
INTRODUCTION AND OVERVIEW

The privilege of specifying how you wish to dispose of your assets at your death does not exist under all legal systems. Subject to certain restrictions, a property owner in Australia may specify how assets directly owned at death will be disposed of by executing a valid Will. A Will may perform several other functions as well, such as designating who will administer your estate and who will be the guardian for your minor children. Regardless of other estate planning steps you have taken for the disposition of your property (such as the execution of a trust), you should execute a Will.

PROPERTY WHICH PASSES AT DEATH

ASSETS WHICH PASS AT DEATH

Significantly more than what you own in your own name will pass to others when you die. It is important for you to be aware of these kinds of property and to take steps to make sure they are disposed of, to the extent you can, in a way which best fulfils your estate planning goals.

JOINTLY OWNED PROPERTY

Not infrequently, an individual will own an asset with one or more other individuals, in fact, almost all assets can be owned by more than one person. Basically, the law provides for three types of common ownership. The first is known as a “tenancy in common”. A tenancy in common is a typical form of common ownership with persons other than your spouse. For example, if you and your brother have inherited a piece of land from your parents, and the property stands in both your names, you probably own it as tenants in common. Under a tenancy in common, each of you owns your respective share (usually one half, but it can be any other percentage).

You can sell your half without the other owner’s consent (unless there is an agreement to the contrary) although that sometimes is difficult to arrange; for example, the new owner will become a Co-owner with your brother, which may not be regarded as desirable. In addition, you can give your interest away without the consent of the other person and you can dispose of your interest in the property at your death by your Will.

If you want to sell the entire property but the other owner or owners do not, as a rule you can commence an action in court to effect what is known as a "partition" of the property. From a theoretical perspective, this means that the court will award you your share of the property and you will own it separately and alone and the balance will be held by the other owner or owners.

An important point to remember is that you can, at your death and by your Will, dispose of your interest in property held with others as tenants in common. That is not the case with certain other forms of property owned in common with others.

The second type of property owned in common is known as a "joint tenancy with rights of survivorship." Sometimes this form of ownership is simply referred to as a joint tenancy. Almost any type of property can be owned by persons as joint tenants with rights of survivorship. During lifetime, the owners' rights are very similar to those of tenants in common. The primary difference is what happens when one of the Co-owners dies. The right of survivorship means that the surviving Co-owner or Co-owners will automatically receive the property. As a general matter, even if you direct in your Will or another document that your interest in the property will pass to someone other than the surviving Co-owner or Co-owners at your death, the provision usually will be ineffective and the Co-owner or Co-owners will succeed to ownership of the entire property.

In some cases, the title to the property will indicate that it is one that contains survivorship rights. Bank accounts, for example, that contain the letters "JTWS" connote rights of survivorship, as the letters mean "joint tenancy with rights of survivorship." Similarly, "EOS" on a bank account connotes a survivorship feature-the initials mean "either or survivor."

The third type of common ownership is known as "tenancy by the entirety." A tenancy by the entirety is a form of joint ownership with rights of survivorship which can exist only between a husband and wife. A major difference between a regular joint tenancy with rights of survivorship and a tenancy by the entirety is that one Co-owner in a tenancy by the entirety cannot alone terminate the Co-ownership arrangement and the rights of survivorship which go with it. Any Co-tenant of property held as joint tenants with right of survivorship can sever the joint tenancy and rights of survivorship at any time (up until death). However, if you and your spouse own property, such as your home, as tenants by the entirety, neither of you alone (without the consent of the other) can change the form of ownership. In any case, property held between you and your spouse as tenants by the entirety will automatically pass to the survivor of the two of you when the first of you dies.

LIFE INSURANCE

In most cases, life insurance proceeds will be paid, upon the death of the insured, to a beneficiary who has been designated by the policy's owner. (In many cases, the insured will be the owner of the policy.) Even if you specifically provide for the disposition in your Will of the life insurance proceeds, that disposition will be ineffective if you have also completed a valid beneficiary designation form.

As a general matter, you can name any person, institution or entity (such as a trust) as the recipient of life insurance proceeds. If an effective designation is not made (for example, you name your mother as the only beneficiary and she dies before you), the proceeds usually are paid to your estate. In any case, where you have named your estate as the beneficiary or the beneficiary designation you have made is ineffective (or you have failed to make one), the proceeds will be received by your estate and will be disposed of by your Will.

RETIREMENT BENEFITS

Usually retirement benefits are disposed of in the same way that life insurance proceeds are, that is, in accordance with a completed beneficiary designation form. In some cases, the retirement plan will require that the proceeds be paid to a member of your family and you will not be permitted to designate any beneficiary. In some cases, as with life insurance proceeds, you will be able to name the recipient of the retirement benefits or, should you fail to name a recipient, the benefits will be paid to your estate for disposition by your Will.

