MAKING A WILL AND ESTATE ADMINISTRATION

**Do the right thing –
see your lawyer first**

NEW ZEALAND
LAW SOCIETY

Contents

1. Making a will and estate administration

A will lets you say how you want your property dealt with when you die. Once you die, everything you own is called your estate. This pamphlet tells you about making a will and how the estate is administered.

This area of law is now covered by the Wills Act 2007, which came into force on 1 November 2007. That act made some important changes, which are covered in this pamphlet.

Significant powers in this new act are intended to give better effect to a will-maker's powers. However, they are not applicable to wills made before 1 November 2007 so if you want to take advantage of those powers, you will need to remake your will even if you don't want to change its content.

2. Making a will

Your will contains your instructions about what you want done with your property when you die and how you want your dependants (spouse, civil union partner, de facto partner, children, etc) to be looked after. As far as you and your family are concerned, it could be the most important paper you ever sign. A will can relieve financial and emotional strain on your family after your death and help minimise the likelihood of dispute about your estate. Remember, it is not just money you have to think of, but all your property and possessions – that is, your entire "estate".

Who can make a will?

Anyone of sound mind who is at least 18 years old can make a will. A person under 18 may make a will if they are (or have been) married or in a civil union or de facto relationship. Others under the age of 18 can make a will if given approval by the Family Court or if they are in the military or are a seagoing person.

When should I make a will?

Now. Even if you don't own major assets, you can quite quickly build up possessions that can have monetary or sentimental value to you and to others. You may have some money in a savings account, a car, furniture and household items, a good stereo or home entertainment system, a life insurance policy, some jewellery and so on. A will allows you to decide what will go to whom, even if your possessions have sentimental rather than financial value.

In particular, you should make a will when you marry or enter into a civil union or de facto relationship, or when you have children. And you should revise your will if a relationship ends.

If you marry or enter a civil union, any will made before that is automatically revoked unless it was made in contemplation of that marriage or civil union. This applies even if you marry or enter into a civil union with someone who is a beneficiary under that existing will.

If you separate from your spouse or civil union partner with the intention of ending the marriage or civil union, provisions in your will relating to your spouse or partner will remain valid until formal separation orders are made or the marriage or civil union is legally dissolved (that is, you are divorced). You will have to change your will if you want to exclude your spouse or partner before those orders are made. When you separate legally or divorce, any provision made for your ex spouse or civil union partner will be void unless you, as the will-maker, have made it clear in your will that you want them to remain valid in such circumstances. So you should always check your will if your marriage or civil union ends.

The situation is different for de facto partners. Entering a de facto relationship does not revoke an earlier will. This means an existing will benefiting someone other than your current partner remains valid and may disadvantage your partner. Nor does the ending of a de facto relationship revoke provisions in your will relating to your former partner so if you don't want that person to administer your estate or to inherit, you must change your will.

Can a will prevent legal problems after my death?

Not necessarily, but it gives you more control over the destination of your property than dying without a will. Some statutes – such as the Property (Relationships) Act, Family Protection Act and Law Reform (Testamentary Promises) Act – allow some people to challenge a will. It is important to get legal advice in order to minimise the chances of your will being challenged.

What if I die without a will? (known as dying "intestate")

If you die intestate, the Administration Act specifies how your property will be distributed – usually to a surviving spouse/partner and immediate family, or to near living relatives, in set proportions. This may not be what you would have wished or what your family wants, and it could involve them and your estate in the cost and effort of making a claim under one or more of the above acts.

If there are no relatives in the categories listed in the Administration Act, then your estate goes to the Government.

Your lawyer or a family member can still administer your estate if you have not made a will, but only according to the Administration Act.

How do I make a will?

Because of the importance of your will, the law says it must be made in a prescribed manner. Do-it-yourself kits do not always cover all the aspects you need to consider and the technicalities are outside the scope of this pamphlet, so you should get legal advice about how to make your will.

Why should I see a lawyer?

Though you choose what to say in a will, the law specifies how you should say it. If you do not comply with the law, your will – or parts of it – may be invalid.

