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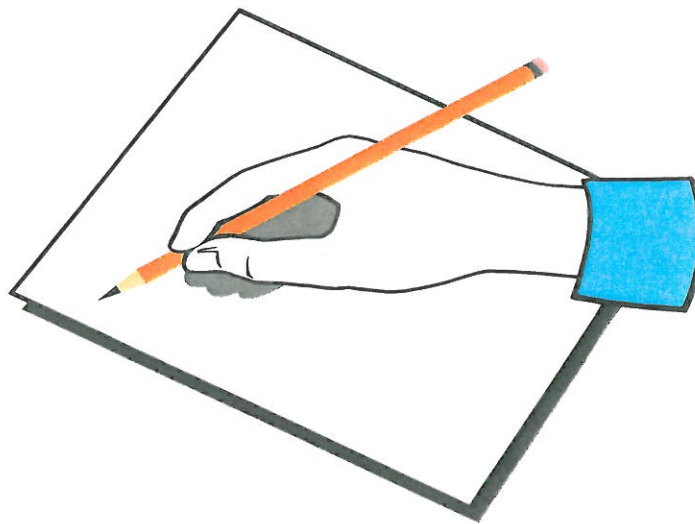
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WILLS



**Are you thinking of
making a Will?**

1.0 **Wills - Executors & Trustees**

- 1.1 When you are making a Will the first question to consider is who will be your executor(s) and trustee(s). The executor and trustee is the person or persons who have the obligation to carry out the wishes expressed by you in your Will.
- 1.2 In a situation of a couple (whether married or de facto) it is most common for the executor or trustee to be your spouse or partner.
- 1.3 However, there may be situations where this is not appropriate because there is a possibility of conflict of interest. For example, if you are in a second relationship and you have children from a prior relationship then you may wish to appoint someone outside of your family as your children and your spouse / partner may have conflicting interests as to the administration of your estate and who is to receive benefits from it.
- 1.4 The job of executor / trustee can range from being very simple and straight forward to being very complicated and taking a long time. For example if you are married / de facto and you give everything to your spouse / partner then the administration of the estate can be over in a relatively short period of time.
- 1.5 However, if e.g. you give a life interest to a spouse / partner and then give everything to children after the death of that person then the estate will last as long as your spouse / partner is alive.
- 1.6 In some circumstances it may be appropriate to have professional advisers as your executor / trustee. In those situations we are always happy to act on your behalf.

2.0 **Wills - Provision for Spouse / Partner**

- 2.1 When making a Will it is very common that the first person who is thought of and who receives the greatest benefit is your partner / spouse.
- 2.2 However, there are a number of questions that you need to consider:
 - (a) Do you wish for your spouse / partner to have your entire estate. That would undoubtedly be appropriate where you have no children.
 - (b) If you have children, do you want your spouse / partner to have only a share of your estate or have the benefit of some specific assets e.g. a home. The answer to this question will depend upon:
 - (i) The value of your estate;
 - (ii) The age of your children. For example if your children are minors then in most cases you would give everything to your spouse / partner on the understanding that they would leave everything to the children.

- (iii) You may wish to consider whether you give you spouse a life interest in all or part of your estate. For example some people may give their share of the family home to their spouse / partner by way of life interest. This means that the spouse / partner can live in the home, including a replacement home, for all of their life. However, the value of the deceased's share of the home does not become part of the survivors assets and cannot be taken into account for any asset testing purposes e.g. rest home subsidy.
- (iv) In the event that you are not giving your entire estate to your spouse / partner you would need to give consideration as to whether there are any specific assets that you would like that person to have. This may include family heirlooms or other items of sentimental value.