CONTRACTS

In effect both retirement benefit designations and life insurance designations are designations made pursuant to contracts. For example, your insurance policy represents a contract between you (or other owner of the policy) and the insurance company, and the contract gives you the right to name the beneficiary by using a designation form. In addition to retirement benefits and life insurance, there are several other ways in which property will be disposed of by contract at your death. For example, if you have used a trust as a substitute in whole or in part for your Will, the assets owned by or payable to the trust at your death will be disposed of by contract, because the trust is nothing but a specialised type of contract.

Often Co-owners of businesses enter into contracts with respect to the disposition of the business assets when one of them dies. You may be required, for example, to sell all or part of the ownership in your business back to the company or to the surviving owner when you die. Other types of options, which usually are a form of contract, will control the disposition of the property at your death.

Similarly, you may have entered into a property settlement agreement with your spouse or former spouse which will require that certain assets be transferred at your death. You may be required by the agreement to keep a Will in effect providing for the disposition.

POWERS OF APPOINTMENT

Not infrequently, one individual will grant to another the power to specify how property held by a trust or similar arrangement is to be disposed of when someone dies. For example, if your grandmother created a trust for your benefit, she might have granted you the power to say by your Will, or by an instrument executed during your lifetime, who is to receive the trust property when you die.

Often a power to appoint property to others will be exercised in a specific way (such as by making specific reference to the document under which you hold the power). The persons to whom you can appoint the property may be limited (for instance, to your descendants or your spouse). As indicated, in some cases the power of appointment can be exercised by your Will only. (In some cases, your Will be deemed to have exercised the power even if you do not make specific reference to it.) In other cases, however, you can execute the power only by a document executed during your lifetime. Usually if you fail to exercise a power of appointment, the property will pass to beneficiaries specified in the document which conferred the power of appointment to you.

ASSETS DIRECTLY OWNED

Assets which you own directly at the time of your death generally can be disposed of by your Will when you die. (As indicated above, if you have transferred assets to a trust, the terms of the trust will dispose of the assets, as the assets will not be directly owned by you at the time of your death.) If you do not die with a valid Will, or to the extent that your Will fails to dispose of certain of the assets which you own directly at the time of your death, usually those assets will pass pursuant to the "intestacy laws" of the state in which you reside at the time of your death. (Certain assets, such as real estate, usually will pass pursuant to the intestacy laws of the state where the assets are located.)

You do not want to die intestate with respect to any of your property. If you do, state law will decide how your assets are disposed of. If you do not die with close relatives, your assets will pass to the state. For example, except for a minimum amount. (which varies from state to state), if you die with a spouse and children, your spouse will not be entitled to receive all of your assets. Usually, at least one third and in some cases two thirds of your property will pass pursuant to the intestacy laws to your descendants. It is probable that your estate will follow the poorest tax and administrative plan possible if you die without a Will. Among other matters, it is almost certain in most jurisdictions that the individual who ends up administering your estate will have to post a bond. The bonding company will charge for the bond, and either the administrator or your estate will have to pay for it. In almost all cases, the bond requirement can be waived by your Will. Also, if you have minor children, your failure to have a Will probably means that you have failed to designate a guardian.

If your spouse does not survive, there is likely to be a lengthy and costly legal proceeding, if not a bitter one, involving members of your family and your spouse's family as to the selection of the guardian.

LIMITATIONS ON YOUR ABILITY TO DISPOSE OF ASSETS AT DEATH

Introduction

As a general matter in Australia (contrary to rules which exist in several other countries), you are free to dispose of assets by your Will in any manner which is regarded as lawful. (For example, you cannot leave your property in a way which is intended to promote crime.) However, in some cases the law imposes limitations on the amount of property which you are free to dispose of if certain other persons exercise their rights to it. In addition, there are limitations on the manner in which you can dispose of your property. Moreover, for anyone holding any significant amount of wealth, capital gains taxes may erode more than half of the property, meaning in effect that you can only dispose of the balance.

OTHER RIGHTS MAY APPLY TO OTHER PROPERTY

Your ability to dispose of property at your death may also be limited by other legal rights of your spouse or descendants. For example, as a general matter, your spouse will be entitled to certain payments from any retirement plan which was maintained for your benefit or which you own at the time of your death.

Moreover, your spouse may contend that assets in your name are really held for his or her benefit under an implied agreement or trust arrangement. Your spouse may also contend that a portion of the assets in your name belong to him or her by reason of an oral or implied business partnership between the two of you.