A lawyer can:

- suggest how you can best and most fairly provide for your family and dependants;
- express your wishes so they have the legal effect you intend, and ensure your will is properly drawn up and valid;
- tell you about alternatives you must consider (including who may challenge your will and why – this can be quite complex legally);

- advise on the appointment of suitable executors;
- advise on and form trusts for your beneficiaries;
- explain extra powers available to your executors and trustees that you might want to include in your will and advise on the appointment of suitable people to take on these roles.

When you see your lawyer, take along:

- a list of your property;
- a list of the names of people and charities you want to leave property to;
- a list of questions you want to ask; and
- any trust deed or relationship property agreement you have made.

How much will it cost?

Whoever you consult about making your will, do check their charges beforehand and take into account any charges that might apply if they are going to administer your estate when you die. Call different firms to compare costs and don't be afraid to discuss cost with your lawyer before you start (see our other pamphlet *Seeing a lawyer*). At the end of the day, having an expert prepare your will could save your relatives the grief and expense of you having an invalid will or none at all.

What should my will include?

Your will should name at least one **executor** – a responsible person who will see that your wishes, as expressed in your will, are carried out and who will administer your estate until it is properly distributed. Your lawyer can assist the executor in their duties, which may include paying debts, selling property and finally distributing the estate in terms of the will. If any claims against the estate arise during this process, your lawyer can advise the executor.

An executor can be named as a beneficiary in your will and you can direct that your executor(s) should get paid for the work involved. You should give some thought to this even if your executor is a friend or relative as administering an estate can involve a lot of work. A person named as an executor can also witness your will but this might affect any gift you leave that person (see page 6), though this would not apply to payment for services as an executor.

Your will should provide for **payment of your liabilities** such as mortgages, overdrafts and debts.

It should make adequate **provision for your dependants** (as well as partners and children, this can include adult children not able to look after themselves and, sometimes, parents). If it doesn't, they may be able to make a claim under the Family Protection Act (see also page 13). Under the Wills Act 2007, a gift to one of your children who dies before you can pass automatically to any child (that is, your grandchild) of that person.

It should say **who you want to inherit your property and possessions**. Some people make a provision in their will asking the executor to observe any list they leave about who is to receive particular items. If this is handled properly, you may be able to update it without changing the will. Any property you own as joint tenants automatically becomes the property of the surviving partner with whom you own it, unless there is an agreement otherwise (subject to Property (Relationships) Act rules). You may own property with others that is not owned jointly, but is owned in proportions. On your death, your share of such property becomes part of the assets in your estate and is dealt with as your will directs.

Your will can name **preferred guardians** of your children (see "Guardianship of children" on page 9).

You can set out any specific **funeral** arrangements that you want, though those organising your funeral are not legally bound to follow these instructions.

You can state your wishes about being an **organ/tissue donor**. Anyone up to 80 years of age (or 85 for corneas) can be a donor. However, it may be better to do this elsewhere and to make sure your next-of-kin know about your wishes as your will may not be read in time. Note, however, that your wishes in this regard are not binding on your next-of-kin so they will be asked for their consent.

If you are interested in **leaving your body for teaching and medical science**, you need to arrange this with either the Otago or Auckland Medical Schools before you die as they do not automatically accept bodies. If they agree, then you will be asked to lodge the relevant forms with the school. A copy of those details should also be lodged with your will.

You can give directions as to how a **business** you own should be dealt with when you die.

Your will can also include a **bequest** or a **gift to charity**. This might be a specific gift, such as an amount of money or shares, a nominated percentage of your estate or a residue gift – that is, part of anything that is left of the estate after specific gifts.

Who should I name as beneficiaries?

Beneficiaries are the people who inherit your property – that is, they benefit from gifts in your will. You can name anyone and any organisation you like as beneficiaries but remember, there are circumstances in which people can challenge your will.

For instance, it is usual to provide for your spouse or partner, children, possibly grandchildren and, in some cases, parents. If you don't, they may be able to bring a claim under the Family Protection Act.

Also, you may have promised to leave a certain item or some money to someone who has helped you. If you don't make provision for that in your will, they can make a claim under the Law Reform (Testamentary Promises) Act.

Usually you cannot leave any gift to a person who witnesses your will, or any spouse, civil union partner or de facto partner of a witness. However, if you do leave such a gift, it may be declared valid if those who would otherwise benefit agree, or if the High Court is satisfied that the will-maker knew and approved of the gift and made it voluntarily.

What about Maori land?

