

## **THINGS TO THINK ABOUT FOR YOUR WILL**

### **A very brief overview to get you thinking prior to meeting with us**

#### **Status of your relationship**

Marriage automatically revokes a will unless the will states that it is made in contemplation of a particular marriage. So if you have made a will prior to your marriage it may be void. Divorce revokes any provision for your previous spouse but does not revoke the rest of the will. If you are separated but not divorced, you should make a new will as your ex will still have claims under your current will until you are divorced. If you are in a de facto relationship your new will can be made in contemplation of you marrying so that it is not automatically revoked should you decide to both marry (each other!) in the future.

#### **Trustees**

You will need to appoint someone to be the trustee and executor of your will. These persons obtain probate and are your personal representatives when administering your estate. The role should be only for a short time if your estate is distributed promptly. However, if there are children that may not receive their inheritance for some time then your trustees will remain the owners of this property until they can pay out to the children. If you are in a relationship, you will usually appoint each other in the first instance, but other persons in the event both of you die.

#### **Guardian**

Who do you want to appoint as the legal guardian of your children?

#### **Funeral**

Do you have any special requests or preferences?

#### **Special legacies**

Are there any special gifts you want to make?

#### **How do you want your estate divided?**

Usually it is all to the other partner and then to the children. Your situation may be different. You may not have children so you may want to leave your estate to (say) your siblings or nieces and nephews or friends. A common way to divide the estate is for couples is to give one half of their estate to their family and one half to their partner's family. This ensures that should both of you die or the survivor does not have the opportunity to change their will, that one family does not inadvertently receive the entire estate.

#### **What will be in my estate?**

Not everything you own or control will necessarily be covered by your will.

- Anything owned in a person's sole name goes into their estate to be distributed in accordance with their will;
- Anything owned by you and other person in joint names will go straight to the survivor(s) regardless of what your will says (subject to relationship property laws).
- Property in a family trust does not belong to you so does not form part of your estate. But if the trust owes you a debt (that it may do if gifting has not been completed) then that debt will be an asset in your estate. You can include a forgiveness of this debt in your will so that the trust does not have to pay it back on your death.
- Life insurance policies are paid to the policy owner(s). Your life insurance will only be part of your estate if you are the sole owner of it. In cases you will want it to be in your estate, in some cases you will not.

## **Family Trust**

Do you have property in a family trust? We will need to discuss this more fully. It would be helpful if you could bring a copy of your trust deed with you when you visit our office. It is important to know who the beneficiaries are and who the trustees of the family trust are. Usually your will would leave your estate to your family trust and forgive any debt the trust owes you. But there are sometimes exceptions.

## **Children from previous relationships**

A person has an obligation to provide for all their children whether from a previous relationship or whether they are adult or children. If they are not adequately provided for they could bring a claim against your estate under the Family Protection Act. The obligation to provide for children includes both financial support and recognition of "belonging" to your family. Every situation is fact specific. Things to consider are how much you financially support the child now, what support they would need if you died compared to the support your other children would need, the primary obligation to provide for your spouse, dependent children, the relationship the child has with you, and the value of your estate. If the court decides that there is a breach of moral duty then it can alter the distribution to fix the breach. Case law has indicated an amount of 10% of the estate is generally considered appropriate for a child to be adequately provided for. The best thing to do is to ensure the child is included and to sign a note to be kept with the will explaining your reasons for any decision.

You will need to think about how you can provide for children of a different relationship in practical terms. Where will the money come from? It can either be paid out or held in trust for them with your spouse having the benefit in the meantime. You may choose to have a life insurance policy for their benefit so that your partner does not have to fund the payout. There are options we can discuss.

## **Relationship Property Issues**

You may need to consider the Property (Relationships) Act. This is the law that determines how property is shared between spouses/partners and it also applies after death of one of the parties. Relationship property is shared equally while separate property is not. How property is classified comes down to how it is used and where it came from, not who owns it. This area of the law can be complex so it is important to discuss what property you have and where it came from.

Property that is passed to your spouse under your will or by survivorship (they owned it jointly with you during your life) can be clawed back under relationship property laws. It is possible for the court to require that your share of the relationship property pool be put back into your estate to cover a family protection claim.

## **Life interests**

It is possible to put in your will that property be held ultimately for a specific person while giving the benefit and use of it to another for a period of time. Sometimes this can help with situations where there are children of a previous relationship where the surviving partner can have the use and benefit of property during their life but a share ultimately to go to the deceased's partner's children.