Wills: common questions answered

Hayman Lawyers
Your lawyers for all reasons

Introduction

We are often asked questions about wills. In these notes, we answer questions about wills that frequently arise.

Why should I make a will?

- To be sure your property will be distributed as you would like.
- To enable your estate to be administered quickly and economically.
- To make the situation on your death easier for your family.

Can I prepare my own will?

You can—but beware! "Do it yourself" kits for wills can lead to poorly drafted wills and administrative difficulties for your trustees. Common problems with homemade wills are a failure to deal with all your property, unclear wording, (which might require your trustees to apply to the High Court for a ruling) and a failure to consider laws which allow courts to alter the terms of your will, such as, the Family Protection Act. Equally importantly, you have the difficult issue of where to store your homemade will. If you store it at home, it may become lost or destroyed. If you store it "off-premises" such as, at a bank, no-one may realise the connection especially if you sever the link (by changing banks, for example).

We strongly recommend that a lawyer prepare your will and store it. Most lawyers scan local death notices so you can be sure your will will be found.

Do chattels require care?

Our experience is that many family feuds have their origins in disputes over the division of personal effects. You can prevent this by leaving a list of your important chattels and indicating who is to receive each item. We can insert a clause in your will referring to the list which will allow you to change the list whenever you wish without having to make a new will. The list should be stored with your will.

Should I specify funeral arrangements in my will?

There is no legal requirement to specify funeral instructions in your will. Your trustees will make the decisions, guided by your family. However, if there are special considerations involving some preference or cost, these should be mentioned. Examples are directions to be buried in a family plot; to have a headstone erected or to be cremated rather than buried.

Can I leave my body to science?

Under the Human Tissue Act, you can provide for your body or certain organs to be used for operations or for medical science. Please contact us for details of this option.

How often should I revise my will?

Clients are encouraged to review their wills every five years and whenever their circumstances change significantly—through marriage or acquiring major assets, for example. In particular, it is important to check whether your trustees and testamentary guardians are still suitable.

New provisions may be needed for business assets, guardianship of children, second family situations and de facto relationships.

What happens if I marry, enter into a civil union or get divorced?

Marriage and civil union automatically revokes prior wills unless there are special provisions in the will. If your marriage or civil union is dissolved, provisions in your will which benefit your ex-spouse become void but your will is effective for the other beneficiaries named in it. If you are separated from your spouse, the entire will is effective including provisions for your spouse.

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What is a living will?

This is a document intended to set out your expectations if you become too ill to give instructions regarding medical treatment. Living wills usually outline circumstances where you do not wish to have your life prolonged. Although there is no legal basis for such documents, people sign them to make their wishes known to their next-of-kin. We also have forms drawn up by the Medical Council known as "advance medical directives". They are supposed to be signed only after a consultation with your doctor. The forms should be lodged with your medical adviser as well as with us. Again, there is no legal basis for the directives but they can be helpful to your family.

What if I die without a will?

If you die without a will or if you have married without making a new will, you are "intestate" and the Administration Act dictates how your property is divided. For example, your spouse receives all jointly-owned property, all chattels and the first $121,500 of the remainder of the estate. The balance is divided one-third to your spouse and two-thirds to your children.

This division can cause problems because your spouse may be deprived of ownership of part of your estate but may need it to look after your children. The legal expenses in an intestacy are greater than where there is a valid will. It can take longer to wind up an intestate estate.

The solution is simple—always ensure that you have a current will.

Who should I appoint to be my trustees?

If there is a sole beneficiary, that person could be the only trustee. Otherwise, we recommend that at least two trustees be appointed. Sometimes we are asked to be trustees, often in combination with members of the client's family, to guide the family. Your trustees should have either a good knowledge of your family or have suitable business or professional experience.

What will it cost?

- We charge a modest fee for preparing your will.
- The Cancer Society will make a contribution (currently $250 plus GST) towards our fee if you make a bequest (say, $2,000) to the society in your will (the bequest is not paid until you die).
- We would like to develop a life-long relationship with you in all areas of the law that you may need assistance in, not just the law relating to your death. Please see the list of our services on page 4.

Who should I give my property to?

Although you may feel that you should have a free choice of who you leave your property to, the terms of your will are not immune from change after your death. Please see our response to the next question for more information on how your will can be challenged.

Accordingly, care is required when choosing your beneficiaries, particularly if you are contemplating an unequal distribution amongst your children or if a family member has special needs.

Many clients leave all their estate to their spouse and provide that, if the spouse does not survive them, their estate goes to their children. Most wills contain a substitution of issue clause which means that if any of your children die before you but leave their own children (your grandchildren) who survive you, those grandchildren receive the share that their parent would otherwise have received.

