

Making a Will – Enduring Powers of Attorney

A Will

Why is it so important?

For most people, a will is one of the most important documents they will sign.

Unfortunately, for many people a will is also one of the most difficult documents to plan because it makes you face your own mortality. We all know we are going to die but who wants to think about that now?

You should make your will when you feel just fine. You can feel all generous, warm, giving and organised without giving up a single thing.

Never start to brood about making your last will. Think, this is the last one until next time. A wise lawyer once wrote that the only occasion when making a will might hasten your death is in the pages of an Agatha Christie novel.

We have helped many people over the years to plan their wills. The most common reasons for making a will are:

- You are about to get married or divorced, or you have separated;
- You are going overseas;
- You wish to provide for your partner;
- You have purchased a house;
- You own substantial assets;
- You are about to have a child;
- A close relative has just died;
- You are about to start in business.

All of these reasons have one feature in common – a concern for those left behind. A death is a very emotional time for those you leave behind and is made even more stressful if you do not make a will.

If you die without a will your estate will be divided in terms of the provisions contained in the Administration Act.

If you don't make a will and ...

Your spouse is living but you have no children, grandchildren or parents living, then your whole estate goes to your wife or husband;

Your children are living but your spouse is not then your whole estate goes to your children equally; Your spouse and children are living. Your husband or wife receives:

- All personal chattels
- \$121,500 plus interest
- plus one-third of the remainder

Your children receive:

- Two-thirds of the remainder

Your parents are living but your spouse and children are not:

Your whole estate goes to your parents equally; Your spouse and parents are living but your children are not;

Your husband or wife receives:

- All personal chattels
- \$121,500 plus interest
- Two-thirds of the remainder

Mother and/or father receive:

- One-third of the remainder;
- Your spouse, children, grandchildren or parents are not living then your whole estate goes to certain blood relatives; If none can be found then it goes to the New Zealand Government.

A little-known fact is that if you are living in a defacto or same sex relationship your partner is not automatically treated as your next of kin. This means that if you live with your partner for years and you are financially dependent on your partner you have no right to claim against your partner's estate if your partner has not made proper provision for you in a will. However, from 1 February 2002, the Property (Relationships) Act will grant defacto and same sex partners the same rights as a married couple.

It is also worth noting that if you marry or remarry your will is automatically cancelled. However, if you separate or divorce, your will remains the same.

If your relationship status changes, particularly if there are children involved, it is essential to make a will or update your will to reflect those changes and

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ensure that you have fulfilled the responsibilities you and your partner have towards each other, your children or those of previous relationships.

To summarise, a will is a unique and clear record of your wishes. It is the only way of ensuring that your last wishes are clearly understood.

Restriction on freedom to leave your estate to whomsoever you wish

It is not widely known that no matter what you may say in your will, in certain circumstances, your will can be challenged.

Matrimonial Property Act

Since 1963, if a spouse dies, the widow or widower has the right to claim a share of the matrimonial property even if title to the property is in the name of the deceased. The surviving spouse's entitlement is based on contributions to the deceased person's assets, rather than on contributions to the marriage.

Family Protection Act

Under the Family Protection Act 1955, a will can be challenged not just by a surviving spouse but also by certain other family members.

Law Reform Testamentary Promises Act

If a person promises to provide for another person in his or her will in return for work or services performed, and that promise is not honoured in the will, the person to whom the promise was made can make a claim (Law Reform Testamentary Promises Act 1949). This applies to a surviving spouse, de facto partner, family member or anyone else.

Property (Relationships) Act

Provisions in the Property (Relationships) Act ("the Act") will replace and change the widow or widower's right to claim relationship property. The Act also extends the right to claim to a surviving de facto partner. In some circumstances, a spouse or partner from an earlier marriage or de facto

relationship will also be able to claim against the estate.

Under the Act, when a person dies and leaves money or property in a will to his/her surviving spouse or partner, the survivor must choose either to receive the money or property under the will or to make a claim for a share under the Act. The survivor would make that claim against the deceased person's estate if the will did not provide the survivor with what s/he considers a fair share of the relationship property built up during the relationship.

If the surviving spouse or partner chooses to make a claim for division of property under the Act, any gift to the survivor made in the will is treated as revoked. The exception to this is if the will specifically states that the gift to the survivor is to stand, even if the survivor does make a claim.

The surviving spouse or partner has some time to weigh up the options. Within six months after the person has died, a written notice must be lodged with the estate administrator or, if there is not yet an administrator, with the High Court indicating what the survivor has chosen to do. The notice must be accompanied by a lawyer's certificate stating that the lawyer has explained to the survivor the effect and implications of the choice.

If the survivor has chosen to make an application for the division of the relationship property under the Act, the administrator of the estate cannot start distributing the estate.