There are special laws governing who can inherit Maori land. The process is known as succession and it is covered by Te Ture Whenua Maori Act 1993 (also known as the Maori Land Act).

Does making a will restrict what I can do with my property?

A will does not prevent you from selling or giving away anything or dealing with your property in any way you choose during your lifetime. Your will takes effect from the date of your death, not from when you sign it.

However, often two people make mutual wills agreeing on how to dispose of certain property and agree to maintain that arrangement in any future arrangements. Under the Wills Act 2007, if the first person to die keeps the promise but the second person to die does not, then the intended beneficiary can make a claim against the second person's estate.

Death duties have been abolished in New Zealand.

Can I cancel or change my will?

You can revoke (cancel) your will at any time (while you are still of sound mind) simply by making a new will, by declaring in writing (in a manner similar to that for making a will) that you revoke your existing will, by destroying that will with the intention of revoking it or otherwise showing an intention to revoke it.

When you make a new will, you should start by inserting a clause revoking any previous will. It is a good idea to tell anyone holding a previous will that it is no longer current. You should also consider advising any previous executors and trustees if there has been a change.

You can change (revoke) part of your will by writing on the will and having that properly witnessed, or by obliterating words so as to prevent their effect being apparent, or you can add a codicil (a supplementary amendment) to your will, provided it is properly witnessed.

A revoked will or part of a will may be revived if the correct procedure is followed.

How often should I review my will?

You should review your will regularly, say, every five years. You should also review it whenever your circumstances change – if you marry or enter into a civil union or de facto relationship, or when such a relationship ends; if any beneficiary or trustee named in the will dies; or if your assets change significantly.

You should also review your will if the law changes. Some major law changes in recent years have affected wills so if you have not done so already, check to see if your existing will is still valid and unlikely to be challenged under any of these new laws.

You do not have to amend your will because the Wills Act 2007 took effect on 1 November 2007. While it applies to the wills of people who die on or after 1 November 2007, the changes it makes as to how a will is made affect only wills made after that date. However, there are useful powers in the new act to ensure better effect is given to a will-maker's wishes and if you want your existing will to be able to take advantage of these powers, you will need to make a new will even if you do not want to change the actual content or intentions.

Where should I keep my will?

Your lawyer or trustee corporation will store your will free of charge. You should tell your executors, a family member or a friend where it is held. When you die, your lawyer or trustee corporation will check to ensure that the will they hold is indeed your last will. Most people also keep a copy at home (with a note as to where the original is held).

What if a will is lost?

If the original of a will cannot be found, the court may approve a copy. It is necessary to prove that the will was signed, not revoked and that the original has been accidentally lost or destroyed.

If no will can be found, the person will be deemed to have died intestate and their estate will be handled according to the provisions of the Administration Act.

What could make a will invalid?

A number of things can make your will, or parts of it, invalid, including:

- if you have married, entered a civil union or ended a marriage or civil union since the will was made;
- if it is not signed and witnessed properly;
- if there was some undue pressure or influence on you to dispose of your property in a certain way;
- if you were not of sound mind or were under-age when you made the will;
- if it is not clear that you approved a gift to a witness (or spouse or partner of a witness).

Parts of a will may be invalid if they are so unclear that they cannot be interpreted with certainty. However, the court can use external evidence, including evidence of the will-maker's testamentary intentions, to interpret words in a will that make part of the will meaningless, ambiguous or uncertain.

If you did not sign the will or if mistakes were made in the witnessing of the will, the court can declare your will valid if it considers that the document expresses your testamentary intentions.

The court can correct a will containing a clerical error or if the will does not give effect to the will-maker's instructions.

A military or seagoing person may make an informal will (a will that would otherwise be invalid) provided certain conditions are met.

3. Guardianship of children

Parents are usually the legal guardians of their children. Non-parent guardians look after children's welfare when the parents cannot do so, though they are not necessarily responsible for the day-to-day care of the children or for supporting them financially. A testamentary guardian is a person appointed by will or deed by the parent of a child to act in the place of that parent in the event of his/her death.

While you are not required to name a testamentary guardian for your dependent children, it is a good idea to include one in your will. This is especially important should both parents die together or if you are your children's sole guardian.

