

This guide is intended to assist Foster and Kinship Carers (Carers) consider the arrangements that need to be made for the distribution of their estate to children and young people in their care.

What is an estate?

In legal terms, an individual's estate is everything comprising their net worth, including all land and real estate, possessions, financial securities, cash, and other assets that the individual owns or has a controlling interest in.

What is a will?

A will is a legal document that identifies a person's wishes regarding care of their biological or adopted children, as well as to whom and in what way they wish to distribute their estate after their death. The people who are to receive part of an estate after a person's death are called "beneficiaries".

Can I leave a part of my estate to my child or young person who is under guardianship of the Chief Executive?

In considering what is to happen to their estate upon their death, a Carer may decide that they wish to include their child or young person as a beneficiary in their will, to ensure they are provided for after they are no longer alive.

There is nothing preventing a Carer from leaving money or any other part of their estate to their child. This must be clearly specified in their will document otherwise the child or young person will not be provided for under South Australia's probate laws.

Please note: that compared to any biological or legally adopted children, the child or young person remains under the guardianship of the Chief Executive, and will remain the official guardian until their orders cease. Whilst a Carer can elect to leave their child or young person money and/or assets, they cannot dictate where the child is to live or who is to look after them after their death, as this remains the remit of the Department for Child Protection (DCP).

Estate Planning to include my child or young person

In instances where a Carer wishes to include their child or young person in their will, it is highly recommended they seek legal advice from an experienced wills and estates lawyer and have a will document drafted that includes their child or young person amongst the beneficiaries.

Each Carer's circumstances are different and there will be varying considerations involved regarding the size, scale and nature of the estate. This is why individualised legal advice is recommended.

What is Probate?

Probate is the judicial process whereby a will is "proved" in a court of law and accepted as a valid public document that is the true last testament of the deceased, or whereby the estate is settled according to the laws of intestacy (explained below) in the absence of a legal will.

A "grant of probate" or "of letters of administration" is a legal document issued by the Probate Registry which is located in the jurisdiction of the South Australian Supreme Court. The grant enables the legal personal representative named in the grant to formally administer the estate of the deceased person, by collecting and dealing with assets and paying estate debts. In South Australia, the probate process is carried out under the Administration and Probate Act 1919 (SA).

Dying Intestate

If a person dies and does not have a will, they are referred to as having "died intestate". In circumstances such as this, a child or young person in the care of a Carer will not be provided for as a matter of course as the formula used in probate is such that any child under guardianship would not be a beneficiary.

Establishing a Trust

If the Carer includes their child or young person in their will and the Carer dies when the child is a minor, then the will document should leave the relevant portion of the estate in "trust" for that child.

A trust is essentially an arrangement that allows a third party, or "trustee", to hold assets on behalf of a beneficiary or beneficiaries. Trusts can be arranged in many ways and can specify exactly how and when the assets pass to the beneficiaries.

Further considerations if taking this route involve making decisions about who is appointed to manage the trust. A lawyer experienced in this field will be able to provide advice and assistance in establishing such a trust so as to ensure that the assets or property are available to the child upon them turning eighteen.

Disputing a Will

Whilst the aim of a will is to clearly set out the wishes of a person for the distribution of their estate so that matters can be dealt with efficiently after their death, it is important to acknowledge that under the Inheritance (Family Provision) Act 1972, there is legal scope for certain persons such as a spouse or a biological child to make a claim and contest the will within six months of the grant of probate if they disagree with the distribution of the estate.

Further Research Materials

The law of wills and estates is complex. A useful resource regarding general discussion of legal issues involved is the South Australian Legal Services Commission's Law Handbook at the following link: <https://lawhandbook.sa.gov.au/ch36.php>

Wills and Estates Lawyers

This Carer Guide constitutes a general summary only and should not be taken as legal advice.

If you require assistance to find a lawyer to help with the drafting of a will, please contact CF&KC-SA for a list of lawyers in both the metropolitan and regional areas, who specialise in this field.

For more information, or to discuss your personal circumstances, please contact us:

Email: support@cfc-sa.org.au

Freecall: 1800 732 272

The
LAW FOUNDATION
of SA Incorporated



The Law Foundation of SA Inc
is proudly supported by

Perks.
Integrated business services