



WILLS

Who needs a will?

Everyone over the age of 18 years should have a will. Even if you do not own any property, a will can be drawn now which will apply in respect of property you acquire and dispose of throughout your lifetime.

What happens if I die without a will?

A person who dies without leaving a valid will is said to die "intestate". The effects of this are:-

- 1) the property which you own at your death vests immediately in the Public Trustee, and unless there is someone who wishes to apply to the Court to be appointed as an Administrator, the Public Trustee will administer your Estate.
- 2) the Public Trustee will distribute your estate pursuant to specific rules contained in the *Succession Act*, generally to your next of kin. (However this may not be in accordance with what you would have wanted to happen).
- 3) the Public Trustee charges a fee to administer the estate calculated as a percentage of the value of your estate, and any income of the estate, regardless of how much time is spent in the administration.
- 4) if you die without any next of kin your property goes to the Government.

Obviously it is preferable (particularly if you wish to leave part or all of your property to a person who is not directly related to you, or to a more distant relative or a charity) that you make express provision in your will.

Does a will have to conform to certain standards and requirements?

Yes.

Under the *Succession Act*, there are strict requirements regarding the way in which wills should be drawn up and signed. For example if a beneficiary of your will witnesses the signing of the will, any gift to that person will be invalid.

What if I have previous wills?

The making of a will automatically revokes earlier inconsistent wills.

When drawing up a new will we insert a clause to specifically revoke or cancel any previous wills.

What does an executor or personal representative do?

In your will you will appoint an 'executor', or 'personal representative' to take the necessary steps to sell up any assets, to pay any debts owing at the date of death or incurred in the course of the administration of the estate and to distribute anything remaining over to those entitled under the will.

It is therefore essential that you appoint someone (or more than one person) whom you trust to carry out the important responsibilities of an executor. We often recommend that 2 executors or successive executors be appointed in case a person appointed is unable or unwilling to act in that capacity.

Must a person leave property under a will in exactly the same way as his/her spouse?

No.

Spouses may decide to leave their property as they wish, and this does not necessarily mean they will be leaving property to exactly the same people under their respective wills.

What is the effect of owning land as joint tenants?

Spouses often acquire real estate in both their names "as joint tenants". This means that when one of the joint tenants dies, the whole property is automatically owned by the surviving joint tenant.

This "survivorship rule" will override any contrary provisions of a will relating to that property.

The other way people can own real estate is as "tenants in common" (usually in equal shares). When a tenant in common dies, his or her interest in the land forms part of his or her estate and is dealt with in accordance with his or her will.

Why should I make a will now?

Because:

- you are over 18;
- you own a car;
- you own a house;
- you have entitlement to superannuation benefits;
- it will remove many of the hassles that will otherwise confront your grieving family on your death.

A will may be drawn now so that it operates effectively even though you acquire and dispose of property throughout your life.

What is the effect of marriage and divorce on a will?

Under the *Succession Act*, your will is automatically revoked upon marriage.

If you are contemplating getting married, it is possible to draw up a will in contemplation of marriage, which will not be revoked upon marriage.

Under the *Succession Act*, if you obtain a divorce, any gift to your former husband or wife and any appointment of that person as your personal representative will be automatically revoked.

Note this does not occur if you are only separated. If you are separated and do not change your will your estate may well pass to your separated spouse unless you make a new will.

Can I leave specific gifts to certain persons?

Yes.

For example, you may leave whatever money stands in credit in your bank account at the date of your death to a particular person, or you may leave a specific item of furniture or a motor vehicle to a particular person.

You may also leave an asset to a particular person and indicate that if that person is not alive at the date of your death, the children of that person may share in the asset that that person would have otherwise taken.

In addition, your will can also be drafted so that a certain number of people share whatever you own at the date of your death in equal shares.

Tax Planning

Particularly with the introduction of Capital Gains Tax your will offers significant opportunities for tax planning, as bequests under your will generally do not attract stamp duty and other immediate tax consequences which accompany transfers of property during your lifetime.

Consideration should also be given as to the possible beneficial tax effect of proposed donations to charities.

Your circumstances may also be such that establishing what are known as testamentary trusts in your will would be of very great advantage to your beneficiaries.

You should discuss these aspects with us when giving instructions for your will.

How often should your will be reviewed?

Regularly. There is no fixed time period, however you should consider your will if you purchase or sell a significant asset or when any significant event occurs in your life (e.g. a family member dies or if you marry or obtain a divorce or a child is born).

We recommend reviewing your will any any enduring power of attorney every 3 - 5 years.

What do I need to do?

We would be pleased to assist you in reviewing your current will or preparing your first will.

Please complete the "*instructions for preparation*" form and either:-

- (a) return it to us so that we may prepare a draft document for your consideration and then contact you to arrange an appointment; or
- (b) complete that form and bring it with you at a mutually convenient time so that we may obtain your further instructions.

ENDURING POWERS OF ATTORNEY

What is a Power of Attorney?

A Power of Attorney is a document signed by the person granting the Power (called 'the donor') empowering another person (called 'the Attorney') to act, enter into transactions and sign documents on the donor's behalf.

The dealings and transactions into which the Attorney can enter on behalf of the donor are usually unrestricted, but may be limited if desired.

How does an Enduring Power of Attorney differ from a normal Power of Attorney?

The power to grant an Enduring Power of Attorney was created by an amendment to the *Property Law Act* in 1990 which was then superceded by the *Powers of Attorney Act 1998*. Before that a normal Power of Attorney could no longer be effective where the donor had lost his or her capacity to enter into the transactions which they had authorised its Attorney to undertake; e.g. where the donor was legally incapacitated, in a coma or had become senile.

An Enduring Power of Attorney will continue to operate even if the donor has lost his or her capacity to enter into those transactions and will continue until it is revoked or the donor dies. It cannot be revoked once any incapacity arises in the donor.

Are there special requirements for a Power of Attorney?

Yes.

The *Powers of Attorney Act* provides that Powers of Attorney must be in the form set out in that Act.

A Justice of the Peace or a Solicitor must witness the donor executing the Power and certify that the donor of the Power appeared to understand the effect of the document.

Any Attorney must also sign an Enduring Power of Attorney to acknowledge the responsibilities placed upon them as Attorney.

Can an Enduring Power of Attorney be revoked?

Yes.

The donor may revoke any Power of Attorney (whether enduring or not) at any time while they have capacity.

An Enduring Power of Attorney is also revoked by death of the donor.

Is it advisable to have an Enduring Power of Attorney?

Yes.

We believe it is very important to have some form of Power of Attorney, and that an Enduring Power provides the most benefits.

An Enduring Power of Attorney is particularly appropriate when travelling overseas for an extended period, or to cover the circumstances such as the donor becoming ill or injured whereby he or she is unable to deal with his or her personal affairs. An ordinary power would lapse in such latter circumstances.

Can I have more than one Enduring Power of Attorney?

Yes.

However, you should be careful not to appoint too many Attorneys, although it is possible to appoint two or more Attorneys under the one document whereby either one or both jointly have power to manage your affairs.

It is also possible to appoint an Attorney for a specific purpose; e.g. to sell a specific property; and appoint another Attorney, for another purpose or generally.

If you have any queries regarding the above, or wish us to prepare a power of attorney on your behalf please contact our office to make an appointment for a time convenient to you.