NEW ZEALAND LAW SOCIETY

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MAKING A WILL AND ESTATE ADMINISTRATION

A will lets you say how you want your property dealt with when you die. Once you die, everything you own, and everything you owe, is called your estate. This guide tells you about making a will and how your estate is administered.

This area of law is covered by the Wills Act 2007. This Act gives a will-maker significant powers, described in this guide. However, most of those powers are not applicable to wills made before 1 November 2007, so if you want to take advantage of them, you will need to remake your will, even if you don't want to change its general effect.

Some provisions of the Wills Act do apply to wills made before 1 November 2007 and they may invalidate some existing wills. This is a good reason for reviewing and perhaps renewing your will.

WHAT IS A WILL?

Your will contains your instructions about what you want done with your property when you die and how you want your dependants (spouse, civil union partner, de facto partner, children, etc) to be looked after. As far as you and your family are concerned, it could be the most important paper you ever sign. A will can relieve financial and emotional strain on your family after your death and help minimise the likelihood of dispute about your estate. Remember, it is not just money you have to think of, but all your possessions and debts.

WHO CAN MAKE A WILL?

Anyone of sound mind who is at least 18 years old can make a will. A person under 18 may

make a will if they are (or have been) married or in a civil union or de facto relationship. Others under the age of 18 can make a will if given approval by the Family Court or if they are in the military or are a seagoing person.

WHEN SHOULD I MAKE A WILL?

Now.

Even if you don't own major assets, you can quite quickly build up possessions that can have monetary or sentimental value to you and to others. You may have some money in a savings account, a car, furniture and household items, a good stereo or home entertainment system, a life insurance policy, some jewellery and so on. A will allows you to decide what will go to whom, even if your possessions have sentimental rather than financial value.

In particular, you should make a will when you marry or enter into a civil union or de facto relationship, or when you have children. If you marry or enter a civil union, any will made before that is automatically revoked (cancelled) unless it was made in contemplation of that particular marriage or civil union (which is best explicitly stated in the will itself). This applies even if you marry or enter into a civil union with someone who is a beneficiary under your existing will.

And you should revise your will if a relationship ends. If you separate from your spouse or civil union partner with the intention of ending the marriage or civil union, provisions in your will relating to your spouse or partner will remain valid until formal separation orders are made by the court or the marriage or civil union is legally dissolved (that is, you are "divorced"). A separation agreement or relationship property agreement does not revoke your will. So you will have to change your will if you want to exclude your spouse or partner before a separation or dissolution order is made.

When you separate legally or "divorce", any provisions made for your ex-spouse or civil union partner will be void unless you, as the will-maker, have made it clear in your will that you want them to remain valid.

The situation is different for de facto partners. Entering a de facto relationship does not revoke an earlier will. This means an existing will benefiting someone other than your current partner remains valid and may disadvantage your current partner. The ending of a de facto relationship does not revoke provisions in your will relating to your former partner. So, if you don't want that person to administer your estate or to inherit, you must change your will.

CAN A WILL PREVENT LEGAL PROBLEMS AFTER MY DEATH?

Not necessarily, but it gives you more control over the destination of your property than dying without a will. Some statutes (such as the Property (Relationships) Act, Family Protection Act and the Law Reform (Testamentary Promises) Act) allow some people to challenge a will. It is important to get legal advice in order to minimise the chances of your will being challenged.

WHAT IF I DIE WITHOUT A WILL? (KNOWN AS DYING "INTESTATE")

If you die intestate, the Administration Act specifies how your property will be distributed – usually to a surviving spouse/ partner and immediate family, or to near living relatives, in set proportions. This may not be what you would have wished or what your family wants, and it could involve them and your estate in the cost and effort of making a claim under one or more of the above Acts. If there are no relatives in the categories listed in the Administration Act, then your estate goes to the State. Your lawyer or a family member can still administer your estate if you have not made a will, but only according to the Administration Act.

HOW DO I MAKE A WILL?

Because of the importance of your will, the law says it must be made in a prescribed manner. Do-it-yourself kits do not always cover all the aspects you need to consider and the technicalities are outside the scope of this guide, so you should get legal advice about how to make your will.

WHY SHOULD I SEE A LAWYER?