4. Property (Relationships) Act (PRA)

Anyone in or entering a relationship (marriage, civil union or de facto, including same sex) should consider potential claims under the Property (Relationships) Act when they are making or reviewing their will. This act applies to **all wills**, including those made before the PRA came into force on 1 February 2002.

Under the PRA, a spouse or partner could elect to claim half the relationship property (as on separation). If they choose this option (known as option A), they cannot receive anything under the will, unless the will specifically allows that, or under the Administration Act, unless the court considers it just that they should inherit as well as take their share of the relationship property. Or they can choose option B, which is not to claim their share of relationship property but to keep what they own, take jointly-owned property and inherit what is available to them under the will (or the Administration Act rules if there is no will).

They must make this choice in a prescribed form within six months of the grant of probate or letters of administration for the deceased's estate for an ordinary estate; or six months from the date of death where the deceased's estate was a small one. The time for making a claim may be extended in certain circumstances. Once made, the choice cannot be revoked except by the court.

The form is then given to the personal representative of the estate. Then the surviving spouse or partner can make a property sharing agreement with the personal representative to sort out what is relationship property and what is separate property, and how the relationship property should be shared.

When the relationship is ended by death, a married or civil union partner can claim half the relationship property in this way no matter how short the marriage or civil union. A de facto partnership of less than three years would not usually qualify. If it did, then sharing would be determined according to contribution to the relationship rather than starting from a presumption of equal sharing.

To avoid this right to a half share of the relationship property in your will, you and your spouse or partner would need to have a properly drafted legal agreement contracting out of these particular provisions and stating how property is to be shared when you die.

In certain circumstances, former spouses or partners may also be able to make a claim under this act.

This is a complex area of law, so legal advice is strongly recommended. See our pamphlet *Dividing up relationship property* for further information.

5. Enduring powers of attorney

When you go to see your lawyer about making a will, you should also ask about drawing up **enduring powers of attorney**. This is a way of nominating someone who can manage your care and your property if you become incapacitated through accident or illness. This can happen at any time so it is advisable to draw up the powers when you make your will. Enduring powers of attorney must be made before you become incapacitated but they come into effect only when you are incapacitated. See our other pamphlet *Powers of attorney* for further information.

6. Living wills and advance directives

A **living will** or **advance directive** is a written or oral instruction made while you are in good health and of sound mind. It gives directions as to what you would want to happen should you suffer an illness or accident that leaves you incompetent to make decisions about your health care.

A living will or advance directive is not an alternative to enduring powers of attorney. Enduring powers of attorney give people the legal power to act for you in whatever way they think fit while you are alive but incapacitated (see our other pamphlet, *Powers of attorney*).

The living will or advance directive may not be legally effective but may give your family and the medical profession an indication of your wishes (it may be described as *"a statement of wishes regarding health treatment"*). If it covers the particular circumstances that have arisen and expresses your true wishes, then it would be lawful to rely on the directive and possibly unlawful to ignore it. The Code of Health & Disability Services Consumers' Rights (Rights 7(5) and 7(7)) refer to advance directives and, if you are drawing up a living will, advance directive or statement of wishes, it is advisable to discuss it with your lawyer and doctor.

7. Estate administration

The administration of an estate is an important responsibility and must be carried out with great care.

Who looks after the estate?

When someone dies, their property is **administered** by personal representatives. If the personal representatives were appointed in the will, they are known as **executors**. Where there is no will, they are appointed by the court and are known as **administrators**.

Grants of probate and letters of administration

Where a will appoints executors, their authority to deal with the estate is confirmed by the High Court in a grant of **probate**. Where administrators are involved, they obtain their authority to act as personal representatives by the High

Court granting **letters of administration**. The person entitled to apply for the appointment as administrator is the person who stands to benefit most from the estate, such as your surviving spouse or partner, or one of your children. If none of them wants to do it, certain others can be appointed. Applications to the High Court for grants of probate or letters of administration require the preparation of formal documents. The lawyer acting for the person wanting to apply for appointment as administrator will prepare these.

Duties of personal representatives

The duties of executors and administrators include:

- arranging the funeral (if this has not already been done);
- preserving the assets and, as appropriate, selling and disposing of property in the course of administration of the estate;
- paying debts, testamentary expenses and taxes of the estate;
- keeping accounts and records of all dealings involving the assets of the estate; and
- distributing the assets of the estate according to the terms of the will or rules of intestacy.

