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ESTATE PLANNING

THIS GUIDE IS DESIGNED TO A BRIEF OVERVIEW OF
THE BASICS OF ESTATE PLANNING -
WILLS & POWERS OF ATTORNEY.

CROSS THIS OFF YOUR ‘TO DO’ LIST?

If it makes you feel any better, most people in Australia don’t have a valid Will or Powers of Attorney!

However; this is missing the opportunity to, among other things, decide on the two most basic aspects of your wishes – who will manage your estate, and who will get what you leave behind.

There is also the peace of mind of knowing it is done and off your To Do list!

THE BASICS

WHAT IS A WILL?

A legal document which allows you to choose who will be responsible for managing your estate and who receives your belongings and assets after you pass.

Where a person dies without a Will or a Will is found to be invalid, all is not lost! Laws govern how an estate is to be distributed to partners and immediate family members. However, in this event it may be managed and distributed by people and to people you would not wish to be involved.

WHAT IS A POWER OF ATTORNEY?

A legal document that appoints someone to take care of your financial and legal or medically affairs, either before or after an accident or sudden illness which leaves you incapable of doing it for yourself.

Detailed laws exist governing how Attorneys must act on behalf of Power donors.

WILLS

GENERAL INFORMATION

WHO SHOULD I GET TO MANAGE MY ESTATE?

Someone you trust! You can appoint up to four people in the role of Executor and Trustee.

They must act unanimously.

WHAT KIND OF PROPERTY CAN I WILL AWAY?

Everything in your personal name.

You may not necessarily be able to leave the following assets to someone in your Will:

a. **Jointly Held Property** For example, if you own real estate with another as "joint proprietors", upon your death that property automatically passes to that other person, outside of the operation of your Will. However, if you own the property as "tenants in common", you can gift your ownership to someone under your Will.
b. **Property Held in Trust** Such property is not your property to deal with unless clearly set aside to your benefit as a beneficiary under that Trust.
c. **Shares** Certain shares in private companies cannot be given by Will.
d. **Partnership Property** Whether you can gift such property under your Will depends upon the terms of the partnership agreement.
e. **Superannuation** Depending on the rules of your Fund, you may have already nominated the beneficiary/ies, and so not be able to gift it under your Will. You should talk to the trustee of your Superannuation Fund to determine this.
f. **Life Insurance Policy Proceeds** You may have already nominated the beneficiary, and so not to be able to gift it under your Will. You should talk to your life insurance company to learn whether and who you have nominated as a beneficiary/ies.
g. **Capital Guarantee Deposits** You may have already nominated the beneficiary/ies, and so not be able to gift it under your Will.

TESTAMENTARY TRUSTS

In brief Testamentary Trusts:

a. Are created by the Will upon death. The wording for the trust is contained in the Will and is dormant, only coming into existence upon death.
b. May last as long as 80 years or may be terminated at any time at the direction of the Trustees (if discretionary).
c. They are entities where your trustees hold assets on behalf of beneficiaries, and can have discretion as to which of nominated beneficiaries receive income and capital of the Trust.
d. Because of their discretionary nature, as long as your estate remains in Trust, your beneficiaries can be protected from matrimonial or de facto splits, from creditors in the case of bankruptcy, and in the case of incapacitated beneficiaries or those vulnerable to gambling or drug or alcohol related illnesses, steady funding can be provided for medical and accommodation needs.
e. The Trustees have broad powers to invest funds while under their control.
f. They can be tax effective.
g. They are becoming increasingly popular, as a method to in some way protect beneficiaries from themselves.

CAPITAL GAINS TAX

The way you wish to draw your Will may affect the application of Capital Gains Tax to your assets. You should speak to your accountant/taxation adviser.

PENSION

A gift to someone on a pension, or who may later become entitled to a pension, may raise their assets to a point where they lose or suffer a reduced pension. You should speak to the proposed beneficiary or your financial advisor.

FUNERAL ARRANGEMENTS AND ORGAN DONATION

You can indicate your interest in these areas in your Will, however we recommend you provide your wishes to your loved ones now, as often when the Will is read it is too late to follow any wishes or directions set out in the Will.

