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WILLS / POWERS OF ATTORNEY / GUARDIANSHIP APPOINTMENTS

1. WILLS

- A Will sets out the intentions of a person (the Testator) for the distribution of his or her assets after death.

Why you should have a Will

- Those people who die without leaving a Will, will have their assets distributed according to the Rules of Intestacy (see Annexure), which may result in their assets being distributed in a way which is not in accordance with their wishes.
- An interested party (a relative, friend or next of kin) may apply to the Supreme Court in its Probate Division to be appointed the *administrator of the Estate*. If appointed, the administrator will have the same functions as the Executor in a Will.
- However, the Court will often require the administrator to put up a substantial bond as security for the mishandling of the Estate or the distribution to a party not entitled in the Estate. This can sometimes be prohibitive (hundreds of thousands of dollars in large estates).
- If the Will has been improperly drawn or does not address the contingencies required for certain situations, an administrator may be appointed to the Estate with the Will (with its imperfections) annexed to the grant to the administrator.
- In certain cases, the Public Trustee can be appointed to act in the capacity of Executor and pay the debts and distribute the Estate. Naturally, there is no administration bond required in these circumstances. However, the Public Trustee's fees are often high. As a result of the Public Trustees legislative based obligations, the administration of the Estate by the Public Trustee can take longer than usual.
- Consequently, to avoid delay and expense, a Will is recommended for all those people with assets. In extreme cases, where there is no Will and no-one to take the Estate, the funds and other assets will pass to the State Government.

What needs to be taken into account to properly draft a Will?

- Whilst Commonwealth Estate Duty was abolished in 1979, NSW Death Duty was abolished in 1981 and gift duty no longer applies, a recognition of the possible impact of Capital Gains Tax is important. As accountants, have a detailed knowledge of how the tax operates so I will not attempt an examination of it. However, a brief overview is annexed.

- Naturally, to take proper instructions for a Will, it is vital to understand the nature of the Testator's Estate. For example, assets which are held by the Testator as joint tenant with another person will pass to the surviving joint tenant as a matter of course, independently of the Will. Joint bank accounts and other assets held jointly with other people need to be investigated to find out whether the holding is as joint tenants or as tenants in common. If the tenancy in common alternative exists, then the share of the asset of the Testator may pass to a third party and not the surviving owner. These questions may ultimately only finally be determined by a request of the asset holder to confirm the nature of the holding and if necessary, to put the asset holder on notice of the intentions of the Testator on death.
- Similarly, insurance policies and superannuation policies often do not form part of the Estate because the policy may be owned by the beneficiary or beneficiaries named in the policy. The particular rules of the Fund allow the trustees of the Fund to pay the proceeds of these types of policies to the beneficiaries named in the policy, rather than the legal personal representative of the Testator. Similarly, death benefits attaching to the policy may be subject to 'binding death benefit nominations' which the trustees of the Fund must follow. Of course, in many cases the funds are paid to the Executor/Administrator of the Estate.
- Therefore, an overview of the nature of the assets in the Estate and the implications if the Testator 'died tomorrow' is essential. Often, the Testator's accountant is in the best position to determine these questions because the full picture of a person's financial circumstances is best known by the financial adviser.

Drafting a Will

- The first step is to determine whether the Testator has the capacity to give proper instructions. This is a complicated area and also applies equally to Powers of Attorney and Guardianship Appointments (see below). With constant advances in medical knowledge about how the brain works, situations that might once have been considered hopeless are potentially not so (tests to determine mental capacity are now more specific). Another aspect of this is an awareness of any pressure being put on the Testator by any one, which could lead to a challenge later.
- Subsequent marriage will revoke a Will unless it is made in contemplation of the marriage. In the ACT, NSW, Qld and Tasmania dissolution of marriage revokes part or all of the Will (depending on the ex spouse's entitlement under the Will).
- The Testator needs to appoint an Executor (or preferably Executors) whose functions are to bury or cremate the Testator according to the discretion of the Executor(s). Under English law, the Testator cannot bind his Executor to dispose of the Testator's body in any particular manner but may (and usually does) want to mention a preference in the Will. The Executor(s) chosen should be relied upon to follow the Testator's wishes, especially if those wishes are unusual. There is an exception if the body is to be left to medical science. Such an election (or non election) is decisive and backed up by statute.

