

### 3 WILLS AND POWERS OF ATTORNEY

#### 3.1 Introduction to Wills

A will is a written statement of the way in which you (the testator) wish to have your property distributed after your death. A will must comply with the formalities set out in the *Wills Probate and Administration Act 1898* (the "Wills Act"). The Wills Act states that to be effective, a will must:

- (a) be in writing - handwritten, typed or printed;
- (b) identify the testator and display the testator's testamentary intention i.e. that he or she intends the document to be a will;
- (c) be properly signed - at the end of the will and on the bottom of each page; and
- (d) be witnessed in accordance with the *Wills Act* - two witnesses must be present when you sign your will and they too must sign it in your presence. Not everyone can witness your will, as explained below. To avoid doubt later that the two witnesses were present when you signed the will, you and each of the witnesses should use the same pen.



If your will is not made in this manner it may not be enforceable; the court has a discretion to grant or not grant probate (a confirmation that the will is valid) and your property could be disposed of as if you had not made a will. In exercising its discretion, the court needs to be satisfied that the document sets out how you want your assets to be distributed. Normally, a paper on which a person has simply written their wishes has no validity, nor has a spoken request by a dying person.

#### 3.2 Do I need to make a will?

Anyone over the age of 18 years who has the necessary capacity can make a will. Nearly everybody owns some property and would normally like to pass it on to 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:

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

If there is any doubt about whether a person has the capacity to make a will (perhaps because of illness or extreme old age), it is advisable for one of the witnesses to be a doctor who can give a medical opinion if needed. Sometimes wills are challenged on the basis that the testator did not have sufficient understanding (or capacity) at the time to make a will.

A court can alter the provisions of your will, if someone who the law deems was entitled to receive something was left out of the will or did not receive enough for their education and advancement in life. If there is someone who would ordinarily expect to receive a large share under your will (such as one of your children) and you wish to leave them out, there is not a lot you can do to prevent a challenge. In fact, it is impossible to draft a will that cannot be challenged by a person who feels they were “entitled” to more. If you do want to leave someone out who ordinarily expects to receive something, consider allocating that person a small amount (rather than nothing) and explaining in the will why they did not receive as much as they might have expected.

### **3.3 When should I make a new will?**

You must make a new will if you marry, as the act of marriage automatically revokes a will, unless your will specifically states that it is made in contemplation of that particular marriage. A new will should also be made if you divorce or experience any major change in circumstances which would make the provisions of a previous will no longer suitable. It is important to remember that a divorce does not automatically revoke a will, even though marriage does. It is a good idea, also, to revise a will on a regular basis, say every five years, to make sure that it still represents your wishes.

### **3.4 What happens if I don't make a will?**

It is not compulsory to make a will. However, if you die intestate (without making a will) then your estate will be distributed according to a statutory chain of inheritance. This assumes that you would have intended to benefit your next of kin. So your spouse and children, if there are any, will be the primary beneficiaries. However, if your estate is less than \$200,000, the whole of your estate goes to your surviving spouse. If you had no spouse and no children, or grandchildren, then the estate will be distributed to more remote family members, such as your parents, brothers and sisters, grandparents and uncles and aunts. Only if you have no living relatives at all in these categories will your estate then pass into the ownership of the state.

Of course, this scheme does not provide for specific items to be given to particular persons, or for particular relatives to receive a larger or smaller share (or no share at all).

To ensure that your property is passed on to the people you choose, you should take the time to make a will.

### **3.5 Can I make a will myself?**

You can make your own will if you wish – a ‘Will Kit’ is available from newsagents and most Australia Post stores. However, a will is an important legal document and may not be in your best interests to draft it yourself. There have been many cases where homemade wills were either unclear, not properly drawn up or caused an unwanted tax liability. Some of these cases end up in court and caused significant expense to the deceased's estate.

Many solicitors are prepared to draft a will for a very reasonable charge. It is quite acceptable to ring several firms to obtain a quote before going ahead. Also, you may ring the Law Society of NSW for further information in finding a solicitor to assist you with a will. Some employee unions and other organisations can also refer you to a solicitor who will give a special rate to members.

