Wills, Power of Attorney & Enduring Guardianship

WILLS

What is a will?

A Will is a written legal document where a person sets out how they want their property to be distributed after their death. The person making the Will is called the Testator. A person receiving property under the Will is called a Beneficiary. A Beneficiary must survive the Testator by 30 days before they can receive what was left to them in the Will, unless the Will provides otherwise.

When making a Will, one or more people need to be appointed as the executor/s of the Will. The executor is responsible for distributing property as set out in the Will. 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
- Understand that you are making a Will and the effect that it will have as a legally binding document (called 'testamentary capacity').

To be valid, a Will must meet some formal requirements. The Will must:

- Be in writing;
- Be signed by the Testator in the presence of two or more witnesses present at the same time; and
- Be signed by at least two of those witnesses in the presence of the Testator.

A witness to a Will should not also be a Beneficiary or the spouse of a Beneficiary, as this will generally prevent the Beneficiary from receiving anything left to them by the Will.

Content of a Will

A Will should:

- Appoint one or more people as the executor/s;
- Set out how the property is to be distributed (property is known as the estate).
- Include the payment of funeral expenses and any debts

A Will may also include your wishes on other matters, such as funeral arrangements or who is to be the guardian of your children. These wishes are not legally binding on the executor, meaning that they do not have to carry out that wish. Although these wishes are not legally binding, they are helpful to show what you wanted to happen after your death in the case of any disagreement.

A Will is often not read until after the funeral, so if there are any specific requests for funeral arrangements they should be discussed with family.

Changing your Will

You can change your Will at any time by writing a new one that meets the formal requirements above.

You may also change a specific part of your Will by writing a Codicil. A Codicil is a separate document attached to the Will. To be valid, a Codicil must meet the same formal requirements for a Will.

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 you did not make your Will with your future marriage or registration of relationship in mind;
- 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 was not made with either of those events in mind;

It is important to note that 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 died before 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. This application is made in the Supreme Court and must be granted before the executor can distribute property under the Will. Probate gives the executor the legal right to deal with the assets and liabilities of the estate. The grant of probate is usually a formality but cannot be issued until seven 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 a Will being invalid may include that the Testator did not have capacity, or was forced by another person into 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 adequately provide 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. A person's dependants include their spouse and children. Dependents also include parents if they die without leaving a spouse or children, or an ex-spouse where that ex-spouse is receiving or is entitled to receive spousal maintenance.

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 the extra 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 means that before your property can be distributed, 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 property will be distributed in a certain order that is set out in the *Intestacy Act 2010*. The order for distribution under the *Intestacy Act 2010* is:

- Where you leave a spouse and no children, or a spouse and children that are also the children 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 children of that spouse, your spouse will be entitled to:
    - Your personal effects;
    - A statutory legacy (which is a set amount which is to go to the spouse, based on a specific formula set out in the *Intestacy Act 2010*); and
    - Half of the remainder (if any) of the estate.

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

- Where you do not leave a spouse but do leave children, they will be entitled to the whole of the estate. If your children die before you, your estate will 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; and
- Your next of kin.

Where you leave no entitled person, as outlined above, 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.

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

1. Ordinary Power of Attorney which ends if you lose mental capacity; and
2. Enduring Power of Attorney which 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 to make personal, medical or lifestyle decisions for you (you can appoint an enduring guardian for this).

An Enduring Power of Attorney gives your Attorney the power to continue to make these decisions for you if 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.

You can limit a Power of Attorney so that your Attorney can only do specific things in relation to your financial and property matters instead of having a general power for them to do anything on your behalf in relation to those matters.

Both Ordinary and Enduring powers will end if you die, become bankrupt or insolvent, or you revoke it as outlined in the *Powers of Attorney Act 2000*.

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 your affairs, someone that you have chosen can take care of these things for you. You should always be careful who you choose as your Attorney because they will be dealing with your property and finances. Each year many people are taken advantage of 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 you should seek assistance from a solicitor who will charge a flat fee plus the registration fee for registering your Power of Attorney.

You can also choose 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 mean you will be charged additional costs for this. You should contact your solicitor or the Public Trustee for details of their fees and charges.

A Power of Attorney is not effective unless it is lodged with the Recorder of Titles for registration. You can find out what the fee for registration is from the Land Titles Office.

ENDURING GUARDIANSHIP

What is an Enduring Guardian?

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. It allows you to decide now how you want your life to continue should you lose your mental capacity 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 that you have not left instructions in your Enduring Guardianship, your Enduring Guardian will make these decisions for you. Your Enduring Guardian must act in your best interests at all times when making decisions for you.

Formalities

Only people over the age of 18 may be appointed as an Enduring Guardian. You can revoke the appointment at any time 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 for you.

How is it different to an Enduring Power of Attorney?

An Enduring Guardian has the power to make decisions about your personal, medical or lifestyle situations if you lose mental capacity. An Enduring Power of Attorney gives someone the power to make decisions about 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**

"Wills, Powers of Attorney, Enduring Guardianship" is intended to give general information about the Wills, Powers of Attorney and Enduring Guardianship laws in Tasmania. Whilst we have made every effort to ensure the contents of this document are accurate at the time of printing the law and services do change. Legal and service exactness is not possible in a publication of this nature. This publication should not be used as a substitute for legal advice

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