Obtaining advice from competent legal counsel is the only way you can be certain of the extent to which your spouse has rights to your property which will limit your ability to dispose of it.

CONTRACT RIGHTS

Although parents rarely contract with their children to leave them property at death, it does happen from time to time. What is more common is for a husband and wife in connection with a divorce to contract to leave to their children a certain percentage of their estates. The extent to which the children can enforce such rights (as opposed to enforcement by the surviving spouse on their behalf) is not always certain. You should discuss with your attorney the extent to which any such contract rights will limit your ability to dispose of your assets at your death and, if you wish, the extent to which you can restrict or eliminate their rights.

CREDITORS' CLAIMS AND EXPENSES OF ESTATE ADMINISTRATION

The costs of your funeral and burial, the charges for administering your estate (including fiduciary commissions, court costs, appraisal expenses and attorney fees) as well as claims against your estate will almost always take precedence over debts and bequests under your Will. Debt obligations almost always take precedence over bequests. In some circumstances, those claims, expenses and charges can be made against property which passes outside of your Will (such as assets held in a revocable living trust at your death). As mentioned above, your spouse, your ex-spouse or your descendants may have contractual rights and will be creditors of your estate on account of contractual rights under property settlement agreements entered into prior to your death.

EXECUTORS, PERSONAL REPRESENTATIVES & CHOICE OF ADMINISTRATORS FIDUCIARIES

The People Who Will Handle Your Affairs After You Die

Any person or institution you name to administer your estate is called an executor. The executor literally "executes" the terms of your Will. If you have no Will, or the person you name as executor does not serve, the person who administers your estate is usually called an administrator. As a practical matter, the duties and obligations of an executor or administrator are identical.

Upon qualifying in court, your personal representative acts to take title to all of your property, pay your creditors and taxes and ultimately distribute the property to those who are entitled to receive it. Your personal representative generally becomes the legal owner of your assets and can decide unilaterally which assets to sell, trade or hold. In addition, a personal representative may be able to decide which assets are given to which beneficiaries. (For example, if you have left half of your assets to your son and the other half to your daughter, the executor may be able to decide which assets each receives.) Failure by your executor to carry out the duties of office carefully can result in significant penalties against your estate. For example, your executor will be charged with filing your estate tax return. Almost always, severe penalties will be imposed if the return is not filed on time. For example, if the return is filed one day late, your estate almost certainly will have to pay a fine equal to 5% of the tax due even if the taxes are paid on time.

Your personal representative may also be personally liable for your debts and pre-death income taxes if they are not paid in full when due. In addition, if your executor fails to administer and invest your assets prudently (something about which reasonable persons can disagree), your executor may be personally liable for any loss or damage which your estate suffers. Your personal representative also may be liable if assets belonging to you are not discovered and collected and your estate loses the ability to obtain them (as sometimes happens). Thus, your executor could be subject to a high degree of personal liability.

For owners of businesses, the choice of an executor is an especially important one. The executor usually will become the legal owner of your business interests and, therefore, able to decide whether to continue the business, sell it, merge it, change lines of business, fire and hire personnel and take all of the other steps which you during your lifetime could take with respect to the disposition and operation of the business. The choice of an executor is often the most critical one in an estate plan; it is even more essential to choose the right personal representative for the estate of the owner of a business.

In any event, in almost all circumstances you can choose whoever you wish to serve as your executor. That choice is one of the most important legal privileges you have.

TRUSTEES

Any trust which you create will be administered by one or more trustees. Usually, a trustee will receive assets directly at your death (as when you name the trust or trustee as the recipient of proceeds of insurance on your life) or will receive them upon distribution from the personal representative of your estate during or at the end of the administration of your estate. The trustee becomes the legal owner of the assets received, although they must be held for the exclusive benefit of the beneficiaries of the trust. As the owner, the trustee can decide which assets to sell, trade, buy or hold. If assets in your business are transferred to a trustee, as a general matter the trustee will be in the same position that you were in to control the disposition of the business and to operate it. In many ways, the powers of the trustee are more extensive than those of your personal representative. First, the administration of a descendant's estate is generally much more limited in time than the administration of a trust.

Second, an executor usually has limited flexibility in deciding how much a particular beneficiary will receive or when the beneficiary will receive assets. It is common, and with good reason, for a trustee to hold significant power to decide which of a group of beneficiaries will receive property and when it will be received. Again, you can usually choose whomever you wish to serve as trustee, subject to very few restrictions.

In some circumstances, the restrictions will be more severe if the trust is created under your Will than if it is created by a written agreement during your lifetime (such as a discretionary trust which acts as a substitute for your Will).