You may also have a will drawn up at no charge by the Public Trustee at any of their statewide locations, provided the Public Trustee is appointed as executor. As well, you can commence your will online at [www.pt.nsw.gov.au](http://www.pt.nsw.gov.au). The Public Trustee charges a fee only when administering your estate.

You should be particularly careful in drafting your will and seriously consider getting some legal advice on your will if any of the following circumstances apply to you:

- (a) you have children to different marriages;
- (b) you have step children who are or have been dependent on you;

- (c) you have children who have died, leaving children of their own; or
- (d) you are still technically married but are separated and in another relationship.

### 3.6 The form of the will

There is no specific form which must be used. However, there is a conventional format which includes all the necessary elements. This is as follows:

- (a) the name, address and occupation of the testator (the person making the will) with a declaration that the document is intended to be a will;
- (b) a revocation clause (ie a clause which revokes all previous wills);
- (c) the appointment of executors and trustees (the person or people who administer and distribute your estate);
- (d) disposition of specific property and pecuniary (money) legacies (if required);
- (e) disposition of the residue (the rest of the estate);
- (f) trustee powers;
- (g) date; and
- (h) formal execution of the will (ie, signing and having it witnessed).

A will can be handwritten, typewritten or prepared on a computer. A tape-recording or video is not sufficient.

### 3.7 Who should be a witness to a will?

Two witnesses are required to witness you signing the will. They must not be people who receive anything under the will, or spouses of people who receive something under the will. If these people are witnesses, they will normally lose their gift under the will. The will should not be witnessed by the executor or executors appointed by the will.

The witnesses should be over 18 and sighted, since blind people cannot see the testator sign, and this is essential. The witnesses do not need to read the will. Their function is merely to witness it (ie watch the testator sign it). The will is signed *on each page*, normally at the foot or end by the testator in the presence of the two witnesses who both see the testator sign, and then sign themselves as witnesses and print their names and addresses clearly under their signatures. This may be important in case they are called upon to give evidence about the signing of the will after the testator's death. The witnesses should use the same pen as the testator in signing the will, preferably a blue pen so the original can be easily distinguished from a photocopy.

### 3.8 Altering a will

You should take care in making changes to the will before you sign it. This often happens when something has been left out, and you want to make a small change by hand rather than printing out an amended version. Alterations must be initialled by you and your two witnesses. Otherwise, after your death, it will not be clear to the court who made the alteration, and whether it was made before or after your death.

If alterations are required to a will *after it has been signed*, you cannot simply make a change on the document. It is better that your solicitor prepares a codicil or a new will.

### **3.9 What is a codicil?**

A codicil is a document which sets out alterations to an existing will. It must be executed in the same way as a will and must refer to the original will. With today's computer technology it is just as easy to make a few changes on the original and print out a new will. Codicils have therefore become much less common.

### **3.10 Where should the will be kept after it is signed?**

Most solicitors are prepared to keep the original will in safe custody for a client. Alternatively, it may be kept in safe deposit in a bank or in a safe place at home. It is a good idea to keep a copy of the signed will somewhere else, and to give one to the executor (in a sealed envelope if you like) so that if the original is missing, the signed copy can be admitted to probate. Tell the executor where the original will is kept. There is also a national wills register run by a private organisation, The Wills Trust of Australia Pty Ltd, and the NSW Registry of Births Deaths and Marriages manages a government Wills Register. Contact details for the Registry are set out in Chapter 14.

### **3.11 What is an executor?**

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 be sure 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.

After your death it is the executor's job to look after funeral arrangements and then to ascertain all the assets and debts of the estate, and to ensure that the debts are paid. The executor makes an application for probate, if necessary. Frequently the executor will delegate matters concerning the estate to a solicitor.

### **3.12 What property can be left in a will?**

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 person's 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, eg '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, details of which are set out in Chapter 14.

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 over-ride the terms of your will. Superannuation will be paid out in accordance with the superannuation fund's trust deed – either to your nominated beneficiary on the policy or to your estate (and therefore distributed in

accordance with your will). Usually, if you have expressly included your superannuation as a gift in your will, then the trustee of the superannuation fund will take that into consideration in deciding who should get the proceeds of your policy, unless it is a binding nomination, in which case the trustee must abide by that nomination.