- The Executor's other functions are to pay all the debts of the Testator and distribute the assets in the Estate, according to the Will. Full records should be kept of all transactions to do with the Estate because the Supreme Court chooses Estates at random to require a proper set of accounts to be filed in Court.
- The next step is the distribution of the assets. Many people leave legacies to friends, relatives and charities for example.
- It is very common these days to establish a testamentary trust in the Will to enable a fund to be established for the benefit of infant children if, for example, both parents die in an accident and the children survive. The Testator can set out his/her wishes in regard to the age at which the beneficiaries will take the capital of their inheritance and any accrued but undistributed income.
- Most people also appoint guardians of the infant children (if they have any) to look after them until their majority and trustees to administer the funds, which will eventually be paid to the children, later in life, when they can make their own decisions.
- It is common in most Wills to allow for a number of contingencies.

For example :-

1. where the spouse dies before the Testator,
2. both spouses and some of the children die before the Testator,
3. where the spouse and all of the children die before the Testator.

While this is relatively uncommon, not to allow for these types of scenarios can leave the Will deficient and result in the appointment of an administrator.

- Because the Trustee Act has relatively limited provisions in regard to the powers of the executors of the Estate, most Wills will include broader powers to deal with the assets of the Estate.

For example, a common provision is to allow the Executors and Trustees (who may be and commonly are the same people) to allow some trust monies to be paid to child beneficiaries for their health, education, advancement in life and so on, before they reach the age at which they will inherit the capital of the fund.

- It is common in Wills to expand the powers to include for example the power to appoint a manager of a Testator's business to run it until it can be sold. Also, the Executor should be given the power to postpone the sale of an asset until the market determines a better time to sell it.
- Often, a Testator will want to try to prevent a spouse from inheriting the whole or part of the Testator's Estate if he or she re-marries after the Testator's death. This can be mentioned in the Will. However, a person who has been contributed financially or has been supported financially by the Testator during the Testator's lifetime, may bring an application under the NSW Family Provision Act for the Court to overturn the provisions of the Will. It is important to note that such an

application must be made within 18 months of the Testator's death and that the costs of the application are usually paid from the assets of the Estate.

- The Will has traditionally been seen as a solemn document and as there are often outside interests and prejudices within families and otherwise, the Court wants to see that there has been no undue influence in the signing of a Will. This means that the Will must be executed in front of two independent witnesses who are not involved in the Estate and both witnesses must be present at the same time and watch each other sign, preferably all using the same pen. The witnesses can then give evidence later if there is a dispute about the execution of the Will.

In most cases, Probate of an Estate will be required because assets cannot be dealt with without the Grant being made. However, in some smaller Estates a grant of Probate is not necessary and the assets can be distributed by operation of law (such as joint tenancies). The application to the Supreme Court is on a standard format, involving the provision of original documents including the Will and Death Certificate. Affidavits are filed in regard to the circumstances surrounding the death and the details of the Executors and the Testator.

2. POWERS OF ATTORNEY

The Principal (or Donor) grants one or more people the right to stand in her/his shoes during his/her lifetime to sign documents, operate bank accounts and make other *business decisions* in regard to the affairs of the Principal, *during the lifetime of the Principal*.

The most important point to make about the Power of Attorney is that it only operates during the lifetime of the Principal. On death, the Executor, if appointed and named in the Will or an administrator appointed by the Court, will have authority to deal with the Estate and the assets contained within it. *A Power of Attorney is automatically revoked on death.*

There are two types of Powers of Attorney:-

1. A *general* Power of Attorney (or ordinary Power of Attorney)
2. An *enduring* Power of Attorney.

In 2003, legislation was introduced in NSW to prescribe a new form for Powers of Attorney.

The form can be altered to accommodate either an ordinary Power of Attorney or an enduring Power of Attorney, at the discretion of the Principal.

An enduring Power of Attorney will operate even though the Principal suffers incapacity of mind after the Power of Attorney is signed. To be effective, a certificate must be given by a legal practitioner at the time the enduring power of Attorney is signed that the effect of the power was explained and the principal appeared to understand it.

Powers of Attorney made before the changes to the law in February 2004 are still valid and may still be registered.

For enduring Powers of Attorney, the Attorney must sign the prescribed form to show that he/she consents to act as Attorney. This can be done at the same time as the Principal signs

or at a later date but the enduring Power of Attorney will not commence to operate until the Attorney signs. The Attorney's signature does not have to be witnessed.

The new Power of Attorney prohibits an Attorney from using the Principal's money for gifts or benefits the Attorney or third parties unless specifically authorised in the Power of Attorney document.

If a Power of Attorney is to be used for real estate transactions, it must be registered at the Department of Lands.

