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WILLS

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Wills

1. Introduction to Wills, what constitutes an effective Will?

   A Will is a written declaration by a Testator (male) or Testatrix (female) as to how the Testator/rix's property is to be disposed of after the Testator/rix's death. The term "Will" is defined in Section 3 of the Succession Act 2006 (NSW) (for Wills made after 1 March, 2008) as "a codicil or any other Testamentary disposition".

   The consequences of an effective declaration, which:

- is made by a person who has Testamentary capacity;
- is executed in a proper manner required by legislation
- deals with the Testator/rix's property and
- has not been revoked
- is that it will be admitted to Probate out of the provisions of the Probate & Administration Act 1898 (NSW)

Probate is the proving of the Will. This power is vested in the Supreme Court to grant Probate to the executor named in the Will. Probate gives the executor title to the deceased's property as at the date of the death, for the purposes of paying debts, funeral and testamentary expenses of the deceased and administering the Estate according to the terms of the Will.

To grant Probate, the Court, or the Registrar, must determine that:

* the document is a Will
* the document shows an intention to make a Will;
* the Testator/rix has testamentary capacity;
* the Will meets statutory requirements for a valid Will; and
* the Will has not been revoked

2. Why do I need to make a Will?

   If a valid Will is not made, the laws of intestacy apply. Supreme Court has power to appoint an administrator and grant Letters of Administration if there is:

- no valid Will left by the deceased, or
- no executor named in a valid Will, or no executor willing and able to act.

   An administrator has the function of attending to the payment of the debts, funeral and testamentary expenses of the deceased. The administrator then distributes the Estate according to:-

- Section 61A and the following Sections of the Probate and Administration Act 1898 (NSW), if there is no Will; or,
- the Will, where there is no grant to an Executor and Letters of Administration with the Will annexed have been granted.

3. When do I need to make a new Will –

Anyone over the age of 18 who has the necessary capacity can make a Will. Nearly everybody owns some property and would normally like to pass onto relatives or friends when they die. The only way to ensure that your wishes are carried out after your death is to make a Will.

To have the necessary capacity to make a Will you must:-

- be of sound mind
- be able to understand what it means to make a Will
- know what assets you have and have an idea how much they are worth
- be able to decide who should fairly receive your assets
- understand that your immediate family might need to take priority over other people to whom you may wish to leave your assets.

You must make a new Will if you marry as the act of marriage automatically revokes your Will, unless your Will specifically states that it is made in contemplation of that particular marriage. Section 13 of the Succession Act provides that a new Will must also be made also on the termination of the marriage. A new Will should also be made if you experience any major change in circumstances which would make the provisions of a previous Will no longer suitable. It is also a good idea to revise a Will on a regular basis, say every 5 years, to make sure that it still represents your wishes. In this regard, you may wish to reconsider the bequests of property to various beneficiaries, or you may wish to change the appointment of your Executor or Executrix, particularly if there is some incapacity that prevents that Executor or Executrix from properly under-
taking their duties in accordance with the Will.

4. Do I need a solicitor to make a Will ("the Black Hawk Disaster")

The short answer is no, you do not need a solicitor to make a Will. You can draft your own Will with the assistance of various precedents, or you can obtain a "Will Kit" from most newsagents or Australia Post.

However, one must understand that the preparation of a Will is a serious matter if it is not prepared in accordance with the law, there is a chance that the Will might not survive and that the wishes of the Executor or Executrix will not be adhered to. The Court would be required to consider the contents of a Will, from the "armchair", of the Testator/rix. The deceased not being able to qualify the intention in the Will.

One of the most extraordinary examples that I was involved in in private practice was the bequest in an estate in an Army Will for a Commando involved in a Black Hawk Disaster, where his entire Estate worth some $2,000.000.00 was passed to his estranged wife and not members of his own family because of the construction of the Will. Somehow, one cannot equate the costs of employing an Attorney to draft and settle a Will at the risk of losing an Estate of that magnitude.

