women's legal service tasmania

Wills, Power of Attorney & Enduring Guardianship

What is a Will?
A Will is a written legal document by which the person making it sets out how he or she wishes their property to be distributed after their death. The person making the Will is called the Testator. A person acquiring property under the Will is called a Beneficiary. A Beneficiary must survive the Testator by 30 days before he or she can receive their gift, unless the Will provides otherwise.

When making a Will, a person will also have to appoint one or more persons as the executor/s of the Will. The executor is responsible for distributing property in accordance with the testator's wishes. An executor must be someone over 18 years of age. It may be a good idea to have more than one executor to your Will.

Making a Will
To be able to make a Will, you must:

- Be over 18 years of age (there are some exceptions); and
- Have testamentary capacity – this includes understanding that you are making a Will and the effect that it will have as a legally binding document.

To be valid, a Will must meet the following formal requirements:

- The Will must be in writing;
- The Will must be signed by the testator in the presence of two (2) or more witnesses present at the same time; and
- The Will must be signed by at least two (2) of those witnesses in the presence of the testator.

*Please ensure that a witness is not also a beneficiary or the spouse of one as this will affect their entitlements.

Content of a Will
A will should:

- appoint one or more persons as the executor/s
- set out your intentions regarding the distribution of your property. This is known as your estate.
- Include the payment of funeral expenses and any debts

A Will may also include other requests such as funeral arrangements or the appointment of a guardian of your children. Although, such requests are not legally binding on the executor, meaning that he or she does not have to carry out that wish. Such requests will demonstrate the testator's intention should a dispute arise.

It is important to note that often a Will is not read until after the funeral, therefore should you have specific requests for your funeral arrangements it would be a good idea to discuss this with your family.

Changing your Will
You can change your Will at any time by writing a new one.

You may also change a specific provision by writing a Codicil, which is a separate document attached to the Will. To be valid, a Codicil must meet the same formal requirements are described above.

Revoking a Will
A Will is revoked, or made invalid, when:

- You make a new one;
- You get married or you register a deed of relationship under the *Relationships Act 2003* and your Will is not in contemplation of that marriage or registration of relationship;
- Your ex-spouse is the sole beneficiary of the Will and your divorce to them is finalised in Court or your deed of relationship with them is revoked and your Will is not in contemplation of either of those events;
  Please note: where there is more than one beneficiary, such as an ex-spouse and children the Will will be read as if your ex-spouse had pre-deceased you, rather than be completely revoked (there may be exceptions to this and you should seek legal advice).
- You completely destroy the Will with the intention of revoking it.

Probate
In most situations where a person has died and has made a Will, the executor will need to apply for Probate. The application is made in the Supreme Court and must be granted before the executor can distribute the property. Probate gives the executor authority to deal with the assets and liabilities of the estate. The grant of probate is usually a formality but cannot be issued until 7 days after the death of the testator.

Contesting a Will
A Will may be contested on the basis that it is not valid. The reason for invalidity may include that the testator did not have capacity, or was forced by another person in to making the Will, or that the Will does not meet one or more of the formal requirements.

A Will may also be contested on the basis that the testator failed to make adequate provision for the proper maintenance and support of a dependant. The *Testator's Family Maintenance Act 1912* allows dependents to make a claim where they have been left out of a Will.

Where can I go to get a Will?
We recommend that a private solicitor draws up your Will for you in order to ensure that your Will is legally valid. You may also choose to have a trustee company draw up your Will, although it is generally cheaper to go to a private solicitor due to additional costs that may be charged to your estate by the trustee company.

If you are contemplating doing your own Will, proceed with caution. Be aware that many things can go wrong, such as incorrect use of witnesses, which can make your Will invalid.

What if I die without ever making a Will?
If this occurs, you are said to have died intestate. This will mean that, in order to obtain authority to distribute your property, your next of kin will need to apply to the Supreme Court for Letters of Administration.

If you die without having a valid will, your assets will be distributed in a certain order, as set out in the *Intestacy Act 2010*.

The statutory order for distribution is as follows:

- Where you leave a spouse and no children or a spouse and children that are also the issue of that spouse, the spouse is entitled to the whole of the estate;

- Where you leave a spouse and children that are not also the issue of that spouse the property will be distributed in the following manner:
  Your spouse will be entitled to:
  - Your personal effects;
  - A statutory legacy based on a specific formula*; and
  - Half of the remainder of the estate.

