

## ESTATE PLANNING FACT SHEET

### What is a Will?

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A Will is a written legal document which sets out your wishes following your death ranging from who is to receive your property and possessions to who is to look after your children.

A Will allows a quick and cost-effective distribution of your assets to your loved ones.

### What happens if I don't have a Will?

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Without a Will, your assets will be distributed according to a pre-set legal formula with each family member receiving a defined percentage of your property which may be very different from what you wanted.

Also if you have no family closer than cousins, then the State Government gets your property.

### Why should I get a Will?

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As a general rule, everyone over the age of 18 should have a Will despite their marital status or level of wealth.

A Will is the only way to make sure your property and possessions are distributed the way you wanted them to be after you have died.

You also decide on issues like who will carry out what is in your will, who will look after your assets if you have young children, who will look after your children, what happens to your body, who will look after your pets, gifts to charity and organ donation etc.

Without a Will, the legal process is more complicated, more expensive, more time consuming and more stressful for your family.

This means your family gets less of your estate.

### Why can't I just use a Do-It-Yourself Will Kit?

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Because they cost next to nothing, some people lean towards do-it-yourself will kits, which are available at some newsagents or even online. Other people choose simply to write their own will themselves.

If you are thinking about writing your own will yourself or using a do-it-yourself will kit, be warned that while it may seem you are saving money in the short term, in the long run the result may be very costly for your estate. This is because there are so many things that could go wrong with home-made wills – it may not be properly signed or witnessed, may not appoint an executor or may not provide an executor with sufficient powers to effectively administer the estate. Because the will is not professionally drafted, there is a high risk your estate may not be distributed in the way you intended it to. Further, many people do not understand the implications of leaving out certain family members from their will.

There is nothing to stop you from writing your own will, just as there is nothing to stop you servicing your own car. But be warned – just as your home-serviced car may not hold up on the road, there is a high risk your home-made will would not hold up in a court of law.

## I already have a Will, do I need to change it or get a new one?

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A Will must be reviewed regularly, in the very least every 2 years. Your circumstances may have changed since the time you made your Will for example a person mentioned in your Will may have passed away, changed their name or even lost your favour. Also your relationship with your partner may have ended, you started having children, you recently bought a large asset, you started a new business or you may have simply changed your mind as to who is to receive what.

Moreover a Will is automatically cancelled if you have married or remarried unless it states that it was made in contemplation of marriage. What's more if you are divorced any gift to your divorced spouse or appointment in their favour is cancelled.

If this is you, then you need a new will immediately.

## What is a Testamentary Trust?

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A Testamentary Trust is a trust established by a Will. A trust is where one person transfers property to another person called a trustee (for example your partner) who then holds that property for the benefit of someone else called a beneficiary (for example your partner, your children or grandchildren).

Upon your death your property becomes trust property which is then managed by your trustee in accordance with your directions.

## What is a discretionary testamentary trust?

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A discretionary testamentary trust is where your trustee has the absolute power to decide how any income or assets of the trust are given to your beneficiaries.

### **Case study: Wendy's Lost Inheritance**

*Wendy was not so happily married to Peter. They have one daughter who is disabled. They also have a huge mortgage on their home, high credit card debt and several large personal loans for their two cars and their business, all secured by personal guarantees by Wendy and Peter. Their business is not doing well.*

*Wendy's parents have both passed away in a horrific car accident. Under Wendy's parents' very basic Wills, everything her parents owned was left to Wendy.*

*Wendy and Peter have now separated and will be getting a divorce.*

*Wendy's inheritance will now be considered by the Family Court in deciding the split of assets between Wendy and Peter so Wendy will as a result get less of their assets.*

*But there is a bigger problem, the business has collapsed and the Creditor's want their money back. They have turned their attention to Wendy's inheritance as Peter does not have anything of value. The Creditors have obtained a court order requiring the executor's of Wendy's parents' estate to pay her entitlements directly to them.*

*The practical effect of Wendy's parents' Wills was to ensure that their assets passed to Wendy's creditors, rather than benefiting their now struggling daughter Wendy and setting up a fund to look after their disabled granddaughter in the future.*

*This is clearly not what Wendy's parents had intended to happen to their estate.*

If they had a discretionary testamentary trust this would never have happened.

## What are the advantages of a Discretionary Testamentary Trust?

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**Flexibility** – allows your trustee to choose the best options at the time of your death because the circumstances at that time may be very different from what they are now.