The lawyer advising your executor or administrator will be able to help in these matters. It is usual to use the services of valuers, accountants, real estate agents, sharebrokers and other advisers in the course of administering the estate, and the estate lawyer can also assist with this. The costs will come out of your estate.

Claims against an estate

In the great majority of estates, the responsibilities of the executors or administrators are relatively simple. They must find out what the assets and liabilities are and, if necessary, have assets valued, and they must pay any debts, taxes and duties out of the estate funds. Only then can they distribute the balance to the beneficiaries in terms of either the will or the Administration Act rules. However, two types of claims against the estate can complicate matters:

1. *Claims challenging the **validity** of the will*

A will's validity may be challenged on a number of grounds, such as that it was not correctly witnessed, that the deceased lacked sufficient mental capacity to make a valid will, or that there was undue influence on the deceased by a person

benefiting under the will. Any such claim must be resolved before the executors can administer the estate. If the challenge is successful, that will is invalid and either an earlier will may be valid or, if there is no earlier will, the estate will be distributed according to the Administration Act rules.

*2. Claims challenging the **contents** of the will*

These can be brought under:

(a) the **Property (Relationships) Act,** by the deceased's surviving spouse or partner if they wish to claim their share of relationship property instead of accepting the terms of the will. This claim is always considered first and takes priority over claims under the next two acts;

(b) the **Family Protection Act,** alleging that the deceased has not made adequate provision for the proper maintenance and support of members of their immediate family. If you do decide to treat people differently in any major way, especially your children, it is a good idea to record your reasons for doing so in your own handwriting and attach them to your will so they can be taken into account if there is any dispute after you die. The courts have tended to rule that parents have a moral obligation to make some provision for children – even adult children who are well-established and have no financial need;

(c) the **Law Reform (Testamentary Promises) Act,** alleging that the deceased has not fulfilled a promise to reward services or work done for the deceased by a provision in his or her will. The person claiming would have to prove that you made a promise and that the promise was a reward for past or future services.

For the Property (Relationships) Act, the choice must be made within six months. For the other two, a claim must be filed in the court within 12 months of the grant of probate or letters of administration. The court may extend these times but not if the estate has already been distributed.

Claims by an estate

Sometimes an estate does not have sufficient assets to provide for the beneficiaries under a will or for claimants against your estate because most of your assets were jointly owned with your surviving partner and do not go into your estate. The executor or administrator of your estate may then apply under the Property (Relationships) Act to divide

the relationship assets owned by you and your partner to claw back assets for the estate. They must get permission from the court to make this claim and prove that serious injustice would otherwise arise. The most obvious example is where you leave young children without adequate financial provision for their maintenance and education.

When can an estate be wound up and distributed?

Executors or administrators may distribute an estate after six months following the grant of probate or letters of administration if no notice of a proposed claim has been received. Therefore beneficiaries should not expect distribution earlier than six months after the date of the grant. In certain circumstances, they may distribute part of an estate earlier, for example to pay for a child's education or maintenance.

There can be delays while assets are sold and, if there are complex business and investment assets, finalising valuations and clarifying tax obligations can also cause delays.

Where a claim is made against the contents of a will or the court is requested to assist in interpreting a will, distribution will be delayed until the court has heard the case.

Where there are no claims against the estate and the assets are left to one beneficiary (eg, a surviving spouse or partner), an estate should in most cases be wound up and distributed by the end of the six-month period.

If an estate is distributed **before** the six months' period is up and there are then successful claims, the executors or trustees may be held personally liable to meet those claims. If it is distributed **after** the six months and there is a later successful claim, they will not be held liable.

If one beneficiary has an entitlement to, say, the interest from an asset for the rest of their life and then the asset passes to another beneficiary, the estate cannot be wound up until the lifetime beneficiary dies. The responsibilities of the executors, including administering the investments during the lifetime of the income beneficiary, continue until the estate is finally distributed.

8. Do the right thing – see your lawyer first

Lawyers deal with many personal, family, business and property matters and transactions. No one else has the training and experience to advise you on matters relating to the law. If your lawyer can't help you with a particular matter, he or she will refer you to another specialist. Seeing a lawyer before a problem gets too big can save you anxiety and money.