The Court can extend the six-month time limit, but de facto partners should be aware that their right to claim is terminated three years after separation. Married couples lose the right to claim 12 months after the dissolution of the marriage. The Court can extend these limits if, for example, children will be affected.

No extension of time is possible if the deceased's estate has been finally distributed.

When you plan your will it is essential for you to take us into your confidence if in the past you have been involved in a relationship or you have made a

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promise which could give rise to a claim being made against your estate.

Things to consider

Your trustee

Your trustee is the person or organisation you appoint to gather in your assets, pay your debts and transfer your assets to the beneficiaries you name in your will.

When you die all assets in your sole name are frozen and only your trustee has the legal authority to use your assets. The authority of your trustee takes effect from the time of your death. Your trustee can do anything required to administer your estate up to the point in time where someone, for example a bank, requires your trustee to prove his/her title. This proof is provided by what is called “probate” which is a document issued by the Court. It is usual for your trustee to apply to the Court for probate when the trustee is notified about your death.

Your choice of trustee is very important because your trustee is registered as the legal owner of the assets you own. For example, on the certificate of title to your property or company share certificate, you will only find the name of your trustee with no indication that the trustee is not the real owner. The trustee is the legal owner of the asset and as far as the public is concerned the trustee can do what the trustee likes with the property. The trustee however has a clear obligation to administer your assets in accordance with the terms of your will.

Who to appoint

For married couples, making simple wills leaving everything to each other, it is usual to appoint the surviving spouse as the sole trustee. If however, your will goes one step further to provide for the possibility of your spouse pre-deceasing you, who should you appoint as trustee?

For couples with adult children it is common to appoint the children as trustees. If you have only one child that child can be the sole trustee unless your will provides for the possibility of your child

predeceasing you in which event a second trustee will be necessary. Alternatively, if you have more than one child, you can appoint all the children as your trustees although if you have more than two children this not usually recommended because of the time it takes for documents to be signed should the children live some distance apart.

A trustee company – beware of the cost

If you have no children, or your children are under 20 years of age, your choice of trustee is more difficult. Some persons may consider appointing a trustee company, such as the Public Trustee or the New Zealand Guardian Trust, but, in our opinion, it is not usually necessary to appoint a trustee company unless you have a large complicated estate which will require administration for a long time.

It must be remembered that a trustee company operates to make a profit and although the company may tempt you to make a will by offering to prepare your will for nothing, if you appoint the company as your trustee, a sprat to catch a mackerel, on your death the trustee company will charge a fee to administer your estate. The fee is charged on a graduated scale with a minimum fee on small estates.

The scale of fees charged by one well known trustee company is as follows:

- On the first \$100,000 of gross assets
5% plus GST
- On the next \$300,000 of gross assets
2% plus GST
- On all gross assets in excess of \$400,000
1% plus GST

The Consumer Institute has warned members about the fees trustee companies charge for administering an estate and at the end of this paper we have attached an article which appeared in the September 2001 issue of Consumer Magazine.

Because of the administration costs, if you have made a will with a trustee company, or are contemplating making a will with a trustee company,

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we strongly recommend that you enquire about the administration fee the company will charge.

Another disadvantage in appointing a trustee company is that your estate will be administered by someone in the trustee company who in all probability is a complete stranger to your beneficiaries. A trustee company may also not be as sensitive in its contact with your beneficiaries.

Although we have listed a number a disadvantages in appointing a trustee company as your trustee, for large estates requiring administration over a long period of time, a trustee company is often the only practical choice. Another consideration is that the introduction of the Trustee Amendment Act 1988 has given rise to personal liabilities. Problems can occur where, for example, there is a private trustee who has failed to manage the estate assets properly, but who has taken advice with his/her personal position and ensured that no assets are held in the trustee's private name. At the very point in time where you require the trustee to front up and make good a loss or arrive at a form of compromise, there is no accountability as the trustee may not be worth suing. While no corporate trustee wishes to set up in business to be sued, it is an inevitable consequence, for any institution specialising in that field. A corporate trustee must therefore ensure that such failures are kept to a minimum.

Family members/close friends as trustees

We have never encountered a situation where it was not possible to appoint family members/close friends as trustees. By appointing family/friends as trustees you will avoid paying any commission because a trustee's services are provided free of charge. If your estate is likely to take a considerable amount of your trustee's time you may wish to make a bequest to your trustee in appreciation of the trustee's services.

If you appoint family/friends as trustees, in most cases, it will be necessary to employ a solicitor to assist your trustees in which event the solicitor will make a charge for his/her services. Fortunately, now that estate duty is zero rated, the solicitors fee can be reduced substantially if the trustees are

willing to undertake some of the work involved in the administration of your estate. The work will usually be undertaken under the guidance of your solicitor so that an inexperienced person does not have to worry about what s/he is required to do.