**Asset protection for your Beneficiaries** - especially where they are facing difficult family circumstances like divorce or financial hardship.

**Reduce tax through income splitting** - allows the trustee to pay income or assets to your beneficiaries so as to minimise tax.

**Reduce tax for your children** - allows beneficiaries under the age of 18 to be taxed at a much lower tax rate.

**Favourable tax treatment** - qualifies for the same 50% capital gains tax discount rules applicable to individuals.

**Protection for your vulnerable Beneficiaries** - by giving them ongoing financial support. (They could be suffering from alcohol or drug addiction, mental illness or some other illness).

## Who should get a Discretionary Testamentary Trust?

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Anyone who would like to take advantage of the benefits of a Discretionary Testamentary Trust.

## What is an executor? How should I choose my executor?

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Your executor is the person who watches over your estate, and makes sure that all your wishes are carried out following your death. If you don't choose an executor, someone else could come forward and claim the right (this could be a family member you might not have chosen), or the court could appoint someone (perhaps an expert but a complete stranger).

Anyone is eligible to be your executor, but usually your executor is one of the following:

- Family member
- Friend
- Business associate
- Solicitor
- Corporate executor (for example, the trust department of your bank)

There are certain characteristics that the person who you choose to be your executor should possess, such as:

- Trustworthiness
- Honesty
- Dependability
- Good organisation
- Common-sense judgment
- Fairness
- Geographical proximity to your property.

Most commonly, a person would choose their spouse as their executor, because typically your spouse receives the largest portion of your estate, and also because it is your spouse who knows you best.

In any event, the job of an executor is a time-consuming and tedious one, so be sure that your spouse or whoever you are considering for the role understands what is expected.

## What is a guardian? What powers does my guardian have?

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You can nominate a person to be the guardian of any of your children under the age of 18 years, following your death. This person is called a "testamentary guardian". You should note that under the *Testator's Family Maintenance and Guardianship of Infants Act 1916* (NSW), a surviving parent of a child under 18 years normally gets guardianship.

Your guardian will be responsible for caring for, for physically controlling, and for maintaining your child. They will also have the power to:

- make decisions concerning your child's education
- make decisions concerning your child's religion
- discipline your child
- consent to your child's marriage
- make decisions as to the medical treatment of your child

## What does "probate" mean?

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Probate refers to the way in which your estate is administered and processed through the legal system following your death. Basically, this involves two steps:

1. Pay any debts you owe
2. Transfer assets to your beneficiaries

Before any assets are distributed during probate, your executor needs to apply to the court to "get probate", that is, proving that the will is valid and that it is truly your "last will and testament".

## What is my "residuary estate"?

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Your "residuary estate" is basically the leftovers in your estate that you didn't explicitly mention elsewhere in the will. For instance, a will may give for your house to A, a sum of money to B, with the balance of the estate divided between C and D.

Your estate may change over time, and if you haven't updated your will in a while then there may be parts of your estate that are unaccounted for. A residuary clause is a good idea as it provides a safety net in case you forget to specifically identify some parts of your estate in your will.

## What is a Power of Attorney?

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A Power of Attorney is an important and powerful legal document where you give another person called your Attorney the power to act for you in relation to your financial affairs, property and other assets.

Your Attorney can for example do your banking and even buy or sell property or shares on your behalf but must act honestly, with reasonable care and in your best interests and cannot benefit under your Power of Attorney unless you expressly state this in the document.

A Power of Attorney may be required where you will be overseas and need someone in Australia to access your accounts in an emergency or you just want someone to sign contracts or agreements for you when you are too busy to do so.

Another reason is you may be confined to bed because of an accident or illness and all you need is someone to attend to your financial affairs like pay your everyday bills.

However your attorney cannot make health, personal, lifestyle or medical decisions for you. You need an Appointment of Enduring Guardian for this.

A Power of Attorney ends when you die, you revoke it or you lose your mental capacity.

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## What is an Enduring Power of Attorney?

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An Enduring Power of Attorney is a Power of Attorney which does not end if you lost your mental capacity.

So for example if you were involved in an accident and were in a coma or you had a stroke and were mentally incapacitated, then your Attorney can continue to act on your behalf and in your best interests in your financial affairs.

Sickness and accidents can happen at any time and without warning so it is essential you and your family are protected with an Enduring Power of Attorney.

