Will, Power of Attorney & Guardianship Information Sheet

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Will

I. What is a Will?

A Will is a legal document that names the people you want to receive the property and possessions you own at the date of your death. These people are known as your beneficiaries.

Your property and possessions include everything you own: your home, land, car, money in the bank, insurance policies, shares, jewellery, pictures, furniture, and so on. Making a Will is the only way you can ensure that after you die your assets will be distributed in the way you want.

II. Should I make a Will?

It is essential to make a will if you are concerned about who will receive your assets and belongings after you die. It is particularly important to make a Will if you have a family or other dependents.

Even if you are married you need a Will. If a husband and wife are killed together, for instance in a motor accident, the older person is normally presumed to have died first. If you were the younger person, you might have inherited assets from your spouse even though you were by then dead — and without a Will your assets would be distributed under a rigid formula regardless of what you might wish.

III. What happens if I don't make a Will?

It is not true that the Government takes your property if there is no Will. The law provides a formula which sets out who is entitled to your assets if you die intestate, but that formula may not distribute your estate in the way you wanted.

In addition, the legal procedures required when there is no Will are more complicated and time consuming and may cause expense, worry and even hardship to your family.

IV. Can I alter my Will if I change my mind?

You are free to alter your Will at any time. If your circumstances change in any way, you can and should alter your Will. However, you cannot simply make an alteration by crossing out part of the original Will and writing in your new wishes.

V. What is an executor?

An executor is the person who will be carrying out the terms of your will and administer your estate.

An executor is responsible for collecting the assets of your estate, paying any debts of the estate, paying any applicable taxes, and distributing the assets of the estate in accordance with the directions of your Will.

VI. Whom should I select to be my executor?

Typically you may choose anyone to act as executor except a minor (anyone under 18 years of age). An Executor can be disqualified if they have been convicted of a crime.

Administering the estate can be complex, time-consuming and stressful. Ensure you select someone you trust, who will be able to handle your financial matters prudently. Your executor does not need to have any legal expertise. An executor can always hire a solicitor should the need arise. Many people select their spouse or an adult child to be their executor. Also, people often choose an individual who will be receiving a substantial amount of property to be their executor. In this way, the executor will want to ensure that the property is distributed properly.

VII. What is a Specific Gift?

A specific gift is just what it sounds like. It is a gift of a specific item of property or sum of money to a named beneficiary. For example:

a. I give my diamond engagement ring to my daughter, Sally Jones;
b. I give $5000.00 to my friend, James Smith; or
c. everything that is not given away as a specific gift forms the residue of the estate.

VIII. What is the Residue of the Estate?

The residue of the estate is all of your property that is not used to pay your debts or given as a specific gift.

For example, if you own a house, household items such as furniture and jewellery, a car and a savings account, and you give your car to your son, and your jewellery to your daughter, your house, all other household items, and your savings account will be the residue of your estate. If you give the residue to your spouse, your spouse will get your house, your household items (less the jewellery) and your savings account.

Remember, your executor has to pay debts before the residue of your estate is distributed. So if you had $25,000.00 in savings and $10,000.00 in debt, your executor would have to pay the $10,000.00 debt before distributing the residue. Debts are usually payable out of the residue first, and if there is not enough money from the residue, then specific gifts will be sold for cash to pay debts.

IX. Can a husband and wife make Mirror Wills?

Mirror wills are used to allow two people to create almost identical wills which leave everything to each other. A husband and wife (or any other couple) can make "Mirror" Wills by each writing a Will that leaves everything to the remaining spouse. Often, there is a clause that provides that if the husband and wife die at the same time or within thirty days of each other, then everything goes to the couples' children or if there are no children, to a named beneficiary.

The important thing to remember is that you can only use a Will to give away what you own, and not what your spouse owns. Additionally, jointly owned property where there is a right of survivorship cannot be disposed of in your Will because the surviving owner automatically becomes the sole owner of the property when one of the joint owners dies. This is true whether it is a house, a bank account or any other property that is jointly owned.

X. Does marriage revoke a previous Will?

In most jurisdictions, if you get married, any previous Will that you made is revoked unless the Will was made in contemplation of marriage and that fact is expressed somewhere in the Will. This is the position in New South Wales.

XI. Does divorce revoke a previous Will?

Depending on the jurisdiction in which you reside, a divorce may revoke your previously made will. In New South Wales the Will is not revoked but is read as if your ex-spouse pre-deceased you.

XII. Do I have to list all my children?

Any child not specifically named in your Will may have the right to claim against your Will as if no Will had been created. If you need to disinherit a child you should do so by naming and disinheriting that child specifically. Otherwise, if you simply leave out a child, a court may assume that you made a mistake and may re-interpret the Will including the missing child.

XIII. How do I address step-children?

Stepchildren are not your natural heirs unless you have legally adopted them. They are not included if you leave property to "all my children". If you want to leave something to your stepchildren, you must name them as beneficiaries in your Will.

