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Article

WILLS & ESTATES

Making a Will

By Mark Minarelli

Wills and agency appointments are not something that should concern only older people. They should be put in place as part of the prudent management of your personal affairs. Like term life insurance, one hopes that they won't be required - but it makes sense to have them just in case. The documents can all be altered or revoked if circumstances change.

Section 1: Is a Will Really Necessary When You Die?

Why make a Will?

Making a Will ensures that you personally direct the way your property is to be dealt with after your death. If you do not have a Will, then government legislation directs how your property is distributed. If you die without making a Will (called intestacy), it can increase the legal, financial and emotional burdens on your family when the time comes to administer your estate. In that case, what usually happens is that the person's next-of-kin will be left to sort out the deceased's affairs. Not only will this process incur legal costs, but it comes at a time when the family is grieving and may not be up to facing administrative responsibilities.

What can you give by your Will?

Basically, anything solely owned by a person at the time of death can be dealt with in a Will. There are certain things which one cannot give by Will. The more common examples are assets owned jointly with another person and some assets such as life insurance that may be on your "life" but are actually owned by another person, such as your spouse.

Assets owned by a family trust also cannot be dealt with in a Will simply because they are not assets owned by the will-maker but by the trust, which is a separate entity.

Superannuation funds are owned by the Trustee of the super fund and are not usually dealt with in a Will.

The best advice is that your Will should be professionally prepared. "Homemade" Wills, possibly on a form obtained from a newsagent, can cause problems if not correctly completed or if some detail is left out. For example, a person may leave his estate to his nephews and nieces. Does this include the spouse's nephews and nieces? Similarly, a legacy left to my "grandson John" for all the help he has given me will cause problems if there are two grandchildren called John. Ambiguities which may arise are many, and a professional will-maker will help you avoid them.

There are also legal requirements to comply with when making a Will. The law prescribes a procedure that must be followed when the Will is signed. Although it is straightforward, mistakes can happen. Examples of some of the more common mistakes are not signing and witnessing the Will correctly, or if alterations are made to the Will, those alterations are not signed and witnessed correctly.

Professional assistance should not only ensure that your intentions are clearly understood but also ensure that all the legal requirements are in place: for example, providing two independent witnesses to the actual signing of the document can be taken care of, and you can then be sure that it is signed correctly. If any of the formalities are not in place, it could result in unwarranted legal costs being incurred.

Updating your Will

Equally important is updating your Will to ensure it meets your current circumstances and reflects your wishes. Changes to your personal or family's circumstances may mean your old

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Will is no longer appropriate and needs to be updated.

If you marry, re-marry, or if you are in a relationship registered with the Relationships Register Act 2016, then your Will is revoked by the marriage. In that case, a new Will is required.

You may have recently divorced. Although the divorce does not revoke your Will, any gift in favour of your former spouse is revoked. This only applies if the marriage is terminated. It will not apply to married couples who are separated or couples living in a de facto relationship.

Your Will ought to be reviewed periodically. It is helpful to think about it on some sort of anniversary date, such as when you are preparing your tax return. Provided that you have not lost your legal capacity, you can revoke your Will whenever you wish. A codicil can be used to make minor amendments to a Will, but with up to date word processing facilities, the use of codicils is now discouraged.

Safe custody of your Will

Your Will is an important document and should always be kept in a safe place. If you are holding your original Will, you must be careful with it. Do not attach or pin anything to your Will otherwise it may give the impression that you have attached something to it that is relevant to your Will. The Court will want to know how any markings such as pinholes got on the original Will as there will be an assumption that you wanted to change part of your Will (perhaps by codicil). Your Executor/s will need to answer any queries the Court may have. The general role of an Executor and Trustee will be discussed in the next issue.

Section 2: The Role of an Executor & Trustee

The most often asked question about Wills and Estates is, "What is the difference between an Executor and a Trustee?" The same person is usually appointed to both positions. The Trustee's duties only arise after the Executor's duties have finished. This transition from the Executor to Trustee occurs when all debts have been paid and the net amount of the estate to be given to the beneficiaries has been determined. Where Trusts are established by the Will, they are administered by the Trustee. An example is when assets have to be held in Trust until an infant child attains the age of 18.

Who can be an Executor and Trustee?