GUARDIANS

As a general matter, you may select the guardian or guardians of the person and property of any minor child of yours if the child's other parent does not survive you. The selection of guardians for your children may be one of the most important functions served by your Will.

If you fail to designate a guardian effectively, the court will have latitude in deciding who the guardian should be. Usually, a relative is chosen as the guardian of the person (with whom the child probably will reside). However, if extensive property is involved, the court may decide that someone other than a family member should be guardian of the property.

If you want to enhance significantly the possibility that the best person will be guardian, you need to name that person in your Will.

ATTORNEYS AND OTHER PROFESSIONALS

As a general matter, you will not be able to require your executor, trustee or guardian to employ a particular attorney or other professional, such as an accountant, to assist in the administration of your estate. You may strongly suggest that a particular person be retained for such purpose although many attorneys regard it as "bad form" for an attorney to prepare a document in which the attorney (or the attorney's law firm) is recommended to be hired. As a practical matter, you can achieve that result by naming a corporate fiduciary (such as a bank or trust company) or naming the professional as the fiduciary. Almost all banks in Australia follow a policy of hiring the attorney who prepared the Will to represent that institution in its capacity as a fiduciary under the Will. If you name the professional as the fiduciary, the professional can generally choose himself or herself (or his or her firm) to perform professional services. For instance, if you name your accountant as the executor under your Will the accountant will generally be able to hire his or her own accounting firm to perform accounting services for the estate.

HOW THOSE FIDUCIARIES ARE CHOSEN

As indicated, you can specify in your Will whom you wish to serve as executor, trustee or guardian. You should be aware, however, that even if only a very small amount of property passes under your Will (because, for example, you have used a discretionary trust as a Will substitute), the powers and duties of your executor (or administrator if you have no Will) will probably be very extensive. For example, under the tax laws *it* is your executor or administrator who is personally liable to see that your estate tax return is filed and all estate taxes paid, even with respect to property not under the control of the executor or administrator. The executor or administrator also is singularly empowered to make certain far-reaching elections under the federal and state tax laws and other state laws. As a consequence, no matter what other planning you have done, you should execute a Will and name as personal representative the person or persons or institution you believe are best qualified to carry out the important duties of an executor.

If you fail to make a Will, or if the person or institution named in your Will fails to serve, the court having jurisdiction of your probate estate (the part of your estate that you could have disposed of by Will) will choose the person to administer it. State law will provide a suggested order or priority for persons to be chosen, usually starting with the surviving spouse (if any). However, the courts will not be required to follow that suggested order in all cases. In fact, some courts, in effect, appoint individuals or institutions the court favours. The court's choice may not be the choice you would make or the choice that will turn out to be best for your family or business.

As indicated, you can specify the individuals or institutions to serve as trustees of trusts created under your Will, including any trusts that you create by exercising a power of appointment under your Will. If you fail to name a trustee, the court will appoint one for the trust. The courts usually have much greater latitude in selecting a trustee than in appointing an administrator. The person or institution which the court chooses may not be what your family wishes or what ultimately turns out to be in your family's best interests. You can assure that the best choice is made only by having an effective designation in your Will or other controlling instrument.

WHERE TO SAFEGUARD YOUR WILL

Lost Wills

Rules relating to the execution of a Will are much more strict than those relating to the disposition of other property, such as the execution of the form by which proceeds of insurance on your life are paid. Usually, in addition to being competent, you must sign your Will at its end, have it witnessed by two persons who are adult and competent (and not beneficiaries under the instrument), and declare the instrument to be your Will (although you do not have to disclose anything about its contents).

Even if you have complied with all of the formalities for execution of the Will, there is a presumption that the Will was revoked if the original is lost. No matter how careful a person you believe yourself to be, there is some probability that the original Will (as opposed to a photocopy) will not be able to be found after your death. Moreover, if the Will is executed in more than one original counterpart, the failure to be able to produce all executed counterparts will result in a presumption that you revoked the Will and it may be denied admission to probate. In either case, legal fees probably will be extensive. A word to the wise is *never* to execute more than one original of your Will. If your attorney insists otherwise, you should check that advice with another attorney, experienced in estate matters, before you do so. In any case, if the original of your Will or all original counterparts cannot be produced when you die, your estate probably will face litigation and attendant expenses.

MAJOR CHOICES: NOT AT HOME

Although you may be inclined to take the original of your Will with you after it has been executed, taking it to your home probably is not a good idea. If you were to die in a fire at home your Will could be destroyed at the same time. In addition, there is a chance that someone - spouse, child, maid or even you might inadvertently throw your original Will away. Keeping your Will at home is not a wise choice.