  Your children will be entitled to the other half of the remainder of the estate.

  *The statutory legacy is a Consumer Price Index adjusted amount worked by taking the CPI for the last quarter and dividing it by the CPI for December 2009 and multiplying it by $350,000.

- Where you do not leave a spouse but do leave issue, the children will be entitled to the whole of the estate. Should your children pre-decease you, your estate would then be distributed to your grandchildren;

- Where you leave no spouse, children or grandchildren, the estate is distributed to your next living relatives in the following order:
  - Your parents;
  - Your brothers and sisters;
  - Your nieces and nephews;
  - Your grandparents;
  - Your aunts and uncles;
  - Your cousins;
  - Your next of kin.

Where you leave no entitled person your estate will be distributed to the State Government.

POWER OF ATTORNEY

What is a Power of Attorney?
A Power of Attorney is a document that gives another person (your "Attorney") the power to act on your behalf. The content of a Power of Attorney can be general or specific.

There are two types of Power of Attorney that you can make:

1. **Ordinary Power of Attorney** – terminates if you lose mental capacity
2. **Enduring Power of Attorney** – remains in force even if you lose mental capacity

A Power of Attorney allows your Attorney to do anything that you can legally do in relation to financial and property matters. It does not allow your Attorney make personal, medical or lifestyle decisions for you (you can appoint an enduring guardian for this purpose).

An Enduring Power of Attorney gives your Attorney the power to continue to make these decisions for you should you lose the mental capacity to do so. When appointing an Enduring Power of Attorney your Attorney must accept the power by signing a prescribed declaration of acceptance.

Both Ordinary and Enduring powers will terminate if you die, become bankrupt or insolvent, or you revoke it in accordance with the *Powers of Attorney Act*.

Why do I need a Power of Attorney?
Having a Power of Attorney means that if for some reason you are unable to take care of or execute your affairs, someone of your own choosing can take care of things for you.
You should always be careful as to who you confer a power on, especially financial powers. Each year many people are financially deceived by close relatives and friends after trusting them as their Attorney.

If you can't take care of your own affairs because you lose mental capacity, and you don't have a Power of Attorney, the Guardianship and Administration Board may appoint an administrator to do it for you.

How do I make a Power of Attorney?
We recommend that when making a Power of Attorney that you should seek assistance from a solicitor who will charge a flat fee plus the statutory charges for registering your Power of Attorney.

You can also opt to have the Public Trustee do your Power of Attorney. If you choose to use The Public Trustee to draw up your Power of Attorney you will be expected to make the Trustee either your Attorney or your substitute Attorney. This will generally incur additional costs. You should contact your solicitor or the Public Trustee for details of their fees and charges.

Formalities
A Power of Attorney is not effective unless it is lodged with the Recorder of Titles for registration. At the time of printing the fee for registration is $90.50 but this is subject to change.

ENDURING GUARDIANSHIP

What is an Enduring Guardianship?
An Enduring Guardian is someone who has the power to make personal, medical and lifestyle decisions for you when you are no longer able to make those decisions for yourself.

Why have an Enduring Guardian?
A decision to appoint an Enduring Guardian is a lifestyle choice that allows you to dictate now how you want you life to continue should you become mentally incapacitated due to an accident or illness such as Dementia or Alzheimer's in the future.

Your Enduring Guardian is bound to follow your decisions, provided they are practical and not against the law. If an event arises for which you have not left instructions, your Enduring Guardian will be able to make those decisions for you. Your Enduring Guardian must at all times act in your best interests whilst exercising their authority.

Formalities

- Only people over the age of 18 may be appointed;
- You can revoke the appointment at anytime while you still have mental capacity;
- The document must be registered with the Guardianship and Administration Board.

If you do not have an Enduring Guardian, and you lose mental capacity, the Guardianship and Administration Board may appoint someone to take on the role of guardian.

The Difference to an Enduring Power Of Attorney

An Enduring Guardian has the power to make decisions concerning your personal, medical or lifestyle situations should you become mentally incapacitated, whereas an Enduring Power of Attorney only confers on someone the power to make decisions regarding your financial and property affairs.

Depending on your needs or concerns, you may require both an Enduring Power of Attorney and an Enduring Guardian.

Contacts

The Women's Legal Service can be contacted on **1800 682 468**