

Wills and Powers of Attorney – Issues to Consider

Your Will

We set out below some of the issues to consider when thinking about making a will.

Your written responses to the questions below will provide the broad framework for the preparation of the will.

It is assumed for the purposes of this article that you have “testamentary capacity” – that is, you have the capacity to enter into this will and do not suffer from some mental or physical impairment that might otherwise affect such capacity.

Step 1 – Your assets and liabilities and marital status

- What are your current assets and liabilities, including overseas assets and/or liabilities – including real property, shares and other securities, personal effects, and the like?
- Do you have an interest in any family trust (as trustee or beneficiary)?
- Do you have any interest in a family company (as office holder or shareholder)?
- Do you have any interest in a deceased estate (as executor or beneficiary)?
- Do you hold any stake in any joint venture, partnership, family business, etc?
- What is your past/present marital status and the status of any dependants (children and/or others under your care)?

Step 2 – Appointment of executor

- Who would you like to act as the executor of your estate?
- If two or more persons are nominated, will they have joint and several powers to act?
- Who would you nominate as alternative executor in the event that the preferred executor is unable or unwilling to act or dies before you do?

Step 3 - What happens if your spouse predeceases you?

- Do you want to leave specific gifts to individuals (such as heirlooms)?
- Do you want to leave specific gifts to charities, religious, medical or educational institutions, etc?
- How do you want the balance of the estate distributed?

Step 4 - What happens if you predecease your spouse?

- Do you want to leave specific gifts to individuals (such as heirlooms)?
- Do you want to leave specific gifts to charities, religious, medical or educational institutions, etc?

- How do you want the balance of the estate distributed?

Step 5 - What happens if you and your spouse die together?

- Do you want to leave specific gifts to individuals (such as heirlooms)?
- Do you want to leave specific gifts to charities, religious, medical or educational institutions, etc?
- How do you want the balance of the estate distributed?

Step 6 – Guardianship/ children’s trusts

- Who would you want to be the guardian of your children (or any other dependants)?
- If two or more persons are nominated, will they have joint and several powers to act?
- Who would you nominate as alternate guardian if the preferred guardian dies before you, or is unable or unwilling to act for whatever reason?
- Do you wish to establish a trust for the benefit of any minor children/dependants, and if so, what would the terms of that trust be?

Step 7 – Family trusts

- Do you have any family trusts? If so, how does the trust deed deal with your death?

Step 8 – Private companies

- Are you a director or secretary of any private company?
- Do you hold any shares in any private company?
- If so, what is to occur in the event of your death?

Step 9 – Superannuation, insurance and employee share schemes

- Are you a member of any superannuation fund? If so, have the necessary steps been taken to ensure you have nominated a beneficiary under the terms of the trust?
- Do you have life insurance? If so, who is the nominated beneficiary?
- Are you a member of any employee share or options scheme? If so what does the document constituting the scheme provide in the event of your death?

Step 10 - Charities

- Do you wish to establishment a charitable foundation in your memory?

Step 11 – Burial requirements

- Do you have any particular requirements in relation to a funeral service and/or burial?



Step 12 – Organ donation

- Do you wish to donate all or any part of your body to medical research/science following your death? If so, have your next of kin been informed?

Step 13 – Pets

- Do you have any pets and if so, how should they be cared for after your death? Consider leaving a gift to the carer for the maintenance of the pet.

Step 13 – Tax and statutory claims

- The tax implications of all of the above gifts should be considered prior to signing the will.
- You also need to consider the implications of the Family Provision Act (NSW) and possible claims by a dependant under that Act.
- You also need to consider whether your spouse should enter into a mutual will.

Your Power of Attorney

- Who will act as the attorney?
- If you appoint more than one attorney, will the powers be joint and/or several?
- Will the power of attorney commence immediately, or at some later date?
- Will the power of attorney be an enduring power of attorney? If so, have the attorneys consented to act?
- Are there to be any limitations on the powers given to the attorney (such as conferring benefits on the attorney and/or giving gifts to third parties and/or donations to charities)?
- Should the power of attorney be registered?
- If you already have a power of attorney, should they be revoked?

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