

Wills and enduring powers of attorney

What is a Will?

A Will is a legal document which ensures that on your death your assets are distributed according to your wishes.

Your Will distributes all of your assets such as your house, land, car, shares and bank accounts on your death.

In your Will you appoint an executor who is the person you nominate to distribute your assets to your nominated beneficiaries. Beneficiaries are the people you choose to receive your assets.

Any person over the age of 18 years of age and of sound mind can make a Will.

Why make a Will?

There is no legal obligation to make a Will, but it is a wise choice. If you don't have a Will, you will not have a say in how your assets will be distributed and who distributes them.

What will happen if I don't make a Will?

If you die without making a Will, your assets will be distributed according to a rigid formula set down by the laws of intestacy. Intestacy means dying without a Will.

Those laws may:

1. force the sale of the family home or family car so other beneficiaries can claim their share of the assets
2. not provide future financial protection for your children or grandchildren
3. leave incapacitated members of your family without adequate support
4. give your assets to the government, if you have no relatives

Furthermore, you will have no say in who administers your estate and who is appointed guardian of your under age children.

Changes to your Will

You are free to alter your Will at any time and as often as you wish. On marriage, your current Will is automatically revoked unless it specifically states it is made in contemplation of marriage. If you divorce, your divorced spouse is not entitled to any assets under your Will. If you are separated but not yet divorced, you should review your Will as soon as possible.

If you wish to alter your Will or your marital circumstances change, you should contact our office.

Can I prepare my own Will?

You can prepare your own Will but you do so at the risk of causing emotional and costly legal battles amongst relatives.

When drawing up a Will, there are a number of legal requirements that must be followed. Failure to follow these requirements may invalidate the Will. If this occurs, the law may consider that you have no Will and the laws of intestacy will apply.

If your Will is considered valid but its meaning is not clear, your Will may need to be interpreted by the court. This may again result in a partial or total intestacy.

A Will is a complex legal document which should be prepared by a lawyer who is trained to advise on the complexities of Will making.

Tax Effective Wills

Depending on your circumstances, your beneficiaries may benefit greatly from a Will incorporating testamentary discretionary trusts, both from a taxation and asset protection point of view. Call one of our lawyers if you require any further information.

Power of attorney

What is a Power of Attorney?

A Power of Attorney is a legal document authorising another person such as a trusted friend or relative to make decisions on your behalf.

A Power of Attorney is just as important as a Will. While a Will operates on your death, a Power of Attorney operates during your lifetime. The new Powers of Attorney Act 1998 increases the scope of matters that can be covered in a Power of Attorney and further allows you to give directions about your future health care.

Why have one?

There may come a time when for some reason you are unable to make decisions about things that concern you. For example, you may not be on the spot when financial decisions have to be made or you may be too ill to make decisions about your own health care or an accident could leave you with a decision making disability. If you lose your mental capacity and do not have an Enduring Power of Attorney your personal and business affairs will be handled by a government official for a fee.

What types of decisions would my Attorney make?

You can give your attorney power to make decisions about personal matters (including health care) and/or financial matters. The form of Power of Attorney that you execute will depend upon what areas you want your attorney to be responsible for.

The Powers of Attorney Act 1998 does not however allow an attorney to decide on special health matters such as donation of body tissue, sterilisation, termination of pregnancy, research or experimental care, certain psychiatric matters or withholding or withdrawing life sustaining medical treatment.

How has the Law changed?

Prior to the 1998 legislation a Power of Attorney could only extend to financial matters and did not cover personal decisions such as health matters or where you would live.

How does the new law affect existing Powers of Attorney?

Any Power of Attorney made before the new legislation came into effect on 1 June 1998 still has legal force however it would be limited to financial matters only.

Can I change my mind after I've signed the Power of Attorney?

Yes you can revoke the power at any time so long as you are capable of understanding what you are doing. You simply fill out a special "Revocation" form. You can also change the details if you wish by completing a new Power of Attorney form. If you do change or revoke the power you must inform your attorney. Otherwise your attorney can legally continue to exercise the power.

Your options in obtaining a Power of Attorney

You can draw your own Power of Attorney but you do so at your own risk. Certain legal requirements must be followed to ensure a valid Power of Attorney is drawn. The Public Trustee and some trustee companies offer free drawing of Powers of Attorney on the condition that they are appointed your attorney. They then charge fees on transactions carried out on your behalf. Thompson McNichol Lawyers will charge you a one off fee for drawing the document and you can choose your attorney. We will also be able to properly advise you of the type of Power of Attorney you require and answer any other queries or concerns that you may have.

For further information please contact our office 07 5443 1566.