Anybody over the age of 18 can be an Executor. The qualifications required are more practical than legal. The person appointed should have some basic business sense, even more common sense, and an ability to liaise with sometimes difficult family members. It is useful to also consider the age of the person being appointed. It is prudent to appoint more than one Trustee in most circumstances. A frequent approach is to appoint a spouse who is a sole beneficiary as a sole Executor of the Will with a provision for alternative Executors if that spouse does not survive. Some consideration is normally given to appointing those alternative Trustees as testamentary guardians of any infant children. An advantage of appointing a Trustee Company as an Executor is that the Company cannot die. They are also experienced in estate administration. Other factors such as costeffectiveness, timeliness and the establishment of a more personal professional relationship might mitigate against the appointment of a Trustee Company.

It is prudent to seek the consent of the person to be nominated as the Executor because they do not have to accept the appointment.

The role of an Executor

The first duty of an Executor is to become familiar with the terms of the Will and to arrange the safe custody of the original document. The original Will should not be "unstapled" for copying purposes. Nor should any notes be written on it. Nothing should be attached to it with a glider clip or any other fastening device. Any of these things will cause difficulties in obtaining a Grant of Probate.

The Will should be checked to see if it contains any directions as to the deceased's required funeral arrangements. If not, strictly speaking, it is the Executor who is in charge of the body, although the wishes of the family are generally given effect.

The Executor then needs to ascertain the assets and liabilities of the deceased's estate. The Executor also needs to locate and advise the beneficiaries of their entitlements.

It is usual that professional assistance is involved at this stage. It is common for the Executor to seek advice from the lawyer who prepared the deceased's Will, but the nominated Executor is free to choose from whom to seek this advice. Obviously, it is prudent to choose an adviser with experience in administering estates.

The Executor will take control of the personal papers of the deceased (bank books, house Titles, Debenture Certificates, insurance policies and the like) and make them available to the adviser.

The various financial institutions should be written to requesting confirmation and details of the deceased's assets. This has two effects. It acts as notification of death, and it also puts those institutions on notice that they should not deal with anyone other than the Executor.

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Collecting the assets

Having ascertained details of the assets, the Executor can now apply for a Grant of Probate if that is necessary. A later article will discuss this in detail. The Executor will then use the Probate to deal with the deceased's assets according to the terms of the Will.

Usually, this can be done by providing the financial institution with a copy of the Probate and the Court's Certificate of Disclosure. The Executor may also have to complete other documents to deal with particular types of assets. An example is that some assets, particularly real estate, need to be "transmitted" into the Executor's name before they can be sold or transferred to a beneficiary.

Payment of deceased's debts

Normally the first thing the Executor needs to do when he has control of the assets is to attend to payment of the deceased's outstanding debts. Notice of what debts are due is usually evident from the deceased's letterbox, but if the Executor is not to become liable for any less obvious debts, it is prudent to issue a Notice to Creditors in the newspaper. This needs to be done correctly and ought to set out by when, to whom and where to lodge the relevant claims. Obviously, the Executor needs to be satisfied that the claims are genuine before paying them. If a family member has previously paid the funeral account, they would normally be reimbursed by the Executor from the estate assets.

Tax is another of the deceased's debts that must be paid by the Executor after lodging a tax return to the date of death.

Administering the estate

The Executor is responsible for making sure that distribution of the estate is correctly made to those who are entitled under the Will. This should be done as soon as possible. A partial or interim distribution is sometimes made.

The Executor will be personally liable if payment is incorrectly made. If legacies are not paid within 12 months from the date of death, the beneficiary is entitled to interest. A final distribution should be accompanied by a detailed statement showing all of the transactions that have occurred during the course of administration of the estate. Once administration has been completed, the records will need to be kept for five years.

Section 3: What is Probate and When is it Necessary?

What is a Probate?

Probate is a document issued by a Court declaring that the Will of a deceased person has been proved and registered in the Court and that the executor named in the Will has been given the authority to administer the estate.

Probate may be granted in either common form, which is usual, or solemn form, which is when there is, or may be, a dispute as to the validity of the Will.

How does an Executor obtain a grant of Probate?

Probate is applied for by the executor swearing and filing in the Court the executor's oath and an affidavit of assets and liabilities of the estate.

The executor's oath gives details of the deceased, and the executor refers to the deceased's last Will and the executor swears that he or she will administer the estate properly.