You should make sure that you dispose of the residue of the estate in the will. The residue is everything which is left after specific gifts and legacies have been paid. There have been cases in the past where testators have made a long list of specific gifts but have forgotten to state who gets what is left over. If this is the case there will be a partial intestacy, and the residue will be distributed according to the statutory formula which applies on intestacy (see above).

### **3.13 What happens if one of my beneficiaries dies before me?**

It depends on the terms of the will, and also on whether the beneficiary is your child. The Wills Act provides that if a child predeceases the testator leaving children (i.e. the testator's grandchildren) then the gift to that child's estate will not fail, and the gift will be distributed according to the child's will.

If the grandparent wishes the grandchildren to benefit in these circumstances, a specific clause must state that in the will.

In the case of other beneficiaries, it is common for testators to put a provision in their will that if a beneficiary predeceases the testator, then the gift will go to someone else instead.

### **3.14 What if a beneficiary is a child when the testator dies?**

Normally, any gift to a person under the age of 18 will be held in trust until they reach that age. A will may provide that a beneficiary may not receive a gift until a specified age greater than 18, if that is what the testator wants, for example 21, or 25.

If it is likely that there will be infant beneficiaries, it is advisable to include trust powers in the will, which will enable the trustee to deal with the part of the estate held for the infant beneficiaries in the best way possible. You should seek advice from a solicitor about drafting suitable trust powers.

### **3.15 Can property be left to one person for life, and then to someone else?**

It is possible to set up a life estate in a will. People may wish to do that when they want to provide a home for a spouse during their lifetime and then leave the house to the children, for example. Life estates can sometimes cause unforeseen difficulties, and it is better to avoid them if possible. If you wish to set up a life estate, you can consider setting up a trust instead, and you should seek advice from a solicitor.

### **3.16 Can provision be made in a will for my pets to be looked after?**

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

### **3.17 Is there tax on the value of the estate a person leaves?**

In NSW there is currently no tax payable on the value of the estate of a deceased person. (Death duties have been abolished.) Furthermore, there is no gift duty payable on gifts in wills. There is however a capital gains tax (CGT) which may be relevant to a deceased estate particularly if the assets being disposed were acquired after 20 September 1985. Because of the CGT implications, it is advisable for all wills to contain an appropriation clause which allows a tax liability to be postponed and gives the executor flexibility in dividing up assets fairly without selling assets likely to attract CGT (eg, investment properties). If there are likely to be assets affected by CGT it is advisable to get legal advice when drawing up your will.

### 3.18 Introduction to powers of attorney

A power of attorney is a legal document, by which you authorise someone (known as your "attorney") to make financial decisions and sign papers on your behalf.

### 3.19 When do I need a power of attorney?

If you are travelling overseas for a lengthy period you may want to give someone a power of attorney to manage things while you are away or you may also wish to grant one if your health has deteriorated (although a power of attorney does not enable your attorney to make decisions about your health and medical matters).

You do not need a power of attorney to deal with Centrelink for the social security pension or with a bank. However, they will require documentation authorising someone to act for you or explaining why you cannot act for yourself.

### 3.20 Can I just fill in a form?

The *Powers of Attorney Act 2003* requires a power of attorney to be in a particular form different to that set out in older legislation. The new form contains information for you and for your attorney, particularly about the attorney's duties. The form also contains specific questions about the authority you are granting to your attorney, particularly in relation to your attorney's right to give gifts on your behalf and to use your money for their own benefit or the benefit of any other person. If you do not wish your attorney to have these rights, you should cross out these clauses on the form.

The new forms for a power of attorney are available from newsagents, Australia Post shops or on the Land & Property Information's website (see Chapter 14 for contact details). It is preferable to have a power of attorney tailored for you, especially where you intend it to be an enduring power of attorney (see the discussion of enduring attorneys below).