Another advantage of appointing family/friends as trustees is that your estate will be administered by persons who will be known to your beneficiaries.

It is not uncommon for a solicitor to act as one of the trustees but unless you have good reasons for appointing a solicitor, for example to avoid any conflict between the beneficiaries, we do not recommend this practice. The reason for our recommendation is that while your solicitor will be familiar with your affairs, if your beneficiaries do not know your solicitor, they will be dealing with a stranger. Many solicitors suggest themselves as a trustee to ensure that the solicitor acts on the administration of your estate. We do not agree with this practice. If you appoint family/friends to act as trustees it may be more convenient for them to seek the assistance of a solicitor who lives nearby or with whom the trustees have had previous contact.

The main disadvantage of appointing family/friends as trustees is the possibility that the beneficiaries in your estate may have to sue the trustees to make good a loss suffered in the administration of the estate. If a private trustee is a member of your family or a close family friend, and inadvertently causes a loss or neglects to act and causes a loss, how comfortable will your family be in seeking legal redress from that person? Remember, trusteeships are appointments of significance that create legal obligations. It is comfortable to appoint a friend or relative but how good will that appointment be if something goes wrong?

Guardianship

If you have a young child or children you will have to think about who will take care of your child/children if something unexpected happens to you and your partner.

You need to carefully think through the primary issues of care, support and education for your child or children and who you want to act as their

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guardian. Who would you choose to stand in your place in their lives if you had to?

The person or persons you select as guardian(s) will act as parent to your child. They will control all major matters of the child's upbringing such as education, health care, physical welfare etc. However, the role of a guardian does not include providing financial support and so your will should make financial provision for your children. If one parent survives that parent automatically continues as guardian.

Some suggestions

The following are some suggestions to keep in mind when making/reviewing your will. The first two suggestions will also help to minimise your legal expenses:-

1. Assets, other than land, which are in joint names (not to be confused with property owned as tenants in common) can be transferred to the survivor on the production of a death certificate. The saving in legal expenses can however be a trap where one/both partners earn good incomes and for a couple with substantial assets who are approaching retirement or who have retired.

2. By keeping your investments in any one institution below \$11,000 it will not be necessary for your trustees to obtain a grant of probate (probate is the document issued by the High Court to verify the appointment of your trustees). For example, if you have \$15,000 in cash invest \$7,500 in two different banks. Separate accounts in the same bank do not satisfy the rules which apply. The same rule applies to any shares your own.

3. In a place known to your trustees keep a copy of your will together with up to date details of your assets and liabilities. With each will we prepare we provide clients with a personal particulars form which enables you to leave a wide variety of information for your trustees including, the information required to complete a death certificate, funeral instructions and details of your assets and liabilities. It is surprising how often, after an estate is completed, that a bank account, life insurance policy or investment in a company turns up that the

trustee did not know about. Like your will the personal particulars form should be reviewed at regular intervals so as to ensure that it always provides your trustee with up to date information.

Conclusion

We hope we have prompted you to think about making or updating your will. If you wish to make a will we invite you to take a copy of the paper entitled "Will Instruction Form". For further information please talk to either Pearl, Tony or Daniel.

We have attached to the end of this paper an article "Will Power" which appeared in the June 1993 issue of Consumer magazine. The article offers an independent view on wills and comments on the various issues we have raised in this paper.

Enduring powers of attorney (EPA)

Enduring powers of attorney - are you taking an unnecessary risk?

Most people insure their house, contents and car. Many people take out life insurance and an increasing number of people arrange medical insurance. Given this desire to insure against potential disasters it is surprising how few people take steps to avoid the difficulties which will arise if you are involved in an accident/are inflicted with an incapacitating illness.

Dementia – mostly Alzheimer's disease – is New Zealand's biggest health problem, and is growing fast. It doubles in frequency over the age of 60. By 85, a third of the population have it.

If such an event were to occur ask yourself who will make the critical decisions concerning your care and welfare and who will look after your affairs? The simple precaution of signing enduring powers of attorney will ensure that a person of your choice will look after your assets and personal welfare.

There are two types of enduring power of attorney:

A property power of attorney;

A personal care and welfare enduring power of attorney.

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A property enduring power of attorney

A property power of attorney allows you to appoint someone else to act on your behalf to look after your property – that is everything you own.

You can appoint any individual over 20 years of age, or a company such as Gellert Ivanson Trustee Limited, to be your attorney.

We recommend you to appoint two attorneys. If you are married or living in a long term relationship it is usual for one attorney to be your spouse or partner. For a single person it is often difficult to decide who to appoint as attorneys. Married couples face the same dilemma in selecting the second attorney. If you have an adult child or children you may appoint your child or children as attorneys. However, according to the Law Commission, some elderly and incapacitated people are being abused by those managing their affairs.