XIV. What is a guardian?

A guardian is a person the testator appoints to look after your children that are under 18 years of age after you die.

You do not have to appoint a guardian for your minor children however, if you do not, the courts will decide who will look after your children if no other person having parental rights survives you.

When appointing a guardian you may want to consider the following questions:

a. Will my proposed guardian be old enough to look after my children? (Your proposed guardian must be an adult.)
b. Does my proposed guardian have experience raising children?
c. Is my proposed guardian concerned about my child's welfare?
d. Is my proposed guardian able to care for my child emotionally, physically and financially?
e. Does the proposed guardian have the time to take care of my children?
f. Does my child like and feel comfortable around the proposed guardian?
g. Where does my proposed guardian reside? (It may be difficult or upsetting for your child to move right after your death.)

XV. Can all my property be given away in a Will?

Not all property can be given away in a Will. Property that cannot be gifted in a Will is commonly referred to as "non-estate assets". Non-estate assets typically cover the following:

a. *superannuation death benefits* - Generally the trustee has the discretion to decide who receives the superannuation benefit. Usually, a trustee will follow your death benefit nomination, however the trustee is not obliged to do so unless a binding nomination has been made.
b. *life insurance* - Life insurance is typically a non-estate asset unless the nominated beneficiary is the person whose life has been insured.
c. *assets owned in a family trust* - Family trust assets are non-estate assets because they are not personally owned by the testator.
d. *assets owned by a family company* - Wills can transfer the shares owned by the testator (and therefore control of the company) however a Will cannot specifically transfer ownership of the assets of the company.
e. *assets held by a private company* - Generally, private company assets are non-estate assets because they are not personally owned by the testator. A testator may be able to leave his/her shares in the company in a Will subject to the governing rules of the company.
f. *jointly owned property* - Full-ownership of any jointly-held property will be automatically transferred to the surviving owner. The surviving owner can then transfer the property in his/her Will.

Power of Attorney

I. What is a Power of Attorney?

In NSW it is a legal document that appoints one person (the attorney) to act on behalf of another (the principal or donor) in relation to their property and financial affairs. For example, the appointed attorney can buy and sell property and operate your bank accounts. It does not allow anyone to make medical or life decisions on your behalf. The attorney is someone you trust — usually a family member or close friend.

You can make either an ordinary or enduring power of attorney.

An ordinary power of attorney ceases to have effect if you lose the mental capacity to make financial decisions, but an enduring power of attorney continues to have effect despite any such loss of capacity.

II. Who can make a Power of Attorney?

Anyone over 18 who wants to and is capable of understanding the nature and effect of the document. Some adults with a disability are capable of doing this, but if capacity is in doubt, an appropriate professional should assess the person's understanding.

III. Why make an Ordinary Power of Attorney?

You may want to make an ordinary power of attorney for a limited time if you:

a. are going overseas or interstate;
b. are going into hospital;
c. are physically unable to look after your affairs; and
d. want something dealt with in another part of the country.

But remember that an ordinary power of attorney has no effect if you lose the mental capacity to manage your own affairs.

IV. Why make an Enduring Power of Attorney?

Because it will continue to have effect even if you lose capability, for example if you have a stroke or are injured in a car accident.

Making an enduring power of attorney allows you to choose who you want to manage your financial affairs if you lose the capability to do this for yourself. It is a cheap and easy alternative to other forms of financial management such as a financial management order made under the Protected Estates Act.

V. Who should I appoint as my Attorney?

You will need to choose a person who is trustworthy and responsible enough to manage your finances, especially as (unless there are special conditions) your attorney has power to dispose of your assets.

Before you appoint someone you should be sure that they will do all the things you want. Your attorney is legally bound to carry out the written instructions in the power and any other instructions you give while of sound mind. The Courts can intervene if your attorney acts dishonestly or Improperly, but this may be hard to prove and can be expensive so be sure to choose your attorney carefully.

You can appoint more than one attorney but you should choose people who can coordinate well. You will need to see a Solicitor or Chamber Magistrate to decide whether you want your attorneys to act jointly (together) or severally (separately).

VI. Do I lose my rights if I make an Enduring Power of Attorney?

When you make an enduring power of attorney you are giving someone else the right to make financial decisions for you. It is effective as soon as it is signed and certified but you can:

a. tell your attorney not to use it until you say so or until you become incapable;
b. keep the document in your possession, which prevents it from being used against your wishes; and
c. limit the power, for instance by allowing the attorney to pay only certain bills or limiting the time the power will operate.

You should see a Solicitor if you wish to put limits or conditions on your attorney.

VII. Do I need to register my Power of Attorney?

Although it is not always necessary, the advantages of registering your power of attorney are that it will be:

a. on record as a public document;
b. safe from loss or destruction; and
c. more easily accepted as evidence that your attorney acts with your authority.