You should also be aware that the requirements for a valid power of attorney vary in each Australian state. There is no requirement for the attorney to sign the form for an ordinary power of attorney. Your solicitor can prepare the form so that it meets your personal circumstances or you can purchase commercial "power of attorney kits" to assist you to make a power of attorney yourself.

If you have an existing power of attorney made in a form set out by older legislation, it may still be valid and can be registered if it was signed and dated before 16 February 2004, the date the current Act came into force.

### 3.21 Can I place limits on the power of attorney?

Yes, you can place any restrictions on the power of attorney you choose. You may choose to grant the power of attorney for a specific purpose, or a specified time period. For example, a power of attorney could be given to sell certain real estate or to operate a specific bank account.

As discussed above, an attorney cannot make gifts on your behalf or use your money for their benefit or for the benefit of any other person unless you specifically grant them this power under the power of attorney.

### 3.22 Should I grant an enduring power of attorney?

If you lose capacity through unsoundness of mind, a power of attorney becomes invalid *unless* you have granted an *enduring* power of attorney. An enduring power of attorney can be made on the same form as an ordinary power of attorney, but it has a number of additional requirements:

- (a) it must contain a statement that you want it to continue even if you lose your mental capacity;

- (b) it must be signed by the attorney to show that they consent to act. Your attorney may sign the document at the same time as you do or at a later time. However, the enduring power of attorney will not come into effect until the attorney has signed it; and
- (c) your signature must be witnessed by a "prescribed witness." A "prescribed witness" is a solicitor, a barrister, a Registrar of the Local Court in Australia, a licensed conveyancer, or an employee of the Public Trustee. The prescribed witness must sign a certificate on the form which states that they explained the enduring power of attorney to you and that you appeared to understand it.

### **3.23 Whom should I appoint as my attorney?**

This is a very important decision which you should consider carefully. Usually a close friend or a relative is appointed. It must be someone you can trust. Sometimes a person's solicitor or accountant may be willing to act. Trustee companies and the NSW Public Trustee are also willing to carry out such duties. You may also appoint more than one attorney. It is possible for attorneys to charge for their services. If you agree to such a charge, you should check the Power of Attorney document carefully for what charges you are agreeing to. If you have not agreed that your attorney can charge for his or her services, you should also check that a charging clause has not been included in the document.

### **3.24 How do I make a power of attorney?**

Although there is no legal obligation to see a solicitor to make a power of attorney, it is advisable to discuss the preparation of a power of attorney with your solicitor or a trustee company. Your solicitor will prepare the document and endeavour to ensure that the wording of the power of attorney reflects your wishes. It is not expensive to have a power of attorney prepared by your solicitor. The State Government does not charge stamp duty on the power of attorney.

### **3.25 How much will it cost?**

Solicitors have ready-made powers of attorney which they can adapt to suit you. They generally charge between \$100 and \$150 + GST. You can also shop around.

### **3.26 Do I have to register the power of attorney?**

A power of attorney must be registered if it will be used for dealing with land (such as leases for more than 3 years or sale of land).

Registering a power of attorney does not attract stamp duty, however it does attract a \$77.25 lodgement fee with the Land & Property Information. If a solicitor lodges it for you they will charge for sending it to the Land & Property Information.

Further information about powers of attorney may be obtained from the Law Society of New South Wales website: [www.lawsociety.com.au](http://www.lawsociety.com.au) or the LPI website: [www.lpi.nsw.gov.au/dealings/powerattorney.html](http://www.lpi.nsw.gov.au/dealings/powerattorney.html).

### **3.27 Can I cancel the power of attorney?**

Yes, a power of attorney can be revoked or cancelled at any time if you have capacity to revoke (see Chapter 2 at 2.5). If you no longer wish a particular person to act for you, you can revoke the power of attorney and appoint someone else. You should write to your attorney to tell them you are revoking the power of attorney. If you had registered a power of attorney you should also have a written document revoking it, pay stamp duty on it (if necessary), and then register it at the Land & Property Information. However, if the power of attorney is expressed to be irrevocable, then you may not be able to revoke it. This is why it is strongly recommended that you seek legal advice if you are required to give an irrevocable power of attorney.