EXPRESSIONS OF WISHES

Some people wish to create a letter expressing certain wishes that would not normally be found in a Will and cannot be legally imposed on an executor and trustee, such as:

- Which school they would wish their children to attend;
- In which religion or faith, they would wish their children to be raised;
- A desire for children to be taken overseas on a regular basis;
- A desire for monies to be spent on certain things for beneficiaries, while still held in trust and prior to distribution.

Such a document is not legally binding, but meant to act as a guide to assist executors and trustees in administering your estate in the manner you would prefer. It would normally be kept with the Will, and read to beneficiaries at the same time as the Will.

A SUMMARY OF CONTACTS

It is useful to your executors and trustees for the orderly running of your estate and its timely distribution to have a one-page document with your Will, setting out all contacts in relation to financial matters, such as your lawyer, stockbroker, accountant, financial advisor, insurance representative, real estate agent and so forth.

AFTER SIGNING

a. If you have signed the Will otherwise than in the presence of your lawyer, you should send them a photocopy, so they have a record, and can check it has been correctly signed.

b. Do not attach anything to the original Will, not even by paper clips.

c. The original Will should be kept in a safe place, either by your lawyer, your bank safe deposit, waith the Registrar of the Supreme Court or with the Public Trustee. You should consult your lawyer.

d. You should give a copy of your Will to your executor(s) and trustee(s), perhaps in a sealed envelope marked “Open if Necessary”, and inform them where the original Will can be located.

   → Upon making a new Will, all copies of any old Will should be destroyed, or if you cannot obtain all copies, rule a line through each page of your copy of the old Will, mark it as “Revoked” and file that copy with your new Will.

   → You may wish to assist your executor(s) and trustee(s) by making a list of your assets from time to time. If so, file a copy of that list with your copy of your Will. Such a list will not form part of the Will itself, but is only an informal assistance to your executor(s) and trustee(s).

WHEN TO CHANGE YOUR WILL

a. If you marry, your existing Will shall be revoked by the marriage unless it is expressed to be made in contemplation of that marriage.
b. If you divorce, your Will may or may not be revoked, depending on the law in your State or Territory. The area is complex. You should consult your lawyer.
c. Your Will is designed to continue for the duration of your life. However, it is a good idea to review it if:
   - → You change your name, or anybody named in your Will changes their name;
   - → An executor dies or becomes unwilling or unable to act, for example due to age or ill health;
   - → A beneficiary dies;
   - → You leave a specific asset to someone which you now no longer own or its character has changed in some way;
   - → You marry or divorce;
   - → You have children (including adopted or foster children); or
   - → You enter or end a de facto relationship.
d. You may change your Will, make a new one or revoke a current one without informing your spouse, partner or beneficiaries. However, you should consult your lawyer.
e. After you have signed your Will, you should not add to or delete from it without consulting your lawyer. Even the smallest change, if not done correctly, can invalidate the Will or have unwanted consequences.

POWERS OF ATTORNEY

GENERAL INFORMATION

TYPES

Enduring Power of Attorney (Financial)

These can be used in case you suffer an accident, sudden illness or disability, offering security that someone will look after your financial and legal affairs.

You must make such a Power while you are still capable of making legal and financial decisions for yourself.

Thereafter, if you become incapable of such decisions, your appointed person can manage your financial affairs and make legal decisions on your behalf, except make your Will.

These Powers of Attorney are for long term security, and if you lose the capacity to make decisions, will continue until your demise. However, the Guardianship & Administration Board may overrule the Power if in its view the Attorney is not acting in your best interests.

They have become a more rigorous document, requiring one of the witnesses to be able to witness statutory declarations (e.g. A Justice of the Peace, practicing solicitor etc).

The document has three parts – the Power of Attorney, Certificate of Witnesses and Statement of Acceptance (this last is signed by the person who consents to be granted the Power of Attorney).

These Financial Powers now also cover Guardianship - to make personal and lifestyle decisions for you – like where you live and the health care you receive.

Enduring means it continues (endures) even if you become unable to make these types of decisions for yourself.

Enduring Power of Attorney (Medical Treatment)

This is like a Financial Enduring Power of Attorney, except the attorney is required to make decisions about your physical health as opposed to your financial and legal affairs.