Though you choose what to say in a will, the law specifies how you should say it. If you do not comply with the law, your will – or parts of it – may be invalid. A lawyer can:

- suggest how you can best and most fairly provide for your family and dependents;
- express your wishes so they have the legal effect you intend, and ensure your will is properly drawn up and valid;
- tell you about alternatives you must consider (including who may challenge your will and why - this can be a complex area of law);
- advise on the appointment of suitable executors;

- advise on and form trusts for your beneficiaries;
- explain extra powers available to your executors and trustees that you might want to include in your will and advise on the appointment of suitable people to take on these roles.

When you see your lawyer, take along:

- a list of your assets and debts;
- a list of the names of people and charities to whom you want to leave things;
- a list of questions you want to ask; and
- any trust deed or relationship property agreement you have made.

HOW MUCH WILL IT COST?

Whoever you consult about making your will, do check their charges beforehand. Take into account any charges that might apply if that person is going to administer your estate when you die. Call different firms to compare costs and don't be afraid to discuss cost with your lawyer before you start. At the end of the day, having an expert prepare your will could save your relatives the grief and expense of you having an invalid will or none at all.

WHAT SHOULD MY WILL INCLUDE?

Your will should name at least one **executor**. An executor is a responsible person who will see that your wishes, as expressed in your will, are carried out and who will administer your estate until it is properly distributed. Your lawyer can assist the executor in their duties, which may include paying debts, selling property and distributing the estate in terms of the will. If any claims against the estate are made during this process, your lawyer can advise the executor.

An executor can be named as a beneficiary in your will and you can direct that your executor should get paid for the work they do. You should give some thought to this even if your executor is a friend or relative, as administering an estate can involve a lot of work. A person named as an executor can also witness your will but this might affect any gift you leave that person. This does not apply to payment for services as an executor.

Your will should provide for **payment of your liabilities** such as mortgages, overdrafts and debts.

It should make adequate **provision for your dependants** (partners, children, adult children not able to look after themselves and, sometimes, parents). If it doesn't, they may be able to make a claim on your estate.

A gift to one of your children who dies before you will pass automatically to their child

(that is, your grandchild) unless your will says otherwise.

Your will should say **who you want to inherit** your personal possessions as well as your general assets. Some people make a provision in their will asking the executor to observe any list they leave about who is to receive particular less valuable items. If this is handled properly, you may be able to update it without changing your will.

Any property you own as joint tenants automatically becomes the property of the surviving partner with whom you own it, unless there is an agreement otherwise (subject to rules in the Property (Relationships) Act). Your will does not apply to any property held that way.

You may own property with others in equal or unequal shares. On your death, your share becomes part of the assets in your estate and is dealt with as your will directs.

Your will can name **preferred guardians of your children** (see "Guardianship of children").

You can set out any specific **funeral arrangements** that you want, though those organising your funeral are not legally bound to follow those instructions.

You can state your wishes about being an **organ/tissue donor**. Anyone up to 80 years of age (or 85 for corneas) can be a donor. However, it may be better not to do this in your will but in another document and to make sure your next-of-kin know about your wishes, as it is unlikely your will would be read in time. However, your wishes in this regard are not binding on your next-of-kin so they will be asked for their consent.

If you are interested in leaving your body for teaching and medical science, you need to arrange this with either the Otago or Auckland Medical School before you die. If they agree, you will be asked to lodge the relevant forms with the school. A copy of those details should also be kept with your will.

Your will can also include a **bequest or a gift to charity**. This might be a specific gift, such as an amount of money or shares or a residue gift – that is, part of anything that is left of the estate after specific gifts.

You can give directions as to how a **business** you own should be dealt with when you die. That is a complex topic, so you need to consult a lawyer.

WHO SHOULD I NAME AS BENEFICIARIES?

Beneficiaries are the people who inherit your property – that is, they benefit from gifts in your will. You can name anyone and any organisation you like as beneficiaries but remember, there are circumstances in which people can challenge your will.

For instance, it is usual to provide for your spouse or partner, children, possibly grandchildren and, in some cases, parents. If you don't, they may be able to bring a claim under the Family Protection Act.

Also, you may have promised to leave a certain item or some money to someone who has

helped you. If you don't make provision for that in your will, they can make a claim under the Law Reform (Testamentary Promises) Act.

Usually you cannot leave any gift to a person who witnesses your will, or any spouse, civil union partner or de facto partner of a witness. However, if you do leave such a gift, it may be declared valid if those who would otherwise benefit agree, or if the High Court is satisfied that the will-maker knew and approved of the gift and made it voluntarily.

WHAT ABOUT MĀORI LAND?