ATTORNEY SAFEKEEPING

Many attorneys will retain the original of your Will in the firm's safe deposit box (typically called its Will vault) without charge. As with a Will retained by a bank or trust company, you may not have to face the embarrassment of asking for the instrument back. If you want the instrument back, it is probably because you intend to execute a new Will. You can execute the new Will without having possession of the original of the current Will. Once the new Will is executed, possession of the old Will may not be significant.

In a few cases, however, retrieving the original Will can be important. First, you may change the disposition of your property in such a way that you would not want the contents of your prior Will ever to come to light. In other words, you may want the prior Will (and all copies) to be destroyed. You can instruct the person (such as a bank or your attorney) to destroy it for you. Usually, the institution or attorney will not do that but rather return the original to you so that you can destroy it yourself. Whether it is necessary or appropriate to destroy the original (and copies) of a prior Will depends upon the circumstances. In some jurisdictions, people in possession of a Will may be compelled to file it in *court* making it a matter of public record. You should discuss these matters with your attorney at the time you sign your Will. In most cases, however, your attorney will not be compelled to deliver the prior Will to anyone, although if there is a Will contest, the attorney may be required to deliver it upon demand in court proceedings.

In any case, you should retain a photocopy of the original Will. In fact, it is probably better to retain a photocopy than a "conformed" copy in which the names of the person who signed the Will and the witnesses are typed in. As stated earlier, in some circumstances, a Will can be admitted to probate even if the original document is lost. However, as a practical matter, that will be much easier to do if you have an exact photocopy showing signatures. For one thing, the witnesses will be able to verify their signatures.

SUMMARY

The decision as to how best to safeguard your original Will is rather complex. If you have named a bank or trust company as the executor or personal representative, an appropriate choice will probably be to leave the original in the safekeeping of that institution and add a notation to that effect on copies retained by you and your attorney. Placing the original in your attorney's Will vault may also be an appropriate choice, if you are relatively confident that you will not want to retrieve the original from your attorney (as you might if you changed attorneys) or if you can retrieve the original from your attorney without feeling uncomfortable. (You may be able to do the latter simply by writing a letter instructing your attorney to send it to you.)

PROBLEMS TO AVOID IN MAKING A WILL

DO NOT USE FAMILY WITNESSES

The rules relating to the formalities for execution of a Will (such as requiring, in virtually all circumstances, that the Will be witnessed, that all parts of the Will be in writing and that it be signed at the end) are among the strictest of all legal rules. Usually your designation of a beneficiary on a life insurance policy does not have to be witnessed (even though the policy may represent a significantly greater amount of wealth than the amount that you dispose of by Will). One common error is to have family members or other beneficiaries of your Will act as witnesses. Although having a beneficiary witness a Will does not necessarily, in all states, invalidate the Will, it will make the admission of the instrument to probate much more complex and costly. It may also increase the probability of a Will contest and require that the beneficiaries who acted as witnesses forfeit their bequests.

DO NOT WRITE IT YOURSELF

No matter how tempted you may be to write out your own Will by hand, type it yourself or use a form provided by a commercial company, do not try to prepare your Will yourself. Ben Franklin reputedly said, "The lawyer's best client is the man who writes his own Will." What Ben meant, of course, is that a lay person is so likely to make egregious errors that lawyers will get rich in straightening things out afterward.

The amount which your attorney will charge you for preparing your Will depends upon many factors. The charge may vary from a few hundred to tens of thousands of dollars, depending upon the circumstances. Having a lawyer prepare your Will is probably one of the best investments in lawyer's time you can make. Of course, your Will have no real effect upon you during your lifetime; it will only affect your family and other beneficiaries after you die. You may not want to spend *your* money to benefit others after your death.

If that is your attitude, perhaps you do not want a Will at all. But if you do want to make a decision regarding the proper disposition of your own property, you must execute a Will and you should have it prepared by an experienced attorney.

Never Execute More Than One Copy

As stated above, your Will not be invalid because you execute multiple originals, but you are asking for trouble if you do so, The big winners will be the attorneys who will have to convince the court that the instrument should be admitted to probate even though all of the originals cannot be found. There could even be a contest after your death (resulting in greater legal costs) as to whether the Will should be admitted under any circumstances. Keep in mind that those who would take under prior Wills and those who would take if there were no Will may argue that the instrument offered for probate as your Will is not valid.

If you have already executed a Will in more than one original copy, go back to your lawyer, have a new instrument prepared, sign only one original and have it kept safe in the manner suggested above.

