

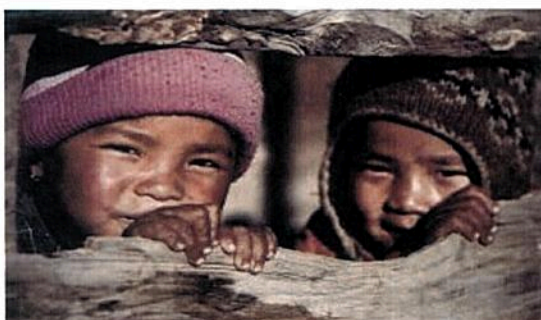


As the Judge says

Whilst delivering his judgment on distribution of an intestate estate (ie an estate where a person died without a will, or died with a will which didn't dispose of the whole of the deceased's property), a judge of the NSW Supreme Court made these remarks:

“... the statutory intestacy rules... are generally regarded as a second best option for disposing of a deceased estate. As these proceedings demonstrate, compared with an estate administered in accordance with a will, there are extra transaction costs (including legal expense, inconvenience and delay) in the administration of an intestate estate, at least where a grant of administration is required for the collection or transmission of estate property. In modern Australia, the making of a will is not a mere matter of conventional piety, but an exercise in enlightened self-management.”

Making a will properly means that assets end up with the right persons without extra legal costs, inconvenience and delay.



What's a child? Does it include a step-child?

Jan Stapleton made a will in 1997. She left the residue of her estate to her grandchildren. She had two children. At the date of the will, one was married and had two children. The other, Nigel, was single and childless. After the date of the will Nigel married. His wife had two children.

The question that came before the Supreme Court was whether Nigel's step-children came within the description of grandchildren in his mother's will.

It is generally accepted that the words “child” and “children” have more than one meaning. The words usually mean a person of any age who is the offspring of the parent, i.e. an actual

child or a child by blood. The words include an adopted child. They commonly include a person who, by reason of legislation, is presumed to be a child unless the contrary is established. For instance, a person's birth certificate makes the person a presumed child of the parents listed on the certificate.

What of a stepchild? The answer depends on the context in which the words are used. In 2015, a NSW Court of Appeal decision held that the word "children" in a will included the will-maker's stepchildren. A 2016 decision of the Supreme Court reached the same conclusion in relation to a different will. Foster children and children by affinity (or de facto children) can also be treated in law as children, depending on the circumstances.

In relation to Stapleton's will, the court said that whilst step-grandchildren wasn't the ordinary meaning of grandchildren, the court could consider the family relationships that arose after making of the will. The outcome was that the court construed 'grandchild' to include Nigel's step children.

The moral is to save the estate the expense, delay and potential acrimony involved in these disputes by carefully defining the meaning of words like 'children' in the will.



Accounting for an attorney's improper actions

The second wife was acting as attorney for her husband who was incapable of managing his affairs. She used his money to fund the purchase of a residence in the names of her daughter and son-in-law and then to fund the construction of a granny flat for herself on that property. The Enduring Power of Attorney appointing the wife as attorney did not authorise the attorney to obtain or confer a benefit or make gifts of the deceased's property.

After the husband's death, his two sons by his first marriage sued the second wife. The Court concluded that the purpose of the Power of Attorney was not to empower the attorney to treat the deceased's property as her own. Its purpose was to empower the attorney to manage the deceased's estate for his benefit during his incapacity. Any benefit the attorney could derive from her management of his estate could only be incidental. Not only was the second wife required to account for the husband's monies which she'd wrongly spent, but the son-in-law and daughter were bound to account to the sons for their residence.

This shows one of the difficulties that can arise with estate planning in blended families. It demonstrates the care needed with preparing powers of attorney.



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