There are special laws governing who can inherit Māori land. The process is known as succession and it is covered by Te Ture Whenua Māori Act 1993 (also known as the Māori Land Act).

DOES MAKING A WILL RESTRICT WHAT I CAN DO WITH MY PROPERTY DURING MY LIFETIME?

A will does not prevent you from selling or giving away anything or dealing with your property in any way you choose during your lifetime. Your will takes effect from the date of your death, not from when you sign it.

However, often two people make mutual wills agreeing on how to dispose of certain property. They can agree to keep the same arrangement in any future will, by way of a separate contract. Under the Wills Act 2007, if the first person to die keeps the promise but the second person to die does not, the intended beneficiary can make a claim against the second person's estate.

CAN I CANCEL OR CHANGE MY WILL?

You can revoke (cancel) your will at any time (while you are still of sound mind) by:

- making a new will;
- declaring in writing (similar to making a will) that you revoke your existing will;
- destroying your will with the intention of revoking it;
- otherwise showing an intention to revoke it (but that can cause problems if there are photocopies available and people don't know you have revoked it).

When you make a new will, you should start by inserting a clause revoking any previous will. It is a good idea to tell anyone holding a previous will that it is no longer current. You should also consider advising any previous executors and trustees if they have been replaced (though that is not legally necessary).

In some circumstances, you can change part of your will without making a new one. However, you should consult a lawyer if you want to do this, to discuss the consequences on other provisions in your will.

HOW OFTEN SHOULD I REVIEW MY WILL?

You should review your will regularly, say, every five years. You should also review it whenever your circumstances change – if you marry or enter into a civil union or de facto relationship, or when such a relationship ends; if any trustee or significant beneficiary named in the will dies; or if your assets or debts change significantly.

You should also review your will if the law changes. Some major changes in recent years have affected wills so if you have not already done so, check to see if your will is still valid and if it is likely to be challenged under any of the new laws. If your will has been made since 1 November 2007, it is probably valid under the new laws.

WHERE SHOULD I KEEP MY WILL?

Your lawyer or trustee corporation will store your will free of charge. You should tell your executors, a family member or a friend where it is held. When you die, your lawyer or trustee corporation will check to ensure that the will they hold is the last will you made. Most people also keep a copy at home (with a note as to where the original is held).

WHAT IF A WILL IS LOST?

If the original of a will cannot be found, the court may approve a copy. It is necessary to prove that the will was signed, not revoked and that the original has been accidentally lost or destroyed. If no will can be found, or there is no evidence the will was signed and not revoked, the person will be deemed to have died intestate and their estate will be handled according to the provisions of the Administration Act.

WHAT COULD MAKE A WILL INVALID?

A number of things can make your will, or parts of it, invalid. These include:

if you have married, entered a civil union or ended a marriage or civil union with a court order since the will was made;

- if it is not signed and witnessed properly;
- if there was some undue pressure or influence on you to dispose of your property in a certain way;

- if you were not of sound mind or were under-age when you made the will;
- if it is not clear that you approved a gift to a witness (or spouse or partner of a witness).

Parts of a will may be invalid if they are meaningless, ambiguous or uncertain. However, the court can use external evidence, including evidence of the will-maker's testamentary intentions, to interpret words in a will to determine their meaning.

If you did not sign the will or if mistakes were made in the witnessing of the will, the court can declare your will is valid if it considers that the document expresses your testamentary intentions. But this power can only be used in respect of wills made after 1 November 2007. The court can correct a will containing a clerical error or if the will does not give effect to the will-maker's instructions. A military or seagoing person may make an informal will (a will that would otherwise be invalid) provided certain conditions are met.

GUARDIANSHIP OF CHILDREN

Will-makers who have children may appoint a guardian to take over some responsibilities for their children if they die. Guardians appointed under a will are called testamentary guardians. Testamentary guardians do not necessarily provide the day to day care for a child but are responsible for making the key decisions concerning the upbringing of the child.

While you are not required to name a testamentary guardian for your dependent children, it is a good idea to include one in your will. This is especially important should both parents die together or if you are your children's sole guardian.

PROPERTY (RELATIONSHIPS) ACT

Anyone in or entering a marriage, civil union or de facto partnership should consider potential claims under the Property (Relationships) Act (PRA) when they are making or reviewing their will. This Act applies to all wills, including those made before the PRA came into force on 1 February 2002.