An enduring Power of Attorney made in another state or territory of Australia will be recognised as valid in NSW. However, in order to be registered in NSW, it will have to be accompanied by a certificate from a legal practitioner from the State or Territory in which it was made saying it was made in accordance with the formal requirements of the law of that State or Territory.

The importance of an enduring Power of Attorney is best illustrated by a situation where a person does not attend to the making of the document and then loses capacity to understand the nature of it and cannot give a valid Power of Attorney. This means that in many cases, the Principal is unable to deal with his/her financial affairs and a guardian appointed by the government may be necessary.

Conditions and limitations can be imposed on the Attorney for certain activities or for certain time frames and so on.

The Power of Attorney can be revoked or cancelled at any time as long as the Principal still has mental capacity. There is no set or prescribed form for revoking a Power of Attorney – a letter will do. However, there is a suggested form for revocation and whether you use this form, or just a letter, you must give a copy to the Attorney to ensure that he/she knows the power has been revoked. There is no obligation to register the revocation but if the Power of Attorney has been registered, it is advisable to register the revocation. A Bank, or anyone else who might be expected to act on the faith of the Power of Attorney, should also be notified that it has been revoked.

Companies can grant a Power of Attorney to individuals. Minors can give a Power of Attorney, but this is limited to those powers the minor, himself/herself, has (for e.g. it would only be valid for contracts for essential items such as food, clothing and so on).

The Power of Attorney cannot be used for health or lifestyle decisions. The Principal should appoint an enduring guardian if a particular person is to make these decisions (see below).

An Attorney must always act in the best interests of the Principal. Unless the Attorney is expressly authorised, the Attorney cannot gain a benefit from being an Attorney.

If you need a Power of Attorney for use interstate or overseas, you may need to make a Power of Attorney under the laws of that other State or Territory or Country.

An Attorney should keep the Attorney's own money and property separate from the Principal's money and property, unless they are joint owners, or operate joint bank accounts. An Attorney should keep reasonable accounts and records about the Principal's money and property.

Unless the Attorney is given express authority to do so, he/she cannot irrevocably appoint a substitute, delegate or create a sub-attorney.

The Principal is not prevented from dealing with his/her own affairs even at the same time as the Attorney, as a consequence of granting a Power of Attorney, unless the Principal has lost mental capacity.

The right to exercise the powers granted under a Power of Attorney will cease if:-

- (a) The Principal dies;
- (b) The Principal or Attorney becomes insolvent;
- (c) The Principal demonstrates by his/her conduct that the Principal considers the powers to have been terminated;
- (d) An Attorney notifies a principal that the Attorney will no longer act pursuant to the Power of Attorney;
- (e) An Attorney suffers unsoundness of mind.

It is common for the Power of Attorney to operate where the Donor is interstate or overseas or is somehow physically incapacitated from looking his/her own business affairs (e.g. coma and so on).

3. GUARDIANSHIP APPOINTMENTS

In much the same way as a Principal may appoint an Attorney to act for him/her in his/her business affairs, *the appointment of a guardian enables someone to make decisions about the Principal's health or lifestyle independently of the business side of their lives.*

Prior to 2002, it was common for individuals to make a Living Will (also known as an Advance Directive) appointing a person to make decisions about health issues. These documents were persuasive but not binding.

However, there is now a form for the binding appointment of guardian introduced by legislation.

In the same way as the appointment of an enduring Attorney, an enduring guardian can be appointed whereby the appointment will survive the mental incapacity of the donor.

Commonly, the guardian is given the power to decide where the Principal lives, what health care he/she receives, what other kinds of personal services he/she receives and also to be able to give consent to the carrying out of *medical or dental treatment*.

If, for example, the Donor is in a coma in hospital and the decision has to be made to amputate a leg, the Donor cannot give consent and the health professionals are entitled to ask for that consent from the guardian.

In contrast to the laws regarding Powers of Attorney, the appointment of an enduring Guardian, requires *the Donor and the Guardians to be advised by a solicitor, barrister, or clerk of the local court and for a certificate of explanation to be given to both.*

By contrast, for Powers of Attorney, the Attorney must sign an enduring Power of Attorney but it need not be witnessed and there is no need for a certificate of explanation to be given to the Attorney.

SUMMARY

It is recommended that everyone with assets should establish a valid Will, enduring Power of Attorney and enduring Guardianship Appointment to ensure the smooth administration of his or her affairs, both business and health during his or her lifetime, and for the proper administration of his or her Estate upon death.

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