MAKING A WILL INFORMATION BROCHURE

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What is a will?

It's a legal document that sets out your instructions for the distribution of your assets after your death. Having a clear, legally valid, and up-to-date will is the best way to ensure that your assets are protected and distributed according to your wishes.

What happens if you die without a valid will?

Your assets may not go where you would like as a standard formula is used to distribute your property and possessions. Usually, this means all your assets will pass to your spouse or children. But the situation becomes much more complex if you have a legal spouse and a de facto spouse (i.e. you've separated and have a new unmarried partner), if you have children from different relationships, or if you die with no spouse and no children. The court's formula usually also only lets your family members inherit from you. So having a valid will is vital if you want to leave gifts to friends or charities.

Can you change your Will if you change your mind?

As long as you have mental capacity you can change your will at any time . However, you cannot change your will by crossing out something in your will and initialling it, or writing something different in its place. You must make a new will or a codicil (a separate document in which you make a change to your will) which will need to be signed and witnessed in the same way as when you made your will. It is usually best to just make a completely new will.

What happens if you marry or divorce?

Generally, getting married cancels the terms of any will you've previously drawn up, but there are exceptions. If you divorce, it cancels any gift you made to your former spouse under your will. It also cancels their appointment as trustee, executor or guardian under your will, except as trustee for property left to any children. You should always make a new will if you marry, divorce, or separate.

Are all assets "estate" assets?

No, not all assets that you may think are yours to give are considered to be "estate" assets. Only assets which we own in our own individual name are "estate" assets which are capable of being distributed through our will.

Some examples of these types of assets are:

- Family Discretionary Trust;
- Assets owned in joint names (i.e. real estate held as joint tenants or bank accounts);
- Family run company or business; and
- Superannuation funds.

Superannuation and Life Assurance Policies (Death Benefits)

Most people hold life assurance policies (death cover) and there is normally a death component attached to your superannuation policy as well as the amount of the fund. These policies will often not form part of your estate assets and are paid to your dependents or a nominated beneficiary.

You should contact your insurance company or the institution that holds your super policy to see whether you have nominated any beneficiaries. We can provide you with advice once this information has been confirmed.

If you have a self-managed super fund we will need to see a copy of the super fund deed and get particulars of who the trustee is and the fund members. A super fund is a separate legal entity and is usually not affected by your death (i.e. it can continue provided members of the super fund are still alive). This can cause problems if you have children from previous marriages and want some or all of the assets that you hold in the super fund to go to them after your death.

What to consider when making a will

- **Assets and liabilities**
  In order to properly consider, and make, recommendations in respect to your will, you should advise us of the details of your assets and liabilities. This includes any assets owned in the name of companies or trusts and also details of shares owned by you in both public and private companies and any interest in any partnership. It is important that all assets are identified and the ownership confirmed. It may be that we will have to conduct title and company searches to verify ownership.

- **Appointment of Executor/Executors/Trustee**
  When you make a will you need to appoint an executor and trustee, who will handle your affairs when you die.

  An executor's role is to identify and collect the assets owned by you at the date of death, to pay all debts and expenses and to then distribute the assets in accordance with the terms of your will.

  Generally, a trustee administers any trusts set up in the will. This usually happens where you leave assets to people under the age of 18. Before you nominate someone as an executor or trustee, you should make sure they are comfortable taking on the responsibility you are giving them.

  The person you appoint should be a trusted person, a person with time to undertake the task, someone of the same age or younger and a person (preferably) with some business sense. It can be your spouse, your next of kin, children, a professional person, or a trustee company.

  We usually suggest the appointment of two executors/trustees (in case one predeceases you or is unwilling or otherwise unable to act). You may either appoint the two to act jointly, or alternatively, you may appoint one to act on their own but if unwilling or unable to act, then the second executor will then take over.

  People usually choose one person to perform both the roles, but you can name different people as executor and trustee, and you can name as many executors as you like (although appointing more than two can complicate things).

The executor is entitled to commission for their 'pains and trouble' in administering the estate. This commission is awarded by the court considering the assets of the estate and the work done. Any entitlement should be noted in the will. There is a presumption that a next of kin who is a beneficiary and executor is not entitled to commission unless specified.

- **Beneficiaries and next of kin**

  You should consider the persons whom you wish to benefit under your will and obtain full names and addresses.

  If you wish to specifically exclude certain relatives, your executor may be faced with a challenge of your will under the *Succession Act* sections that provide for family provision. If this is the case, we recommend that a statement of reasons for such exclusion be prepared. We can discuss this with you if necessary.

- **Gifts**

  Gifts to beneficiaries can take several forms; consider:

  - ◊ specific gift of assets, e.g., particular items of jewellery, real estate, shares in family and public companies etc.;
  - ◊ specific gifts of cash;
  - ◊ general gifts, for example, 'all my household chattels';
  - ◊ life interest;
  - ◊ gift of residue to A, B and C equally or in a particular proportion as shall survive you or if A should die before, then to X and so on;
  - ◊ specific gifts to charities.

  Depending upon the assets in your estate, it may be more tax effective if after making specific gifts that the residue of the your estate be left on trust by way of a testamentary discretionary trust.

  A testamentary trust will is, in effect, a family discretionary trust established by your will allowing for discretionary distribution of income and capital to a number of named beneficiaries. We can give you further advice about this once we have been provided with full details of your assets and liabilities.

- **Your Business or Profession**

  If you carry on business through a partnership or company you must consider how this affects your testamentary intentions. A separate partnership or shareholder agreement may be required.

- **Family Trusts**

  If you have effective control over a family or unit trust, we will need to explain to you how best to effect your intentions in relation to those trust assets. A copy of the trust deed should be provided for our consideration.

- **Disposal of your Remains**

  This is not essential in a will. You may, however, have a particular wish as to the form of your funeral (e.g. Masonic; in a particular church) and burial (or cremation). These wishes are not binding on your executor but provide a firm indication of your wishes.

You may have thought about donating your body or certain organs to be used for anatomical examination or for medical or scientific purposes. You can authorise or object to the use of your body for scientific purposes or medical research in your will.

- **Other matters**
  This brochure cannot set out all the matters that can be canvassed in relation to the terms of a will, but for convenience we set out other topics for you to consider:

  - ◊ guardians for minor children to be named in your will;
  - ◊ extended powers of executors and trustees (for example, to continue to carry on your business after death);
  - ◊ contracts to leave property to a particular person or not to revoke a provision in your will;
  - ◊ release of debts;
  - ◊ taxation and duties in particular how capital gains tax will be implemented in relation to disposal of your assets.

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