Never Make Changes to the Original Signed Copy

If you keep the original of your Will (something you probably should not do), and you want to make changes to it, do not write on the original instrument. Even though Wills have been around for centuries, the law as to when a writing on a Will invalidate it is not as clearly developed as one might assume. The handwritten changes almost never will be regarded as valid but they may result in the invalidity of the underlying instrument. The one thing you can be certain of, if you do make changes on the original instrument, is that your estate will incur significant legal costs after your death.

WILL CONTESTS AND HOW TO AVOID THEM

WHY WILL CONTESTS HAPPEN

Wills and certain other instruments which effect the transfer of property at death (such as designation forms for the proceeds of life insurance policies or pension plans) often have their validity challenged in court. If the instrument is a Will, the lawsuit is known as a "Will contest." Basically, the validity of a Will can be attacked on one or more of three grounds: the incapacity (incompetency) of the person who signed it; failure to conform strictly to the formalities of execution of the instrument (such as having the appropriate number of witnesses); and fraud or "undue influence" practiced on the person signing the Will.

The motive for mounting a Will contest is usually to obtain more property under a prior Will or the intestacy laws (which specify how your property is disposed of if you have no valid Will). For example, you have bequeathed to your spouse the minimum share of your estate to which he or she is entitled. However, under the intestacy laws (or a prior Will executed by you), your spouse would be entitled to more property. Your spouse will have an economic motivation to attack your last Will and seek to have the more advantageous disposition take effect.

One circumstance, perhaps more than any other, which is likely to cause a Will contest is that in which the decedent has treated one child differently from another under a Will or has significantly disinherited one or more children. For example, for reasons good and sufficient to you, you leave all of your estate to one of your children to the exclusion of the others. Obviously, your other children fare better under the intestacy laws. There may be a high probability of a Will contest under those circumstances.

Although Will contests are commonly believed to be motivated by simple greed, the motivation is quite often hurt feelings or frustrated expectations on the part of those who are disinherited or who would receive less than others.

As Tough as It Is, Tell Your Family Your Plans

Individuals who decide to discriminate among their children or who significantly disinherit them, risk harming relationships among their children or between their children and the beneficiaries of the Will. Whatever your reasons for discriminating among your children or disinheriting them, you are almost certainly guaranteeing a similar fate for your surviving family members. For example, if you have children by a previous marriage and leave a significant portion of your estate to your spouse, it is almost certain that the relationship between your children and your surviving spouse will be impaired after your death.

Moreover, you are almost certain to ensure that additional legal costs will be incurred by your estate and the surviving family members as charges and counter charges are made after your death. Lawyers will be the big winners. In fact, in some cases involving post-death lawsuits among family members, lawyers have received a larger portion of the estate than any family member.

In almost all circumstances, if you plan to discriminate by your Will against your children or anyone else who would be a natural object of your bounty it is preferable to explain your testamentary plans to them during your lifetime. That will provide an opportunity during your lifetime for them to try to persuade you to do otherwise. If you are worried about hurting your relationship with those persons, think about how their relationships with other family members might be hurt when you die.

In many circumstances, I recommend to parents who are disinheriting or discriminating against a child to send or have me send to the child a copy of the Will, giving the child plenty of opportunity to lobby for a change. In addition, the child usually comes to accept the fact that it is the parent's wish that the child receive less or be disinherited entirely. Because the underlying motivation for bringing the Will contest often is a belief that the parent could not have intended it, the fact that the parent has advised the child of the discrimination or disinheritance during lifetime forces the child more readily to accept it, thereby defusing the probability of a Will contest.

ALTERNATIVES

Assets may pass at your death pursuant to legal arrangements other than your Will. The advantages and disadvantages of those alternative forms of disposition are also discussed above. If you do not wish to have property pass under your Will, you have two primary alternatives: the transfer of assets into a joint tenancy of assets with rights of survivorship and the transfer of assets in trust prior to your death. As explained above, placing property in joint name with rights of survivorship may not be a wise choice in many circumstances.

First, in many jurisdictions you are likely to be deemed to have made a gift at the time that you create the joint tenancy. Second, in most jurisdictions, you cannot revoke the transfer of the one-half interest, although you may be able to terminate the right of survivorship to your retained one-half interest unless the joint tenancy is a tenancy by the entirety created between you and your spouse.

Trusts are probably the most effective alternative to Wills. In one form or another, trusts are a valid method of transferring your assets at death, provided you have effectively transferred ownership of the assets to the trust prior to your death.

POWERS OF ATTORNEY

EXPLANATION

As a general matter, you can delegate certain of your legal rights and powers to an agent. This delegation can be accomplished in many ways. The most common is execution of a document known as a 'power of attorney.' By a power of attorney you name another person as your 'attorney-in-fact' to act as your agent. Typically, that person is authorised to engage in some, or all, transactions which you could engage in yourself. This includes, for example, the ability to use your money to buy assets, or to sell assets which you own. In many circumstances, the attorney-in-fact's power will be limited to certain discrete matters, such as selling or buying a specifically identified piece of property.