OPTION A (MAKE A CLAIM)

Under the PRA, a spouse or partner could elect to claim half the relationship property instead of receiving anything under the will or, if there is no will, under the Administration Act (unless the will specifically allows that or the court considers it fair).

OPTION B (NOT TO CLAIM)

The alternative is option B, where a spouse or partner chooses not to claim their share of relationship property but to keep what they own, take jointly-owned property and inherit

what is available to them under the will (or the Administration Act rules if there is no will). They must make this choice in a prescribed form within six months of the grant of probate or letters of administration for an ordinary estate; or within six months of the date of death, where the deceased's estate was a small one. The time for making a claim may be extended in certain circumstances. Once made, the choice cannot be revoked except by the court.

Once signed, the form choosing either Option A or Option B is given to the personal representative of the estate (the executor). Then the surviving spouse or partner can make a property sharing agreement with the personal representative to sort out what is relationship property and what is separate property, and how the relationship property should be shared.

When the relationship ends by death, a spouse or civil union partner can claim half the relationship property no matter the length of the marriage or civil union. A de facto partnership of less than three years would not usually qualify. If it did, then sharing would be determined according to contribution to the relationship rather than starting from a presumption of equal sharing.

To avoid this presumed right to a half share of the relationship property, you and your spouse or partner would need to have a properly drafted legal agreement contracting out of these particular provisions and stating how property is to be shared when you die. In certain circumstances, former spouses or partners may also be able to make a claim under the PRA. This is a complex area of law, so legal advice is strongly recommended. See our guide *Dividing up relationship property* for further information.

ENDURING POWERS OF ATTORNEY

When you go to see your lawyer about making a will, you should also ask about drawing up **enduring powers of attorney**. This is a way of nominating someone who can manage your care and your property if you become incapacitated through accident or illness. Enduring powers of attorney must be made before you become incapacitated. As you cannot always predict when you will be incapacitated, it is advisable to draw up the power of attorney when you make your will.

Enduring powers of attorney in relation to property can come into effect immediately and will continue to apply if you become incapacitated. Enduring powers of attorney in relation to your personal care and welfare come into effect only when you are incapacitated. See our other guide *Powers of attorney* for further information.

LIVING WILLS AND ADVANCE DIRECTIVES

A **living will** or **advance directive** is a written or oral instruction made while you are in good health and of sound mind. It explains what you would want to happen should you

suffer an illness or accident that leaves you incompetent to make decisions about your health care. It can also be called a "statement of wishes regarding health treatment". A living will or advance directive is not an alternative to an enduring power of attorney. Enduring powers of attorney give people the legal power to act for you in whatever way they think fit while you are alive but incapacitated (see our guide, *Powers of attorney*).

The living will or advance directive may not be legally effective but can give your family and the medical profession an indication of your wishes. If it covers the particular circumstances that have arisen and expresses your true wishes, then it would be lawful to rely on the directive and possibly unlawful to ignore it. The Code of Health & Disability Services Consumers' Rights (Rights 7(5) and 7(7)) refer to advance directives and, if you are drawing up a living will, advance directive or statement of wishes, it is advisable to discuss it with your lawyer and doctor.

ESTATE ADMINISTRATION

The administration of an estate is an important responsibility and must be carried out with great care.

WHO LOOKS AFTER THE ESTATE?

When someone dies, their property is **administered** by personal representatives. If the personal representatives were appointed in the will, they are known as **executors.** Where there is no will, they are appointed by the court and are known as **administrators.**

GRANTS OF PROBATE AND LETTERS OF ADMINISTRATION

Where a will appoints executors, their authority to deal with the estate is confirmed by the High Court in a grant of "Probate". Where administrators are involved, they obtain their authority to act as personal representatives by the High Court granting "Letters of Administration". The person entitled to apply for the appointment as administrator is the person who stands to benefit most from the estate, such as your surviving spouse or partner, or one of your children. If none of them wants to do it, certain others can be appointed.

Applications to the High Court for grants of Probate or Letters of Administration require the preparation of formal documents. The lawyer acting for the person wanting to apply for appointment as administrator will prepare these.

Once the court has granted Probate, a will becomes a public record and you can request a copy of it from the court.

DUTIES OF PERSONAL REPRESENTATIVES

The duties of executors and administrators include:

- arranging the funeral (if this has not already been done);
- preserving the assets and, as appropriate, selling and disposing of property in the course of administration of the estate;
- paying debts, testamentary expenses and taxes of the estate;
- keeping accounts and records of all dealings involving the assets of the estate; and
- distributing the assets of the estate according to the terms of the will or rules of intestacy.