3.0 **Wills - Provision for Children**

- 3.1 The issue of how you look after your children in your Will is particularly important when you are in a second or subsequent marriage or relationship. As you will see elsewhere in our pamphlet your surviving spouse or partner has certain rights upon your death. This will affect the benefits that your children (who may not be the children of that current spouse / partner) may receive. Accordingly, serious thought needs to be given as to how to deal with this issue.
- 3.2 A further issue with children is the age at which they benefit from your Will. It is common for Wills to state an age of twenty one (21). However, you may wish to delay the age your children receive a benefit to ensure that they are sufficiently mature to deal with the benefits they will receive.
- 3.3 One of the most difficult issues that people face when deciding upon the contents of their Will is who will look after their children until they reach the age of eighteen (18). It is important to note, that whatever you put in your Will it will be treated as a guide only. Your Will cannot "give away" your children as if they were similar to items of property. Accordingly, the Family Court has the final say in the event that members of your family disagree as to who are to be the guardians of your children.
- 3.4 If your children are minors you may also wish to give some thought as to money being made available to their guardians for issues such as education, housing, purchase of day to day items, holidays etc. There is a fine line between making money too easily available and making sure that your guardians do not suffer financial hardship from looking after your children.
- 3.5 If you have adult children to whom you have made loans you may need to consider this when making your Will. This is particularly important if you have made different loans to different children. In such a case you may wish to

ensure that the children who have received the greater loans must, either repay the loan, or, receive a smaller benefit from your Will to even things up.

- 3.6 There is also the tragic situation that sometimes arises where a child predeceases the parent. In this situation most Wills commonly leave the deceased child's share of the estate to any children of the deceased child i.e. grandchildren. If you did not wish this to happen you would need to give us specific instructions.

4.0 **Family Protection**

- 4.1 The Family Protection Act enables a wife or husband of a deceased, the children and grandchildren of deceased and in some circumstances the step children and parents of the deceased to make a claim against the estate if they are not provided for.

- 4.2 Effectively the court imposes on you a moral duty to provide for these members of your family. The court has a discretion as to whether they should make any such order from family members who may challenge a Will.

- 4.3 In the event that you have decided not to provide for your spouse, children or grandchildren then we advise that you include in your Will an explanation as to why they may have been excluded. For example you may feel that you have provided for them during their lifetime. For example you may have purchased a car for them or assisted with the purchase of a house but not done the same for another family member who has been provided for in your Will. You should make this clear in the Will so it is fully understood and to enable the court to take that into consideration if there is a challenge to your Will under the Family Protection Act.

5.0 **Testamentary Promises**

- 5.1 You should give consideration as to whether or not you have promised any person you will provide for them from your estate when you die.

- 5.2 The promise does not have to be expressly made and can be implied by actions.

- 5.3 Essentially the law allows a claim to be made against an estate based on the rendering of services to or the performance of work for the deceased during their lifetime.

- 5.4 Any person who wishes to make a claim must prove an express or an implied promise by you to reward them for the services or work that they carried out for you.

- 5.5 An example of this is where a friend or family member has assisted with the maintenance of the property, mowing lawns, tending to the garden, painting etc.

for a number of years for an elderly friend or relative.

- 5.6 Examples of such promises would be a specific amount of money or a particular item of property or real estate.
- 5.7 If the person has carried out all the maintenance and tended to lawns and gardens they may argue that there was an implied promise to be given all the deceased's tools and garden implements.
- 5.8 When drafting your Will you should give consideration to whether or not you are in the position of being subject to such a promise. For this reason it is recommended that you review your Will periodically.

6.0 **Wills - Property (Relationships) Act 1976**

- 6.1 The days have now gone where you can make a Will with the certainty of knowing that your assets will end up with those persons whom you choose upon your death. With the breakdown of the family unit, Parliament has now passed legislation granting property rights over your estate to persons whom you may wish to exclude in your Will. In particular:
 - (a) The Family Protection Act 1955. This enables your spouse or partner and children to contest your Will. This will be dealt with under a separate heading in this paper;
 - (b) The Property (Relationships) Act 1976 ("the Act"). In the eventuality of death, the surviving spouse or partner can make a claim against your estate as if it were a separation and that claim takes priority over the provisions of your Will.
- 6.2 Recently Professor Nicola Peart of Otago University, who is also the author of *"Relationship Property on Death"* made some public statements to the effect that the death provisions of the Act have created such uncertainty that it has created more problems than it was intended to solve. In her view, the legislation is ill-conceived and in many cases will render the Will document redundant.

Q. What are the provisions of the Act affecting your estate upon death?

- A. (a) The surviving spouse or partner (i.e. de facto) must make a choice either:
 - (i) To make a claim under the Act in which case the same rules would apply as if the parties had separated; or
 - (ii) Take under the Will
- (See S61 of the Act).

DISCLAIMER

Please note that the enclosed booklet is for information purposes only and is not to be relied upon. Before relying on any of the information set out herein, it is important you consult a solicitor first.