Lawyers must follow certain standards of professional behaviour as set out in their rules of conduct and client care. When you instruct a lawyer, he or she must provide you with certain information, as outlined in our brochure *Seeing a lawyer – what can you expect?*

This includes informing you up front about the basis on which fees will be charged, and how and when they are to be paid. The fee, which must be fair and reasonable, will take into account the time taken and the lawyer's skill, specialised knowledge and experience. It may also depend on the importance, urgency and complexity of the matter. There could also be other costs to pay, such as court fees.

You should discuss with your lawyer how you will pay for the work and advise if you don't want to spend more than a certain sum without the lawyer checking with you. A lawyer is required to tell you if you might be entitled to legal aid.

The brochure *Seeing lawyer – what can you expect?* also outlines how you can help control your legal costs and get best value from your lawyer.

Choose your own lawyer for independent advice. You do not have to use the same lawyer as your partner or anyone else involved in the same legal matter. In fact, sometimes you must each get independent legal advice.

Lawyers must have a practising certificate issued by the New Zealand Law Society. You can call the Law Society on (04) 472 7837 (or at one of the offices listed below) or email **registry@lawsociety.org.nz** to see if the person you plan to consult holds a current practising certificate. You can also check this on the register accessible through the website **www.lawsociety.org.nz**

If you have a concern about a lawyer, you can talk to the Lawyers Complaints Service, tel 0800 261 801.

If you don't have a lawyer:

- ask friends or relatives to recommend one;
- look in the Yellow Pages under "lawyers" or "barristers and solicitors";
- inquire at a Citizens Advice Bureau or Community Law Centre;
- check these websites:
  - www.lawsociety.org.nz/home/for_the_public/find_a_lawyer
  - www.familylaw.org.nz
  - www.propertylawyers.org.nz
- contact your local district law society:

Auckland (including Northland, South Auckland, Coromandel)	(09) 304 1000
Waikato Bay of Plenty (including Taupo)	(07) 838 0264
Gisborne	(06) 867 1562
Hawke's Bay	(06) 835 1254
Taranaki	(06) 758 3238
Wanganui	(06) 345 7092
Manawatu	(06) 356 2214
Wellington (including Wairarapa)	(04) 472 8978
Nelson	(03) 545 2613
Marlborough	(03) 578 7269
Canterbury-Westland	(03) 366 9184
Otago	(03) 477 0596
Southland	(03) 218 8778

Law Awareness Programme

The New Zealand Law Society publishes this pamphlet as part of its Law Awareness Programme to inform you of your legal rights, the law and how lawyers can help you. The full list of titles in this series is:

- Buying or selling a property
- Over the fence ... are your neighbours
- Domestic violence
- What happens to your children when you part?
- Dividing up relationship property
- What happens when your relationship breaks up?
- Living together
- The family trust
- Making a will and estate administration
- Powers of attorney
- Motor vehicles, accidents and alcohol
- You and the police
- Giving evidence
- Going into business

Other brochures

The Law Society also publishes the following brochures outlining the standard of service that clients can expect from their lawyers and about the Lawyers Complaints Service:

- Seeing a lawyer – what can you expect?
- How to complain about a lawyer

Copies of the Law Awareness pamphlets and the other brochures may be obtained from the New Zealand Law Society, PO Box 5041, Lambton Quay, Wellington 6145, tel (04) 472 7837, fax (04) 473 7909, email **pamphlets@lawsociety.org.nz** or from Citizens Advice Bureaux or Community Law Centres. They are supplied free to individuals and non-profit community service organisations, and at a small charge to others. They are also available on the Law Society website – **www.lawsociety.org.nz/home/for_the_public/how_can_we_help_you**

To the best of the New Zealand Law Society's knowledge, the information in this pamphlet is true and accurate as at the date below. However, the Law Society assumes no liability for any losses suffered by any person relying directly or indirectly on information in this pamphlet. It is recommended that readers consult a lawyer before acting on this information.

Reprinted December 2009

FAMILY LAW SECTION
New Zealand Law Society

PROPERTY LAW SECTION
New Zealand Law Society

PO Box 5041, Lambton Quay, Wellington 6145
Tel: (04) 472 7837
Email: inquiries@lawsociety.org.nz
www.familylaw.org.nz www.propertylawyers.org.nz