This Power authorises your appointed person to authorise medical treatment, such as an operation, when you are not able to make that decision or give that consent yourself.

To activate this Power, you must be either unconscious or otherwise incompetent.

WHY SIGN AN ENDURING POWER OF ATTORNEY NOW?

Such a Power must be signed while you are still legally capable of managing your affairs.

Most situations requiring such a Power happen quickly and without warning.

Once you lose the capacity to make your own decisions, you cannot sign a Power of Attorney, and other avenues to appoint a manager of your affairs can be time-consuming and costly.

The usual procedure is to apply for an appointment with the Guardianship & Administration Board, which can take some time and in the interim, no-one can manage your affairs.

WHO SHOULD I APPOINT?

The Attorney must be at least 18 years old and themselves capable of managing their own affairs.

You must have confidence in their ability to manage financial and legal affairs, and must obtain their consent to the appointment.

Your appointed Attorney is obliged to always act in your best interests.

ASSET PROTECTION

Aspects of asset protection often tie into Estate Planning issues, with respect to how assets are owned prior to death.

It is important to assess your current position in this regard.

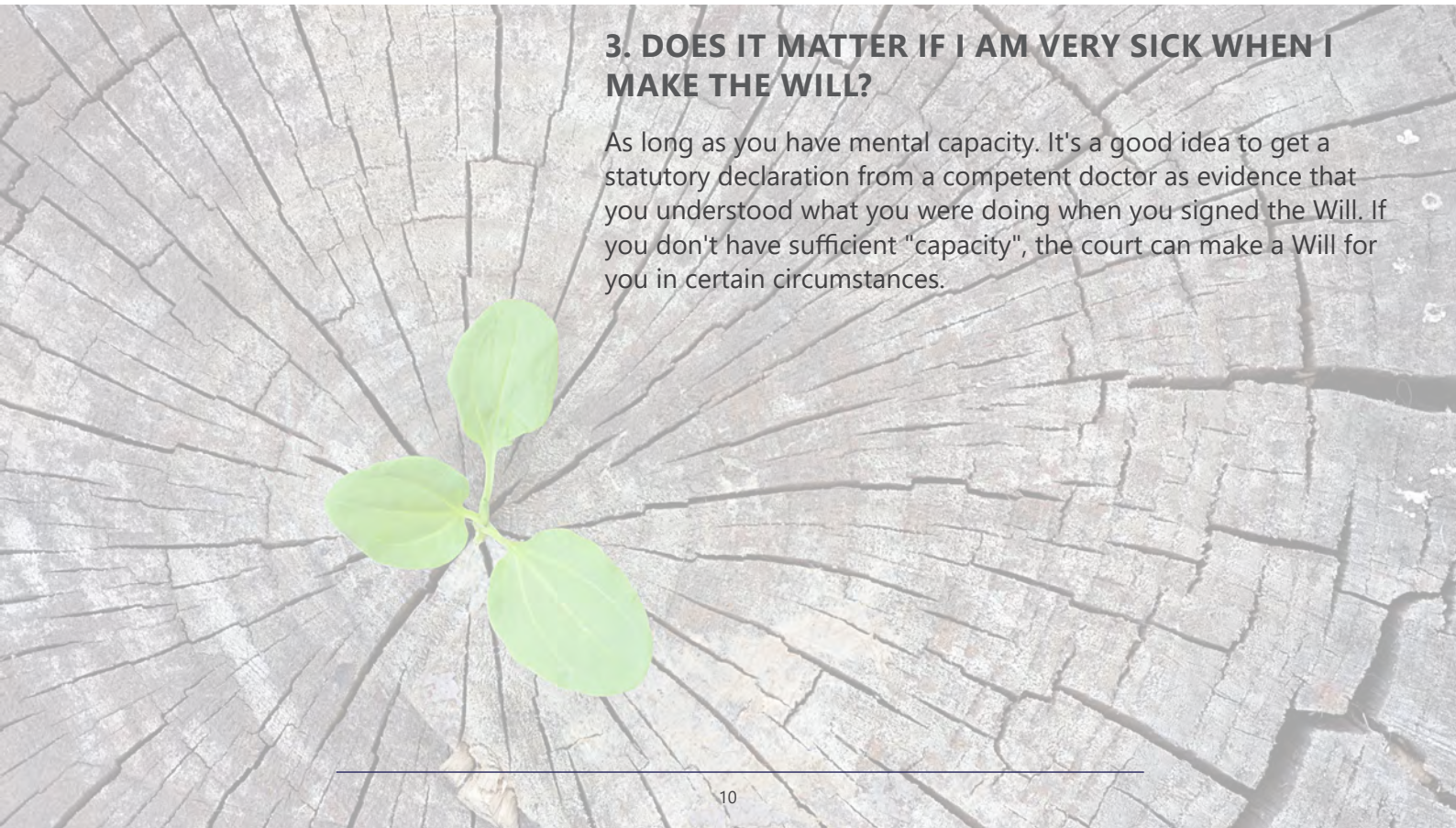
TOP TEN QUESTIONS ABOUT WILLS

1. WHAT IF I ALREADY HAVE A WILL?

Usually a new Will automatically cancels an earlier Will.

2. CAN I LEAVE A LIFE PARTNER OR CHILD OUT OF MY WILL?

You must be very careful about doing this. Certain parties can challenge your Will in certain circumstances. And it's no good just writing in the Will that anyone who challenges the Will loses their inheritance. This would not be valid. It is a complex area for advice specific to your situation.



3. DOES IT MATTER IF I AM VERY SICK WHEN I MAKE THE WILL?

As long as you have mental capacity. It's a good idea to get a statutory declaration from a competent doctor as evidence that you understood what you were doing when you signed the Will. If you don't have sufficient "capacity", the court can make a Will for you in certain circumstances.

4. WHAT HAPPENS IF LIFE PARTNERS DIE AT THE SAME TIME?

Usually a beneficiary must survive the person who made the Will for 30 days before they can inherit. Valid Wills are drafted to deal with such an event.

Otherwise there is a presumption that the younger of the parties survived the other.