5. What is the format of the Will –

   Section 6 of the Succession Act provides the formal requirements of a Will –

   1. A Will is not valid unless:
      a. it is in writing and signed by the Testator/rix or by some other person in the presence of and at the direction of the Testator/rix, and
      b. the signature is made or acknowledged by the Testator/rix in the presence of 2 or more witnesses present at the same time, and
      c. at least 2 of those witnesses attest and sign the Will in the presence of the Testator/rix (but not necessarily in the presence of each other).
   2. The signature of the Testator/rix or of the other person signing in the presence and at the direction of the Testator/rix must be made with the intention of executing the Will, but it is not essential that the signature be at the foot of the Will.
   3. It is not essential for a Will to have an attestation clause.
   4. If a Testator/rix purports to make an appointment by his or her Will in the exercise of a power of appointment by Will, the appointment is not valid unless the Will is executed in accordance with this section.
   5. If a power is conferred on a person to make an appointment by a Will that is to be executed in some particular way or with some particular solemnity, the person may exercise the power by a Will that is executed in accordance with this section, but is not executed in the particular way or with the particular solemnity.
   6. This section does not apply to a Will made by an order under Section 18 (Court may authorise a Will to be made, altered or revoked for a person without testamentary capacity).

6. What is an Executor and who should I appoint?

   An Executor is a person or persons, appointed to handle the estate after you die and to ensure that your wishes are carried out. Anyone over the age of 18 who is of sound mind may be appointed Executor, but you should ensure that the person concerned is willing to act as Executor and has the ability to deal with the business matters which arise.

   It is a good idea to appoint two Executors, or alternative Executors so that if one, for some reason, is not available, the other one can act. It is common practice for people to choose their spouse as Executor, or a child, but it is also common for a solicitor to be appointed one of the Executors as the solicitor will have the skills to manage the Estate. An Executor may be a beneficiary under the Will. Another reason for choosing a solicitor, or some trusted person outside the family, as Executor, is that they will be impartial and will be less likely to become embroiled in family disputes.

   You should also consider the following factors when appointing an Executor:-

- The appointee's willingness to act

- The appointee's age
- The appointee's interest in looking after the Estate and the interests of the immediate family
- The appointee's ability to carry out duties.

You may also need to consider the provisions of the Testator's Family Maintenance and Guardianship of Infants Act 1916 NSW which makes provision for:-

- The rights of a surviving parent to guardianship of children during minority
- The power of parents to appoint Testamentary guardians
- Guardianship of the child is to end at 18 years
- Access by grandparents
- Incidental provisions

7. What property should I leave in my Will and how should I express is?

Most kinds of property that you own outright can be left by Will. Sometimes people wish to leave specific items to particular people. There is no problem with this so long as the items are clearly described and the beneficiaries are clearly identified.

If the property concerned is a car or a boat or some other item which you are likely to change from time to time, care must be exercised. If, for example, someone has left "my Holden Commodore motor car" to a certain person, and if at the persons' death, they no longer own that car, but say, a Ford Lancer, the gift will fail. You should either make a new Will or a codicil every time the car is changed, or express the gift in general terms, e.g. "any motor car which I own at the date of my death".

The same principles apply to houses in the event that you move house. Real estate (houses and land) can also be left by Will, provided that you are the sole owner or own the property with another person as "tenant in common". If a house is owned in joint tenancy, as is the case with many properties owned by married people, it will automatically go to the survivor when one person dies regardless of anything stated in that person's Will. This cannot be changed by a provision in a Will. If you do not know whether joint property is owned as "tenants in common" or "joint tenants" you can find this information on the title deed to the property or by contacting the Land and Property Information (LPI) office.

Care should also be exercised when dealing with life insurance policies and Superannuation under your Will. If you have nominated a beneficiary on your Life insurance policy then the nomination may override the terms of your Will.

Superannuation will be paid out in accordance with the Superannuation's Fund Trust Deed.

8. Are there alternative methods of disposing of my property – what is a life interest?

It may well be that you wish to provide for a bequest which will not bequeath the

legal and equitable interest in the gift. For example, if you own a home with a partner and that home is held by both of you as tenants in common you may wish to leave a life interest only in your share of the Estate which would give a life interest in the Estate to your partner and on his or her death, or the lapsing of the gift upon the conditions it was granted the Estate would then pass to the beneficiaries.

This protects the rights of the partner to continue to reside in the property without the risk of being forced to sell the property by the beneficiaries.

9. For whom should I make provision in my Will, who are my beneficiaries?

You must be careful when identifying beneficiaries for example, with children, is it the Testator/rix's children who exist at the date of the Will who are intended to benefit, or are children born subsequently to the date of the Will intended also to take a benefit?

