delay probate being granted until such time as a formal hearing has been finalised in the Supreme Court.

Further, you can also bring an application in relation to a lost Will and, like contested probate disputes, this application will be heard in a formal hearing. Willis & Bowring was involved in a recent lost Will case that has become the guideline judgment for lost Will cases in NSW.

The Willis & Bowring Estate Litigation team is available to assist you and guide you through the litigation process, as well as provide advice on alternative dispute resolution opportunities where appropriate.

ELDER LAW ADVICE

Supported accommodation

Willis & Bowring can provide comprehensive advice to clients and their families where a relocation to supported accommodation is being considered.

We recognise that this can be a challenging time for all concerned and we act with sensitivity and empathy to assist with achieving your objectives.

Transitions into supported accommodation can involve:

- Staying at home with home care support
- Granny flat-style arrangements with family members
- Moving into retirement villages
- Moving into aged care facilities
- Selling the family home

The Willis & Bowring Estate Planning Team, together with our experienced Property & Conveyancing Team, are available to assist you with making these transitions.

Elder abuse

Our experienced Estate Planning Team recognise that challenges can arise for those in our community who are at risk of losing their independence due to incapacity or ill health.

We can provide advice when disputes arise between family members about decision-making for vulnerable people. This includes advice in relation to proceedings before the Guardianship Division of the NSW Civil and Administrative Tribunal.

WILLIS & BOWRING
Solicitors

ABOUT **US**

Willis & Bowring has been established in the Sutherland Shire since 1960 and celebrated its 60th anniversary in 2020.

Today, the firm has 2 partners, 7 employed solicitors and 14 support staff, making it one of the largest firms in the St George and Sutherland Shire region.

Located on The Kingsway in Miranda, we pride ourselves on our friendly and efficient service and appreciate the importance of client care and communication when delivering legal services.

The strength of Willis & Bowring lies in the specialised skills and experience of its individual solicitors in their own particular field of law. We offer a comprehensive range of legal services in many areas of law, including:

- Conveyancing and Property Law;
- Business Transactions;
- Intellectual Property;
- Family Law;
- Estate Planning;
- Probate & Estate Administration;
- Estate Litigation;
- Commercial Litigation;
- Debt Recovery; and
- Local Government.

CONTACT **US**

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