The commission says misuse of an EPA is likely to include situations where the attorney:

- ☛ Embezzles money – rationalised as “borrowing” or anticipation of an entitlement through a will;
- ☛ Helps themselves to the donor’s belongings to get in before other siblings;
- ☛ Does not place the donor in residential care when this is needed to avoid reducing the size of the estate;
- ☛ Places the donor in an institution prematurely (because this is more “convenient” for the attorney – the donor’s home may then be sold without their knowledge or consent).

We have formed a company, called Gellert Ivanson Trustee Limited, to provide the services required to act as an attorney. When you appoint Gellert Ivanson Trustee Limited to act as your attorney you can be sure that your property will be administered by a team of experienced specialised professionals.

You may allow your attorney to have full or partial control over your assets. The amount of control, and when it comes into effect, are totally up to you.

You decide whether your property enduring power of attorney should come into effect:

- Immediately;
- At a given time; or
- Only if you become mentally incapable.

As long as you are capable of doing so, you can cancel or change the conditions of your property enduring power of attorney at any time.

A personal care and welfare enduring power of attorney

A personal care and welfare enduring power of attorney can come into effect only if and when you become mentally incapable.

Only individuals can be appointed.

We advise you to select a member of your immediate family or somebody that you trust implicitly.

You can only appoint one person to act as your personal care and welfare attorney. You may however nominate a second person to act if the first person you nominate dies before you or is unable or unwilling to act.

Duties of attorneys

The duties of an attorney can be very onerous. For example, if in the future you are living on your own and for whatever reason you become incapacitated as a result of which you require full time care what should your attorney do if you are mentally alert and you do not what to go into care? Similarly, what should your attorney if you drive a car and your attorney decides that you should no longer drive? These are common problems and we strongly advise you to discuss these problems with your attorneys now so that your attorneys know what to do if a problem arises.

The duties of an attorney include:

1. Acting in the best interests of the donor.

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2. Consulting the donor.
3. If different persons hold the personal care and welfare and property powers of attorney, those persons should consult with each other regularly.
4. A property attorney must provide the personal care and welfare attorney with the financial support required for the personal care and welfare attorney to carry out their duties.
5. A property attorney must keep financial records.
6. Provide information to persons nominated by the donor.
7. A personal care and welfare attorney must consider the financial implications of their decisions.
8. A personal care and welfare attorney may have regard to any advice directive given by the donor.

Exercise of enduring powers of attorney

Subject to the exception noted below, an attorney cannot exercise their power of attorney until such time as they have had a health practitioner certify that the donor is mentally incapable. The health practitioner that the attorney must use may have been nominated by the donor in the power of attorney.

There is a prescribed form of certificate which the health practitioner must sign in order to certify that the donor is mentally incapable.

An exception to the above rule is that an attorney can on minor care and welfare matters if they believe on reasonable grounds that the donor is mentally incapable.

Conclusion

No one knows what the future holds and, for the same reason you take out insurance, we strongly recommend you to sign enduring powers of attorney. The powers of attorney can be filed with your will and, hopefully will never be required. If

however you do become incapacitated you know that a person of your choice will look after your affairs. In our experience difficulties can be resolved quickly if an attorney is available who has authority to act.

A right to die

In New Zealand the law prohibits any person from terminating the life of another person no matter what the justification. For some people however a right to die, rather than remain a mental vegetable on a life support system, may be a preferred option. This issue received considerable publicity in the United States following the harrowing case in which the Cruzan family sought the consent of the Supreme Court to have their daughter Nancy's support system disconnected. The question before the Court was whether Nancy herself had the right to dictate her future to the authorities or did the state, and the overwhelming interests of society, demand otherwise?

Since 1976 some 41 of the states in America have enacted some form of document "recognised by the state legislature which permits refusal in advance of measures that can only futilely prolong the process of dying".

While no similar law exists in New Zealand some people may wish to insert a provision in their will which indicates their wishes in such circumstances. While the provision will have no effect it will indicate your wishes if the situation should arise and if sufficient people express their concern the law may change.

Medical alarm

If you live alone and you are elderly or disabled we advise you to obtain an alarm in case there is no one around to help you if you have a turn or fall and cannot reach the phone. While being independent is very desirable, with increasing age there comes a time when it is equally important for help to be available in the event of an emergency. You will also make your family a lot happier.

The St John Ambulance offer a service called Lifelink (phone: 579-2323). A similar service is

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available from ProCare (phone: 0800-477-622). If cost is a concern you may qualify for a subsidy from Work & Income.

If you wish to discuss any of the issues raised in this paper we invite you to make an appointment.

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For More Information

Visit our website at www.gellertivanson.co.nz or call us on (09) 575 2330.