One should be mindful of Section 41 of the Succession Act as well as the use of class gifts where there are gifts to the issue of the children of the Testator/rix.

When gifts are made to a charity or an unincorporated association one must be precise when:-

- Identifying the organisation
- Inserting a receipt clause in the Will allowing a simple discharge to the Testator/ rix's personal representative.

10. How do I make provision for beneficiaries from a prior relationship/marriage and those in a current relationship/marriage?

While a Testator/rix can leave property by Will to whomever he or she wishes, this principle of Testamentary freedom is subject to Statutory provisions and accordingly, one should always have regard to the Testator's Family Maintenance & Guardianship of Infants Act 1916 where under Section 3 of the Act, the Court may make an order for the benefit of a wife, husband, defacto wife or husband, former spouse, a person who was at any time wholly or partially dependent upon the deceased and was either a grandchild or was at any time a member of the household of which the deceased was a member, children where there has not been adequate provision for their proper maintenance, education or advancement in life.

11. At what age should my beneficiaries receive the share of my estate?

The general provision, without a specific age being designated is that beneficiaries take at their age of majority . You may recall at the time of the Vietnam War, the age of majority changed from 21 to 18. However, you

may make provision for a beneficiary to take his or her share in an estate at any reasonable age.

12. Can I make provision for my pets, favourite charities, friends or other persons?

    Yes, it is possible to leave a sum of money in the Will for the care of your pets either by an animal welfare organisation or a friend or relative.

    You may also leave provision for your favourite charity provided there are clear instructions as to the charity or clear identification of your friends or other persons.

13. What if my Executors or beneficiaries die before me?

- Executors – One should always be cautious in appointing an Executor where there is a probability that that Executor will survive the Testator/rix. It is important to make provision for multiple Executors in the event that one Executor should pass before the Testator/rix.

  If, however, all Executors die prior to the Testator/rix, the Will may still be proved, however, there will need to be the appointment of an alternative Executor, now known as an Administrator, to act in the finalisation of the Estate and that application is usually made by a beneficiary in the Estate.

- Beneficiaries – Section 35 of the Succession Act provides that any beneficiary must survive the Testator/rix by 30 days or the specified period in the Will.

  One always needs to be cautious when making provision for a bequest to a beneficiary and the Will must be drafted so that in the event that a beneficiary should predecease the Testator/rix that that gift would pass either to another beneficiary or form part of the remainder of an Estate to pass to a beneficiary or a class beneficiary. In some cases, gifts that are made to individuals may pass to their beneficiaries.

14. Can I alter my Will?

    There is no restriction on the alteration of Wills, or the preparation of new Wills. In fact, it is good policy to review your Wills regularly for the purpose of ensuring that the Will meets your current financial and social circumstances.

15. What is a codicil?

    A codicil is an amendment to an existing Will. There are strict provisions as to the preparation and execution of a codicil.

If the alteration to the Will is a minor alteration, then a codicil may be adopted. The execution of a codicil reaffirms the provisions of the Will and the amendment as contained in the Codicil as at the execution of the codicil.

The writer in 30 years of practice has never prepared a codicil. The reason being that a codicil is a separate document to the Will and may be lost, and with the advent of modern technology, viz a vis, computers, document retrieval and storage, it is totally inappropriate to prepare a codicil where an original document may be prepared from an office precedent in the same time as a codicil would be prepared.

16. Where should my Will be kept and who should I inform?

Usually, your attorney has provision for the safe storage of your Will and other important documents, including your Power of Attorney, your Enduring Guardian and your deeds. Usually no charge is made for the safe storage of those documents. Some banks also provide safe storage facilities. Most of my clients choose to leave their documents with me and my staff provide a copy for reference. You should inform your Executors as to the location of the original Will.

17. Can my Will be challenged and how do I protect myself against such a challenge?

Under the provisions of the Testator's Family Maintenance & Guardianship of Infants Act 1916 a person as previously described may claim that he/she has been left without proper provision for the person's proper education, advancement and wellbeing in life.

An application must be made within 18 months of the date of death of the deceased.

There are quite a number of considerations which one must take into account when making provision, and if there is doubt as to whether provision ought to be made for a person who may make a claim, then full details of those considerations ought to be provided to your attorney and the appropriate advice obtained.