



## What is Testamentary Freedom?

A person's right to leave his or her property to whoever they choose is known as 'testamentary freedom'. It is a concept which has been described as a fundamental individual right, deeply connected to the right to own and dispose of property when the person is alive.

In general, the law in Australia has taken, as its starting point, the idea that only the testator should decide how his or her estate is disposed of after death. You should be free to decide what happens to your property after your death and a court should not be 're-writing' a person's will, even if that will seems unfair, is hard to understand or leaves certain family members out.

However, as discussed in Fact Sheet 2, the United Kingdom and Australia have since adjusted this starting point with laws like the *Inheritance (Family Provision) Act 1972 (SA)*, which sets out certain circumstances in which the court may vary a testator's will, where necessary, to ensure adequate provision for eligible family members.

In effect, these laws allow the court to override the will of a deceased person (subject to certain requirements being met). Often the court is given a discretion – that is, a relatively broad decision making window – to set aside a will and make orders for certain family members to receive portions of the estate. In this way, a testator is not totally free to decide what happens to their property after their death.

## Testamentary Freedom and the *Inheritance (Family Provision) Act 1972 (SA)*

Under South Australian law, family members who are eligible to make a claim include spouses, former spouses, domestic partners, children, stepchildren, grandchildren, parents and siblings. People within these classes must also show that they have been left without 'adequate provision for his or her proper maintenance, education or advancement in life'. These categories and criteria are discussed further in Fact Sheets 4 and 5.

In recent years, courts around Australia have become more and more likely to use laws like the *Inheritance (Family Provision) Act 1972 (SA)* to override the wishes of testators in order to provide for eligible family members. This can occur in cases where the testator leaves a substantial proportion of his or her estate to a charity, or completely excludes one sibling in favour of another, or even favours one child or sibling over another where the wishes of the testator are hard for family members to understand or explain.

These developments have led some lawyers and some members of the community to question the significance of making a will when there is a real chance that the person's wishes could be overruled once they pass away.

In other Australian States and Territories reforms have been suggested which would limit the classes of family members who would be eligible to make a family provision claim, and to impose

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more narrow criteria as to who is eligible to make a claim. One of the justifications for these reforms has been the need to adjust family provision laws to better protect testamentary freedom.

SALRI is interested in your thoughts on these issues, and in particular, whether the current law adequately protects and preserves testamentary freedom, having regard to the policy issues discussed in Fact Sheet 2.

## Discussion Questions

1. To what extent should the law fully implement the wishes of the testator (the person who makes the will) as expressed in a valid will?
2. Should there be any exceptions where the law should intervene to improve the fairness of the will?
3. If so, what should the exceptions be where the law should intervene to improve the fairness of the will?

**Please note: SALRI does not, and cannot, provide legal advice to individuals. If you are in need of legal advice we encourage you to speak to a lawyer and/or contact a community legal service or the South Australian Legal Services Commission's [Legal Advice Helpline](#) on 1300 366 424.**

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