



# WILLS & POWERS OF ATTORNEY



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**Disclaimer:**

***Please note that the information contained in this Booklet is of a general nature only and should not be used as a substitute for professional legal advice.***

***We strongly recommend that you consult one of our Lawyers before signing any documentation.***

## **WILLS**

### **Why make a Will?**

By making a Will you are exercising your legal right of directing to whom and in what manner your assets should be distributed upon your death and who you would like to be responsible for your affairs.

### **International Residents**

Non-Australian residents are advised to have a Will in place dealing with Australian assets alone. This 'Australian Will' will not affect your other assets offshore which will need to be dealt with separately. Whilst international Wills are able to deal with Australian assets, proving them in an Australian court is far more expensive than proving an Australian Will. For the cost of having a simple Will drafted, you could save thousands in the future.

### **What if you don't have a Will?**

When you do not have a Will, you are said to have died "intestate" and your estate is distributed in accordance with the legislation at the time. The disadvantages of not having a Will, are:

- The rules of intestacy may not accord with your wishes;
- Step-children, friends and favourite charities may miss out;
- Your children or other minors in your care may not receive the protection you would have desired (guardianship or monetary assistance);
- Incapacitated members of your family and their own assets may be put at risk;
- Your estate may be administered by someone you would not wish to appoint to act in such a role.
- It is generally a much more costly process.

## Planning your Will

Matters that need to be taken into account for discussion with us:

- The selection of an executor and the appropriate powers to be given to him or her;
- The selection of a guardian for your infant children and how funds available for the children's maintenance, education or benefit should be invested;
- What assets you can dispose of by your Will and what assets you cannot (e.g. those owned by a family discretionary trust); or company;
- Who could make a claim against the estate and how best to avoid a testator's family maintenance claim;
- Providing for a de facto spouse, second marriages and blended families;
- The appropriate age for beneficiaries who are minors to take their share of the estate;
- Where to keep your Will, who should know where it is kept, and in what circumstances it should be reviewed;
- Passing mutual of companies and trusts.

## Testamentary Trusts

Testamentary trusts are created by a Will to provide a greater level of control over the distribution of assets to beneficiaries. The main benefits of testamentary trusts are their ability to protect assets and to reduce tax paid by beneficiaries from income earned from the inheritance.

There are two types of testamentary trusts:

### *1. Discretionary Testamentary Trusts*

The executor gives the beneficiary the option to take part or all of their inheritance via testamentary trust. The primary beneficiary has the power to remove and appoint the trustee and they can appoint themselves to manage their inheritance inside the trust.

## *2. Protective Testamentary Trusts*

The beneficiary must take their inheritance via the trust and does not have the option to appoint or remove trustees. This option may be of use where the beneficiary is too young, has a disability or spendthrift tendencies.

### **Your Will should be reviewed frequently**

A Will should reflect your current domestic and financial situations. If either of these change, you should revise your Will.

If you marry, a Will made prior to the marriage is no longer effective. If you separate, a Will made prior to the separation will not be affected. If you divorce, any gifts to your divorced spouse and his or her appointment as executor will be automatically revoked. If these consequences are not in accordance with your wishes, you must make a new Will. Your choice of executors or guardians for your children should also be reviewed from time to time as circumstances change.

### **What is a Power of Attorney?**

A power of attorney is a document authorising a person to act on behalf of another person.

In Victoria, there are four different powers of attorney. There is a general power and three enduring powers. All of the enduring powers give your decision maker the authority to act when you cannot make your own choices.

The rules for powers of attorney vary from state to state in Australia and need to be considered when drafting your powers of attorney.

The authority under a **General** power of attorney ceases as soon as become mentally or physically incapable of managing your own affairs.

However, under **Enduring** powers of attorney, the authority does not cease once you lose your capacity to make a decision.

You can also give a person the power to act on your behalf in **limited** circumstances: for example, to sell your house for a specific figure, to operate your bank account or to act on your behalf for a limited period of time.

### **Instructions Form**

You may request a Will instruction form by visiting our website. This will assist you and draw your attention to the matter you might want to consider when making a Will.