## What happens if I don't have an Enduring Power of Attorney?

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If you don't have an Enduring Power of Attorney and you have lost your mental capacity, a financial manager may be appointed for you by the Guardianship Tribunal and this person or organisation may be very different from the person or organisation you may have wanted to look after your financial affairs.

The stress and cost on your family of going through this lengthy legal process can all be avoided by making an Enduring Power of Attorney now before its too late. Making an Enduring Power of Attorney is the only way you can choose the person who will manage your financial affairs even if you were to later lose your mental capacity.

## Who should I appoint as my attorney?

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Your attorney will have a very demanding job. They will be responsible for making legal and financial decisions on your behalf. You should ensure that the person you choose:

- does not have any conflict of interest
- can be impartial and will act in your best interests
- will competently make any decisions that need to be made
- has the business and financial skills to be able to manage your affairs, and can keep accurate records of all their transactions

Your attorney needs to agree to take on the role before the Power of Attorney will become effective. It is therefore important you discuss the role with the person you are considering as your attorney and ensure that they are fully aware of what will be involved. Even though your intended attorney may be very close to you, it may be that they feel too daunted or overwhelmed to be able to carry out the role objectively.

Another consideration is the age of your intended attorney. Especially with Enduring Powers of Attorney, it may not be for some time before the person is called on to act as your attorney. Therefore a friend or a relative who is much older than you may not be the best choice as your attorney, if there is a chance they may not survive you.

## What is an Appointment of Enduring Guardian?

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An Appointment of Enduring Guardian is a written legal document where you give another person called the Enduring Guardian the power to make personal, lifestyle and medical decisions for you if you have lost the mental capacity to make those decisions for yourself. Your enduring guardian must act within the principles of the Law and in your best interests.

Until you are no longer capable, you make your own decisions.

## Do I need an Appointment of Enduring Guardian?

Yes. The reason is the loss of mental capacity can occur very unexpectedly either through the onset of advancing age as you find with those suffering from alzheimers, or other illnesses like cancers, brain tumors and stroke or as a result of an accident especially where head injuries are sustained in severe car accidents.

The time to make an Appointment of Enduring Guardian is now. This is because you can only make this while you have the mental capacity to do it. Doing it after the unexpected event is way too late.

## What can my Enduring Guardian do?

Remember they can only act when you are no longer capable.

You decide which decisions they can make and how they are to be carried out. For example you may not wish to be kept on life support should you be brain dead so you can direct your Enduring Guardian to take you off life support and they cannot override your direction.

They may also make decisions on where you are to live, who you see, which doctors you go to, what medical or dental treatments you get, what you eat, how you dress and what personal services like nursing care you receive.

It is therefore essential that you and only you appoint the person you want to do this for you.

## What happens if I don't have an Appointment of Enduring Guardian?

If you lost your mental capacity, the Guardianship Tribunal or the Supreme Court will appoint a guardian for you. That person may or may not know you or be aware of your personal views or requirements. They could be a family member or a friend or the public guardian. This complicated legal process and heartache for your family can be avoided by making an Appointment of Enduring Guardian.

What's more if you haven't appointed an Enduring Guardian and you have lost your mental capacity, a doctor only needs to obtain consent to any medical treatment for you from a "responsible person". This could be your spouse or a friend or a close relative.

Don't let this happen to you and take control of the situation by making an Appointment of Enduring Guardian. Your family will be grateful that you did.

## Who can I appoint as my enduring guardian?

The person who you choose as your enduring guardian must:

- be at least 18 years old
- be someone you trust to make decisions in your best interests.

Your enduring guardian cannot be:

- a person providing medical treatment to you on a professional basis; or
- a person providing accommodation services or support services for daily living on a professional basis; or
- a relative of one of the above

## Can I appoint more than one enduring guardian?

Yes. When appointing more than one though, you should make sure that the people you choose can cooperate with each other and can work together in your best interests.

You can appoint your enduring guardians to act:

- jointly (they must agree on all decisions);
- severally (any one of the enduring guardians can make decisions independently of the other enduring guardians);
- jointly and severally (they can make decisions together or separately).

## Should I appoint an alternative enduring guardian?

It is a good idea to nominate an alternative enduring guardian. The alternative enduring guardian can only act if the original enduring guardian/s dies, resigns or becomes incapacitated.

This fact sheet is provided for information purposes only and should not be relied upon as legal advice. You should obtain independent legal advice in regards to your own estate planning.