The affidavit of assets and liabilities is exactly that, set out in an order strictly defined by rules. Its main purposes are to tell the Court that there are assets in the State so that the Court can be satisfied that it has jurisdiction and to enable any interested person to obtain details of the deceased's assets. It is not used to impose any probate duty or succession or death duty.

There is a fixed probate fee payable to the Court for the probate application, but it does not vary according to the value of the estate.

No death, estate, probate or succession taxes exist at present, but Capital Gains Tax may be payable when there is a disposal of assets acquired from a deceased estate. The rules are very complex. The most important thing that can be done to help the executor deal with CGT problems is to maintain accurate records of the date and cost of various investments.

When is Probate necessary?

Probate is definitely necessary to deal with real estate solely (not jointly) owned by the deceased. It is usually required when the deceased owned shares or had other investments of a substantial nature.

The Grant of Probate is proof that the executor has the power to deal with the deceased's assets. The executor can then become registered as the legal owner of the assets.

Although probate proves the executor's title, the executor does not derive his or her title from the Grant of Probate but from the Will itself.

That is why some organisations will allow an executor to deal with an asset of minimal value without having to obtain a Grant of Probate. Each organisation has different informal ideas about what is a minimal value. Some of them consider

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the value of the asset with their organisation, while others make a judgement based on the total value of the estate. Either way, the organisation will be concerned to be as helpful as possible while bearing in mind its own liability if it acts incorrectly as it would if it allowed the wrong person to deal with the deceased's assets. To limit their liability, most organisations would want some sort of indemnity, normally from the beneficiary, before allowing any asset to be dealt with informally.

Probate is also required if the executor wishes to institute an action in his representative character, such as recovering a debt due to the deceased. Such proceedings cannot be issued until the executor's title is proved by the Grant of Probate.

Letters of administration

The Court grants "probate" when the deceased leaves a Will. If somebody dies without a Will (intestate), the Court grants "letters of administration" to one of the persons having a statutory entitlement to the deceased's assets. This gives the administrator similar powers to administer or deal with the deceased's assets.

In cases where a testator has made a Will but either failed to appoint an executor or the nominated executor has predeceased, then the Court will grant what is called "letters of administration with the Will annexed" to one of the beneficiaries named in the Will. That person will have powers and duties similar to those of an executor.

Joint property

Assets owned as "joint tenants" (but not as "tenants in common") automatically pass to the survivor. Consequently, they do not form part of the deceased estate, and probate is not required to deal with that sort of property.

Superannuation

A superannuation benefit is usually owned by the Trustee of the superannuation fund, not the person who has invested in it. Any payment is usually made at the trustee's discretion, but the Trustee would normally give effect to the deceased's expressed wishes. On the basis that "if you don't own it, you can't give it away", superannuation proceeds are not usually dealt with under a Will, and a Grant of Probate is usually not required to deal only with superannuation proceeds.

Family trusts

Assets held in a family trust are owned by the Trustee of the trust and cannot be given away under a Will. Probate is therefore not required to deal with those assets, but it may be required to deal with the ownership of a shareholding in any company which acts as trustee of a family trust.

Life insurance

Insurance on the life of a deceased person could be owned by someone else, usually a spouse. Probate would not be needed to deal with that sort of life insurance but would be for most other types.

Do it yourself?

Like most things, from building a house to repairing a motor car, it is certainly possible to obtain a Grant of Probate without professional help - but it is not a good idea. It is a complex and time-consuming process where lack of knowledge can lead to lengthy delays, enormous frustration and place the executor at the risk of being sued by the beneficiaries. If an executor wishes to become more involved in the actual process, most solicitors will offer a service that guides them through the administration. However, bear in mind the old adage that "you get what you pay for", and frequently, this results in greater cost overall than if an expert in the field was entrusted to deal with the administration on behalf of the executor.

Section 4: Practical Problems When Making a Will

The following are some of the matters that can cause problems in Wills.

Ambiguity

It should be made perfectly clear, what is meant by the phrases used in the Will. In a recent case a Will maker left his house at a specific address to his son. The question arose whether that included an adjoining vacant allotment that he also owned. Another example would be if a Will maker left the whole of her estate to her nieces and nephews. The question could arise whether she meant to include her husband's nieces and nephews.

Specific gifts

These should always be very fully described. Giving "my diamond ring" to Nancy will cause difficulties if three diamond rings are owned at the date of death.