WHY YOU SHOULD HAVE A POWER OF ATTORNEY

ABSENCE

If you own significant property, there may come a time when action should be taken to safeguard it, but there will be no one with the legal authority to do so. For example, you are on a business trip, and a political or military uprising occurs which prevents you from leaving the country or communicating with the outside world. Events at home may arise which require certain action to be taken with respect to your property (such as the voting of shares in your business). More realistically, perhaps, is the case where you are on an extended vacation and cannot be contacted, but circumstances arise which suggest it would be prudent for certain legal action with respect to your property to be taken. If no one has been authorised to take such legal action, it cannot occur.

If you have executed a power of attorney, the attorney-in-fact can take action on your behalf even in your absence.

DISABILITY

Virtually all of us become disabled at one time or another during our lifetime. While undergoing an operation, you are disabled. If you suffer from an illness, such as Alzheimer's disease, you may become legally incompetent, temporarily or permanently. You may suffer a disabling heart attack or stroke. For many reasons, it may be appropriate for action to be taken with respect to your property while you are legally disabled from doing so. There are procedures which can be implemented by the courts to effectuate legal actions when you are incompetent. However, those procedures are usually time-consuming and very expensive. In addition, to go forward, those procedures usually require proof that you are incompetent.

Presenting that proof may be inappropriate or distasteful. Yet, if there is no other mechanism (such as a power of attorney) in effect, your family or colleagues may have little choice but to undertake those procedures.

SELECTING YOUR ATTORNEY-IN-FACT

An attorney-in-fact does not have to be an attorney-at-law. Generally, any competent adult can be an attorney-in-fact. In addition, you can name more than one person as the attorney-in-fact. You can provide that your attorneys-in-fact must act together, by majority or severally (that is, separately). In addition, you can specify that certain of your attorneys-in-fact can take certain actions, while others cannot. For example, you should not give a family member the power to make gifts to family members, for tax and other reasons discussed later.

It often is best to appoint one trusted family member and one third party as attorneys-in-fact. You might, for example, name the person appointed as the executor of your Will (if that person is not a close family member) to be the "independent" attorney-in-fact. That person could make gifts to members of your family or expend funds on their behalf. You should also consider appointing a trusted family member and providing, as long as he or she is available, that only he or she can take action with respect to the commercial disposition of your property, such as its sale. Usually, however, most people provide for both the family and the independent attorney-in-fact to be able to make decisions with respect to the sale or purchase of property and for the independent attorney-in-fact alone to make gifts or other transfers to family members.

Alternatives to Powers of Attorney

The typical "poor person's" power of attorney is a joint bank account, which may be used, for example, to help a parent who becomes unable to manage his or her own financial affairs. Other assets can also be placed in joint name and, as a practical matter, provide you with a method of dealing with such assets.

However, as explained in more detail above, placing property in joint name may produce adverse results overall. Another method is to transfer assets to a trust and to provide for a third party (that is, a person other than the one who signed the trust) to be the trustee. Virtually all commercial institutions will deal with a trustee more readily than an attorney-in-fact. Nonetheless, even if an attempt is made to transfer all of the person's assets to a trust, a power of attorney is still a good idea,

LIVING WILLS AND HEALTH CARE PROXIES

BACKGROUND

Under general principles of Australian law, each of us can direct what medical care we do or do not wish to receive. Unfortunately, however, individuals who need medical care are often incapacitated and cannot make their wishes known. If you are in an automobile accident and are unconscious, you cannot tell the physician whether you want your leg removed to enhance the probability of your surviving. Similarly, during a final illness, decisions as whether or not to take heroic measures to sustain your life briefly, even though the probability of your recovering or your regaining consciousness is remote, cannot be made by you because you are not able to express your wishes.

The law gives effect to documents by which you make your wishes known or name another person to make binding decisions for you if you are not able to do so. These documents are known, respectively, as "Living Wills" and "Health Care Proxies". Health Care Proxies are known by other names, such as Medical Powers of Attorney.

CONTENTS OF A LIVING WILL

DESCRIPTION

Usually, by your Living Will you specify whether you wish life-sustaining procedures to be used when the probability of your recovering is remote - for example, when you are "brain dead." Perhaps nine out of ten individuals who sign a Living Will state that they wish to have the "plug pulled" at the point when they are brain dead. Others, however, wish their lives to be sustained. Whatever your wishes, you should make them known by executing a valid Living Will. Your attorney should know the form which is best for you. Usually, a Living Will validly executed in one jurisdiction will be respected in another.