Another possibility is to leave your estate, or part of it, to your family trust. This means that the trustees of your trust can distribute your estate amongst your family as the trustees decide.

You may also settle assets on a life-interest, usually, for your spouse. This is often done in respect of your residence so that your spouse does not receive ownership of your share in the house but does receive the right to use the house (to live in it or rent it). When the spouse dies, your half-share of the sale proceeds is divided amongst your choice of beneficiaries (usually your children). Your will can give your trustees the right to sell the house and use your half-share of the proceeds to purchase another property.

Life-interest wills provide a basic level of asset protection by preserving the deceased's share in the assets subject to the life interest for the ultimate beneficiaries. Please ask for a copy of our notes on life-interest wills for further information.

Can my will be contested?

Your will can be challenged in a number of ways including:

- The Family Protection Act allows courts to alter your will to make provision for your family (including grandchildren).
- The Law Reform (Testamentary Promises) Act allows courts to change your will to compensate people who have provided services to you because of a promise that you have not fulfilled in your will.
- Your spouse may claim under the relationship property legislation.
- Your funeral instructions are not binding on your family and trustees.
- Beneficiaries can agree to vary, and even terminate, arrangements in your will. The courts can authorise changes on behalf of beneficiaries.

The problem from your perspective is that you will not be around to explain your wishes. Accordingly, careful legal advice is required to balance competing interests. This is important where parents have remarried and seek to protect the interests of children from previous marriages.

Should I appoint a testamentary guardian?

The Care of Children Act allows a parent to appoint one guardian of the parent's infant children (under the age of 20 years and unmarried). It is usual to ensure that the appointment is suspended while the other parent is alive. Testamentary guardians do not automatically have the role of providing day-to-day care for the children, but they do have the responsibility of contributing to the child's development and the right of determining questions about important matters affecting the child (such as name, residence, medical treatment, education, culture, language and religion).

How should I cover my business in my will?

If you are in business, provisions will be required to allow your trustees to carry on your business after your death to maintain its value for the ultimate purchaser or beneficiary, as you choose.

If you are in business with others (shareholders or partners) it is best to settle in advance suitable arrangements upon the death of a co-owner. These terms are usually recorded in a partnership or shareholders agreement and may nominate who is to value the business; whether goodwill is to be taken into account and timetables for the co-owners to decide whether to purchase your share in the business and pay the price.

You may wish to give an option to an employee or family member to purchase the business and your will should detail the terms of the option.

In addition, your will needs to give flexible powers to your trustees so that they can run the business. These powers are needed even if it is intended to sell the business because it may take some time to find a purchaser and complete the sale.

Who should witness my will?

Unless your will is witnessed in accordance with the requirements of the Wills Act, it may be invalid and of no effect. Two independent adult witnesses are required and a beneficiary or a spouse of a beneficiary cannot be a witness.

Signing a will in our offices, ensures that the legal requirements will be met and will also help to avoid claims of undue influence and duress. We can send you written instructions on how to sign your will at home.

What else should I consider when I make a will?

When you make your will, we recommend that you consider appointing attorneys in case you become mentally incapable. Since 1988, you can grant enduring powers of attorney for property and also for your care and welfare. The care and welfare appointment only takes effect if you become

mentally incapable. The property appointment can effect upon signing or only if you become mentally incapable.

A power of attorney gives authority to other person/s to act on your behalf and can have as wide or as narrow effect as you wish. The persons appointed do not have to be lawyers and commonly are spouses or children.

Your attorneys only have authority while you are alive. On your death, your will comes into effect and your trustees have authority from then on. Accordingly, your attorneys and your trustees never have authority at the same time.

Signing powers of attorney can save a great deal of time and money. Please ask for a copy of our notes on enduring powers of attorney for further information.

Tips to help your family

These suggestions may assist your family:

- Maintain an up-to-date list of your assets and liabilities and a list detailing your chattels and who is to receive them.
- Keep those lists, a copy of your latest tax return and your important family records in a sensible place, so you know they will be found.
- If your will does not treat your children equally or has special provisions which may be contested, write a note explaining your decision and place a copy with your records and with your will. Sometimes we set out the reasons in your will.
- Ensure that your family and/or your trustees know where your records and important documents are.

Other services available

We are able to assist with:

- forming family trusts;
- estate and retirement planning;
- administration of trusts and estates;
- property agreements (including separation, matrimonial and de facto agreements);
- sales and purchases, both residential and commercial;
- leasing arrangements;
- finance—we operate a solicitors nominee company;
- business advice, including joint venture agreements, and intellectual property rights;
- employment law;
- insolvency law;
- family law.
- legal advice of all kinds.

Please visit our website www.haymanlawyers.co.nz for more information about us and to download newsletters and our notes on other topics.

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