5. ONCE I'VE MADE A WILL, WHAT ELSE SHOULD I DO?

Not much! Wills do not need to be registered in Victoria, and usually lawyers can retain originals, or you can if you have a safe place, with copies in the hands of the lawyers.

6. SHOULD I CANCEL MY WILL WHEN I SEPARATE?

Yes, because if you don't divorce or marry again, your wife/husband may still inherit from your Will, and you may not be happy about this!

Wills automatically cancel on marriage, and on formal divorce.

7. WHO ARRANGES THE FUNERAL?

Funerals could be arranged by anyone, but they will be paid for (or reimbursed) by the Executor, who has the legal responsibility for it.

8. WHAT IS THE DIFFERENCE BETWEEN AN EXECUTOR AND A TRUSTEE?

They are usually the same person. The difference is the roles the two names signify.

The Executor sees that the initial intentions in the Will are carried out according to the instructions of the Will maker. The Trustee looks after assets on behalf of a beneficiary (usually children until they reach a certain age), or because you have set up a Trust/s in your Will.

9. CAN I 'RULE FROM THE GRAVE'? CAN I PROTECT MY ESTATE FROM ISSUES AFFECTING MY BENEFICIARIES?

Yes, in a sense. This is the popular area of Testamentary Trusts. If you have an estate of any size, these are highly recommended. Some basic information about these can be found above, however a discussion is best, to relate them to your specific circumstances.

10. CAN I ASK TO SEE A WILL?

The people who can see a person's Will include:

- anyone named in the Will;
- anyone named or referred to as a beneficiary in an earlier Will;
- the spouse or de facto of the person who died;
- a parent, guardian or child of the person who died.

Otherwise the Probate register can be monitored to see when someone applies for Probate of the Will, or obtains a Grant of Probate.

WHERE TO FROM HERE?

The detail needs to come here. An adviser will generally ask you to complete an Instruction Sheet or similar, and/or meet or telephone first to discuss your requirements and have your queries answered.

In our view, a meeting is particularly useful in the more complex area of Testamentary Trusts.

It is important that this initial advice helps you understand the options available to you.

When you engage a firm such as MCP, we prepare first drafts based on any Instruction Sheet or instructions in a meeting, by email or phone, for discussion with you, and thereafter work in conjunction with you until your precise wishes are documented.