The lawyer advising your executor or administrator will be able to help in these matters. It is usual to use the services of valuers, accountants, real estate agents, sharebrokers and other advisers in the course of administering the estate, and the estate lawyer can also assist with this. The costs will come out of the estate.

CLAIMS AGAINST AN ESTATE

In the majority of estates, the responsibilities of the executors or administrators are relatively simple. They must find out what the assets and liabilities are and pay any debts, taxes and duties out of the estate funds. Only then can they distribute the balance to the beneficiaries in terms of either the will or the Administration Act rules. However, two types of claims against the estate can complicate matters:

CLAIMS CHALLENGING THE VALIDITY OF THE WILL

There are a number of grounds on which the validity of a will can be challenged. These include that it was not correctly witnessed, that the deceased lacked sufficient mental capacity to make a valid will, or that there was undue influence on the deceased by a person benefiting under the will. Any such claim must be resolved before the executors can administer the estate. If the challenge is successful, that will is invalid and either an earlier will may be valid or, if there is no earlier will, the estate will be distributed according to Administration Act rules.

CLAIMS CHALLENGING THE CONTENTS OF THE WILL

These can be brought under:

(a) the **Property (Relationships) Act**. The deceased's surviving spouse or partner can claim their share of relationship property instead of accepting the terms of the will. This claim is always considered first and takes priority over claims under the next two Acts;

(b) the **Family Protection Act**, alleging that the deceased has not made adequate provision for the proper maintenance and support of their immediate family. If you do decide to treat people differently in any major way, especially your children, it is a good idea to record your reasons for doing so in your own handwriting and lodge them with your will so they can be taken into account if there is any dispute after you die. The courts have tended to rule that parents have a moral obligation to make some provision for children – even adult children who are well-established and have no financial need;

(c) the **Law Reform (Testamentary Promises) Act**, alleging that the deceased has not fulfilled a promise to reward services or work done for the deceased by a provision in his or her will. The person claiming would have to prove that you made a promise and that the promise was a reward for past or future services.

For claims under the Property (Relationships) Act, the choice between Option A (make a claim) and Option B (not to claim) and any consequent claim must be made within six months of the date of death or of the date Probate or Letters of Administration are granted, depending on the size of the estate. Under the other two Acts, a claim must be filed in the court within 12 months of the grant of Probate or Letters of Administration. The court may extend these times but not if the estate has already been distributed. To avoid any problems regarding distribution it is best to make those claims within 6 months of the grant of Probate or Letters of Administration (see further below).

CLAIMS BY AN ESTATE

Sometimes an estate does not have sufficient assets to provide for the beneficiaries under a will or for the claimants against your estate. The most obvious example is where you leave young children without adequate financial provision for their maintenance and education. This can happen if most of your assets were jointly owned with your surviving partner and do not go into your estate. The executor or administrator of your estate may then apply under the Property (Relationships) Act to divide the relationship assets owned by you and your partner to claw back assets for the estate. They must get permission from the court to make this claim and prove that serious injustice would otherwise arise.

WHEN CAN AN ESTATE BE WOUND UP AND DISTRIBUTED?

Executors or administrators may distribute an estate after six months following the grant of Probate or Letters of Administration if no notice of a proposed claim has been received. Therefore beneficiaries should not expect distribution earlier than six months after the date of the grant. In certain circumstances, executors or administrators may distribute part of an estate earlier, for example to pay for a child's education or maintenance. There can be delays while assets are sold and, if there are complex business and investment assets, finalising valuations and clarifying tax obligations can also cause delays.

Where a claim is made against the contents of a will or the court is requested to assist in interpreting a will, distribution will be delayed until the court has heard the case. Where there are no claims against the estate and the assets are left to one beneficiary (eg, a surviving spouse or partner), an estate should in most cases be wound up and distributed by the end of the six-month period.

If an estate is distributed **before** the six months' period is up and there are then successful claims, the executors or trustees may be held personally liable to meet those claims. If the estate is distributed **after** the six months and there is a later successful claim, they will not be held personally liable but the claim may still be settled using any funds in the estate.

If one beneficiary has an entitlement to, say, the interest from an asset for the rest of their life and then the asset passes to another beneficiary, the estate cannot be wound up until the lifetime beneficiary dies. The responsibilities of the executors, including administering the investments during the lifetime of the income beneficiary, continue until the estate is finally distributed.