WITNESSES

Different states prescribe different formalities for executing a Living Will. In some states, you have a choice of having your Living Will witnessed or notarised.

Often Living Will forms will be provided by a health care provider, such as your doctor or hospital. In the event that the instrument must have witnesses, it is a good idea not to have family members act as witnesses.

COPIES, NOTICE AND STORAGE

Although you should never execute your Will in more than one original, it is perfectly fine to execute multiple copies of a Living Will. In fact, execution of multiple copies is a good idea because it permits you to deliver an original to several persons or institutions to make sure an original is on file. You probably should keep an original yourself, allow your spouse or child to safeguard one, and send one to each of your primary physicians. It may also be appropriate to have a copy filed with the hospital in your community. It is also a good idea to give an original to your attorney for safekeeping.

CONTENTS OF HEALTH CARE PROXY

Description

By a Health Care Proxy, you designate an individual to decide what medical procedures should or should not be undertaken for you when you are unable to make that decision. Typically the Health Care Proxy is used not to "pull the plug" but to give that individual the authority to make decisions on your behalf with regard to specific medical procedures, such as transfusions, amputation or other surgical procedures.

CHOICE OF HEALTH CARE AGENT

In most states, you can name only one individual (and not an institution) as your agent by a Health Care Proxy. However, you can name successors or alternates in the event that the first person named cannot act or cannot be found. Most individuals name their spouse or child as the primary health care agent. A close relative is usually in a better position to make medical decisions than your attorney or accountant. Generally, however, you can name anyone you wish, although in some states you cannot name your physician or a health care provider such as a hospital.

WITNESSES

If witnesses are required, the rules governing the witnessing of a Health Care Proxy are similar to those governing the witnessing of a Living Will. Your attorney will be able to advise you as to proper procedures.

COPIES, NOTICE AND STORAGE

As with a Living Will it is usually best for you to execute several copies of a Health Care Proxy. One copy should be delivered to the primary and secondary Health Care agents named, as well as to your physician. You should keep a copy, as should your spouse (even if your spouse is not named as the agent) and a copy should be kept by your lawyer.

HOW OFTEN SHOULD I REVIEW MY WILL?

At Least Every Two Years

As a general rule, you should review your Will in consultation with your attorney at least every two years. Changes in the law are often subtle, but important in cumulative effect. By reconsidering the disposition of your property every two years, you can ensure that your Will reflects your wishes and the interests of those who survive you. Periodic review with your attorney will help to ensure that your Will takes advantage of changes in the laws from time to time.

Whenever a Major Financial, Health or Family Event Occurs

In addition, you should review your Will, with your attorney, whenever a major financial, health or family event in your life occurs. The sale of your business or your retirement would be financial events which would warrant a call to your attorney. Similarly, the receipt of a significant inheritance by you or your spouse should prompt you to call your attorney about your own Will.

If your health, or the health of a major beneficiary of your estate plan should change significantly, you should also call your attorney about your Will. For example, if your spouse develops a terminal illness, you and your spouse should contact your attorney about your Wills to see if changes are appropriate.

You should also call your attorney whenever there is a major change in family relationships or events. This would certainly include your own divorce, but would also include the divorce of a child or grandchild, your child's or grandchild's marriage or the birth of a child or grandchild.

In other words, whenever something happens to you or your family which could have a financial impact, you should call your attorney and discuss whether it would be advisable to revise your Will,

SUMMARY AND CONCLUSIONS

Your Will is often the centrepiece of your estate plan. Although several types of assets will pass at your death other than by your Will, you should ensure that you have an up-to-date Will. Your Will should dispose of your assets in the manner that will best effect your desired estate plan, naming those individuals or institutions that you want to carry out the administration of your estate and any trusts which your Will creates and granting those fiduciaries appropriate powers to assist them in carrying out their responsibilities.

Generally, you have broad flexibility in disposing of your assets pursuant to your Will, although your spouse and others may have rights that will limit disposition. Although Will contests occur somewhat infrequently, and rarely are entirely successful, you may anticipate a contest whenever you discriminate among the natural objects of your bounty or disinherit them totally or substantially. To avoid the erosion of your wealth by attorneys' fees in such a case, and to avoid aggravating relationships among surviving family members, you should consider steps to remove any motivation to commence a Will contest. Discussing the disposition of your estate with your family members well before your death may be the most effective way of preventing a Will contest, even though you may regard the task as a very disagreeable one. In addition to signing a Will, you should consider executing a power of attorney with respect to your property, as well as a Living Will and Health Care Proxy.

C John Pearson FPNA FTIA C.M.C
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