Furniture and personal effects

There are many difficulties as to what might be included in a gift described by using these words. Would the description include a refrigerator, a wine collection, clothing, a motor car, cash left in the house? Any gift of this sort should be fully described so that there can be no doubt as to what was intended.

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List of chattels

Many people want to itemise which pieces of their furniture etc. should be left to particular people. Putting stickers with names on or making a list is of no legal effect unless the matter is specifically dealt with in the Will. One possible solution is to provide in the Will that all of the items are left to a trusted person with the request that that person distributes them in accordance with wishes that have been made known. The risk is the trusted person can legally (if not morally) keep the items and not distribute them.

Money in a bank account

Although at the time of making a Will, it may be intended that money in a specific bank account would be available to be left to a beneficiary, that may not be the case at the date of death. A recent example is when a substantial amount of money was withdrawn from an account by an attorney to fund a mentally incapacitated person's entrance into a nursing home. The attorney did not realise that the person's Will gave the balance of that particular account at the date of her death to a beneficiary. The beneficiary missed out! A similar sort of problem could arise if the proceeds of a lottery win were placed into the nominated bank account as an interim measure and were not more adequately invested before the Will maker's death. The residuary beneficiaries of the estate would miss out.

Legacies

The gift of a stated amount of money will be adversely affected over time by inflation. One remedy is to include an escalation provision based on the CPI rise or (less effectively) an interest rate. The better remedy is to regularly review your Will to see that the value of the legacy left is still appropriate.

Choice of Executors

Just about anybody can be nominated as an executor, provided that they are over 18. It is obviously helpful if they are honest and trustworthy and have some business sense. A beneficiary can be an executor. Think about what happens if the executor dies before the Will maker. It is common practice for a sole beneficiary to be nominated as a sole executor with some alternative executors provided for in the Will (e.g. children). It is helpful if the executors reside in the area where the estate assets are situated. If there is a reasonable alternative, it is probably best not to nominate, for example, one of your children who lives interstate or overseas. It is helpful to have a provision in your Will specifying what happens if the executors can't agree on some matter. Many people think it better to appoint a professional person (solicitor or accountant) as executor to minimise any possible conflict within the family.

Testamentary guardians

A surviving parent becomes the guardian of a child on the death of the other parent. However, a testamentary guardian can be appointed in a Will. The Will needs to ensure that the person nominated does not suffer any financial inconvenience through acting as guardian. What would happen if the guardian needed to build on a new bedroom and bathroom to accommodate two or three more children? Much thought needs to be given to the appointment of a testamentary guardian as it might hamper the efforts of the family generally to care for the children. Problems also frequently arise in the case of older children who might already have quite definite ideas of their own.

What are the assets being dealt with

A Will can only deal with assets that the Will maker actually owns. It, therefore, cannot deal with assets owned by a family company or a family trust because the Will maker does not own them. This can cause many problems, ranging from the Will maker being nowhere nearly as wealthy as he or she thought (and consequently the Will not achieving the desired wishes) to failing to adequately pass control of the company or trust to an appropriate person.

Superannuation proceeds are "owned" by the Trustee of the superannuation fund, not the Will maker. While the Trustee may follow a non-binding direction as to how to deal with the funds, it usually has complete discretion. It is a mistake to think that superannuation proceeds are necessarily part of an estate for the purpose of making a Will.

Jointly Owned Assets, whether a house, bank account or furniture pass automatically by law to a surviving joint owner. It is a mistake to think of such assets as being dealt with under Will.

Life Insurance Policies on the life of a Will maker may be owned by somebody other than the Will maker, possibly a spouse or even a former spouse. If so, it is not an asset that will form part of the estate. Other policies may nominate a particular person as the beneficiary of the policy with the same result.

Family business

Care needs to be taken to ensure that a Will deals with the correct asset to pass control of a family enterprise. The controlling asset, possibly a share in a $2 company, could have a value far in excess of its face value.

A trustee should be given specific powers in the Will to be able to run the business after the Will maker's death, including possibly the power to employ a manager until it can be sold. Care is needed to ensure that a trustee is not personally liable for any losses.

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Care is needed if the business is to be specifically given to a particular person. Does a gift of "my lawn mowing business" include the van, trailer and tools usually kept in the shed at home? Is the beneficiary liable for business debts?

Partnerships

A gift in a Will of an interest in a partnership will include any rights that the Will maker could deal with either under the partnership agreement or the relevant legislation. That could be a lot or nothing. The documentation should be carefully examined to see what happens on the death of a partner.