Your power of attorney must be registered if you want your attorney to sell, or in some cases to lease your real estate.

VIII. How long will my Power of Attorney last?

Until you notify your attorney that the power has ceased or your attorney notifies you that they will no longer act under the power. It also ceases if either of you die or become bankrupt.

IX. Can I change my mind?

You can cancel your power of attorney at any time as long as you are of sound mind. Make sure that you destroy the document and that your attorney knows that you are cancelling it. You can tell your attorney in person or over the phone but it is best to do it in writing so that your intention is clear to everyone.

However, if the power of attorney is registered you are required to complete the appropriate form and register it with the appropriate authority.

Enduring Guardianship

I. What is an Enduring Guardian?

An enduring guardian is someone you choose to make personal or lifestyle decisions on your behalf when you are not capable of doing this for yourself. You choose which decisions (called functions) you want your enduring guardian to make and you can direct your enduring guardian on how to carry out the functions.

II. Who can appoint an Enduring Guardian?

If you are over 18 years and have the capacity to understand what you are doing, you can appoint one or more people to be your enduring guardian.

III. Who can be an Enduring Guardian?

The person you appoint as your enduring guardian must be:

a. at least 18 years old; and
b. someone you trust to make decisions in your best interests.

The appointed enduring guardian cannot be a person who, at the time of appointment:

a. provides medical treatment or care to you on a professional basis;
b. provides accommodation services or support services for daily living on a professional basis; or
c. is a relative of one of the above.

IV. What sort of decisions can an Enduring Guardian make?

You can give your enduring guardian as many or as few functions as you like. For example, you can give them the power to decide on your health care but not where you live.

You may also give the enduring guardian directions about how to exercise the functions you give them. For example, you can direct your enduring guardian to consult with a particular close friend before making a decision.

If your enduring guardian has a health care function, they will be able to see your medical records to help make decisions for you.

V. What sort of decisions can't an Enduring Guardian make?

An enduring guardian cannot consent to anything unlawful and cannot:

a. make a will for you;
b. vote on your behalf;
c. consent to your marriage;
d. manage your finances; or

e. override your objections, if any, to medical treatment.

All application must be made to the Guardianship Tribunal to authorise medical treatment to which you strongly object. Only the Tribunal can consent to certain "special" medical treatments.

VI. What principles guide an Enduring Guardian?

Your enduring guardian must act within the principles of the Guardianship Act, in your best interests and within the law. You cannot give your enduring guardian a function or a direction which would involve them in an unlawful act.

VII. How many Guardians can I appoint?

You can appoint one or more persons as enduring guardian. If you appoint more than one enduring guardian, you can direct them to act jointly (the enduring guardians must agree on all decisions) or severally (each enduring guardian can make decisions separately from the others) or jointly and severally (the enduring guardians can act together or separately).

You can choose to have the remaining joint enduring guardian(s) continue even though one or more of the others die, resign or become incapacitated. You can also appoint an alternative enduring guardian who can act only if the original enduring guardian(s) dies resigns or becomes incapacitated.

VIII. When does an Enduring Guardianship take effect?

The appointment of your enduring guardian takes effect only if you become unable to make your own personal or lifestyle decisions. if there is any doubt about your capacity to make decisions, your enduring guardian may wish to seek the opinion of a medical practitioner before acting on your behalf.

IX. Can I change my mind?

While you are capable of making your own decisions you can revoke the appointment of an enduring guardian by completing the appropriate form.

You also have to advise the enduring guardian in writing that their appointment has been revoked.

You can appoint a new person as your enduring guardian, or change the functions or directions given to your enduring guardian simply by completing a new form of appointment.

Only the Guardianship Tribunal can make changes to the appointment if you have lost the capacity to do this for yourself.

X. What happens if I get married?

If you marry after appointing an enduring guardian, the appointment is automatically cancelled. If you wish to reappoint the same or a different enduring guardian, you need to complete a new form.

XI. What if someone is worried about what my Enduring Guardian is doing?

Anyone with a genuine concern for your welfare can apply to the Guardianship Tribunal for a review of the appointment if they feel that your enduring guardian is not making appropriate decisions on your behalf. The Tribunal can revoke an appointment or confirm it, and may change the functions in the appointment. However, the Tribunal does not supervise enduring guardians and will act only if it receives an application from a concerned person or receives information which leads it to review the appointment.

XII. What happens if my Enduring Guardian cannot continue?

If the person you have appointed dies, resigns or becomes incapacitated, the Guardianship Tribunal can, in limited circumstances, appoint another person as enduring guardian on your behalf.

XIII. When does Enduring Guardianship end?

Enduring guardianship ends when you die or when you revoke the appointment or if the Guardianship Tribunal revokes it. The appointment is suspended if the Guardianship Tribunal makes a guardianship order.