Interests in professional partnerships (doctors, lawyers etc.) cannot usually be left to unqualified persons.

It is prudent not to appoint a business partner as an executor or Trustee because they have an obvious conflict of interest with the beneficiaries of the estate when it comes to determining the value of the interest in the partnership, which they will usually want to buy.

Marriage

A subsequent marriage revokes a previously made Will. The law assumes that if you marry, you would wish to benefit your spouse on your death and therefore says that any previously made Will is automatically revoked. Unless a new Will is made, legislative provisions dictate the proportions of your estate that various members of your family will be entitled to. The proportions may not be as you would choose yourself. It is not uncommon for newly married couples to sign new Wills immediately after the marriage ceremony at the same time that the marriage register is signed.

Wills in contemplation of marriage

Making a Will in anticipation of a forthcoming marriage is one way of overcoming the problems caused by marriage automatically revoking any previous Wills. The "anticipation" can't be too vague. Possibly some time in the future is no good. A good practice is to state the date of the forthcoming marriage in the Will.

Thought needs to be given to whether the Will would apply if death occurred before the marriage or only if the marriage had actually taken place.

De-facto spouses

Making a Will in favour of a de-facto or putative spouse is no different to one in favour of a spouse - just do it, but remember that it will be automatically revoked by a subsequent marriage. There is special legislation that governs the entitlements of certain de-facto spouses to be treated as legal spouses. When such a Court order is obtained, they would have similar inheritance rights as a legal spouse if the partner died without any Will. It is a lot less hassle to have up to date Wills in place!

Divorce or marriage breakdown

A divorce does not revoke the entire Will but does revoke any appointment as executor and beneficial interests under the Will that were in favour of a former spouse. The effective date is the date of a divorce, but common sense would be to review the terms of an existing Will following a marriage breakdown.

Death of a beneficiary

Properly drawn Wills should make provision for what happens if any of the nominated beneficiaries die before the Will maker. If there is no substitution, the death of a residuary beneficiary before the testator could result in a complete or partial intestacy.

Prior death of a child

An adequately drafted Will would ensure that that child's share of the estate passes to somebody else - usually his or her own children. If there is no such provision in the Will, there is a legislative remedy that imposes a substitution by deeming the child's death to have occurred immediately after the parent's death. This does not automatically mean that the parent's benefit passes on to his or her own children. The gift forms part of the estate of the deceased child and goes wherever that deceased's child's Will directs. That would normally be to the child's spouse, but it could be to anybody. It is good practice to ensure that a Will contains an adequate substitution clause as most people feel more comfortable with assets passing to blood relatives rather than sons or daughters-in-law who may subsequently re-marry.

Re-marriages

Problems commonly occur in balancing the entitlements of a second spouse against the entitlements of children from a first marriage.

One possible solution is to leave the second spouse a life interest which is discussed below.

Life interest

This is a mechanism leaving the whole of the estate or a specified portion (for example, a house) to successive persons. This mechanism is frequently used in cases of second marriages, although it might result in some capital gains tax problem. An example would be that a second spouse is left the right to reside in a house, and on his or her death, the property is given to children of the first marriage.

The major difficulty with this approach is that the children effectively sit around waiting for the life tenant to die, and the house might deteriorate during that time. There are other problems that need to be addressed before considering this approach. Who pays the rates, taxes and insurance? What if the surviving spouse can no longer manage the property and needs to move into a home unit or a nursing home? Can the proceeds of the sale of the house be used to find alternative accommodation? Is the surviving spouse entitled to the income produced by the investment of the proceeds of the sale of the house? Can some non-refundable capital contribution to nursing home accommodation be provided from the sale of the house? Does the life interest to the surviving spouse continue even if he or she re-marries? Professional advice and guidance are essential for dealing with these situations, which have the capacity to cause continuing resentment between surviving family members for many years.

Chattels

Life interest in personal chattels in the house are probably best avoided. There are problems with inventories, valuations and insurance, and over time, specific items may become damaged or wear out or be lost.

Guarantees

A guarantee is a possible liability that may arise at some time in the future if the debtor defaults in their obligations. This may happen after the death of the Will maker/guarantor, in which case the estate may not be free of the possible liability and able to be fully administered until the original debt is repaid. The wisest option is never to act as a guarantor.

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