Wills and Powers of Attorney

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Wills

Thinking about estate or inheritance planning is not just for retired people or seniors. Unfortunately, we can't successfully predict how long we will live, and illness and accidents happen to people of all ages. This is particularly the case for dangerous occupations such as fishing and maritime operations.

Inheritance or estate planning is not just for the old or wealthy. Good estate planning often means more to families with modest assets because they can ill-afford to lose anything through poor planning. An inheritance or estate plan begins with making a Will.

Some things about a Will (or a lack of a Will) that might surprise you:

- When you get married, the Will you wrote before marriage is no longer valid, unless it was made in preparation of the marriage.
- If you die without a Will, all your full assets do not automatically go to your partner. You might be surprised to learn that if you have children, your partner will get your personal chattels plus $155,000. Two thirds of the total remaining assets go to the children and only one third to your partner, possibly leaving them in hardship.
- If you die without a Will, as above your assets will be distributed using a formula set out in the Administration Act 1969.
- The last Will you signed – even if it's out of date – will be the one used if you die.
- Wills are not just about what you leave to people – they can also identify the person you want to look after your children.

Why make a Will?

One of the main purposes of a Will is to provide for how you want to distribute what you own if you die. Wills also let you specify guardians for children or to leave special gifts and meaningful things to people or organisations. They can include special instructions for a funeral. If you don't have a will what you would like to happen may not happen in reality. This could put your family into legal and financial difficulties.

You can get a Will drafted by someone with experience, such as a lawyer or trustee company. A Will must also be signed and witnessed. If the proper procedures are not followed, a Will may not be valid.

What happens if I die without a will?

You don't have to go far to find a horror story about family disputes over the estate of a family member or circumstances where family members were unable to access assets following a death to pay bills or even buy groceries. One way to lessen the difficulties for family members you leave behind is to leave clear instructions in your Will as to the distribution of your estate. At a time of loss and grieving, this can be a real and tangible kindness to your family. Another is to ensure access to bank accounts and ensure that appropriate authority to withdraw funds is in place before your family needs to rely on these steps. Remember you are in a high-risk industry and planning is important to support those you leave behind if something unfortunate may occur.

How long does the process take after a person dies to sort their estate?

Sorting everything out after a person dies is not a quick process. Even those with a Will have to wait for probate.

This is a Court order recognising the Will is authentic and confirming the Executor of the Will

has the legal authority to deal with the estate.

Those without a Will have to apply for letters of administration.

It can take around six weeks for the High Court to process the application, or longer if the Court is busy. After probate or letters of administration have been granted, the Executor of the Will or the administrator of the estate has to allow six to twelve months for any claims to be made against the estate before distributing the assets.

Having a Will certainly streamlines the process and importantly is a record of your intentions and wishes as to how your estate is to be dealt with and may allow an Executor to make an interim distribution to beneficiaries (subject to conditions).

Power of Attorney

What is "power of attorney" (POA) ?

Power of attorney (POA) is an authority by which one person gives authority to someone else who is known as the "attorney" to act in their name.

Why is this relevant to me?

If your health deteriorates or you suffer an accident at sea or onshore that means you are unable to run your own affairs, having someone else with the power to do that on your behalf can be a life saver for your family and your business.

Why is it so important to put formal arrangements in place to get a POA?

Many people think their partner or parent will be able to step in automatically but that isn't the case. Your spouse or family members will not be able to deal with any accounts, policies, or possessions if they are in your own name. They would need to go to court to be given that power. This could take months and cost thousands of dollars leaving them in financial hardship.

No matter what your age, the best option is to arrange a power of attorney in advance. It must be made while you have sufficient mental capacity and judgement to allow you to understand what you are doing and the nature of the arrangements you are putting in place. This is not something you can do after you have lost the capacity or ability to act for yourself. The attorney you choose to implement this process should be someone you know well and can trust.

What type of POA should I have?

There are two broad types of powers. These are "ordinary" and "enduring".

Ordinary power of attorney

is best used for temporary purposes – for example, if you're going overseas and want someone to be able to send you cash from your accounts or to pay bills back home. An ordinary power of attorney will lapse if you become mentally incapacitated.

You can appoint whoever you wish under an ordinary power of attorney provided they are 18 years or older.

An enduring power of attorney

is used for longer term protection. This works after you've become mentally incapacitated, while an ordinary power would lapse. Enduring powers of attorney can relate to property or your personal care and welfare. One attorney can act in relation to both property, and care and welfare.

You can also appoint successor attorneys who can step into the role if the attorney who is named first can no longer carry out that role.

An attorney who deals with your property can write your cheques, roll over term deposits, and even sell your home, depending on the power given or excluded in the document.

You can appoint more than one attorney to deal with your property or use a trustee company. You can appoint a professional such as a lawyer or accountant to be your attorney, but you could also appoint a family member(s) or other persons you trust.

You can state if the power of attorney will have immediate effect or if it will come into effect only if you become mentally incapable.

Only a private individual can act as **an attorney for personal care and welfare**. They have no control over money so must consult and work closely with the attorney for property. It's important to select attorneys that are able to communicate and work well together.

An attorney for personal care and welfare can't act in relation to a significant matter unless a relevant health practitioner has certified, or the court has determined, that the donor is mentally incapacitated and incapable.

You can choose practically anyone as your attorney, though to get enduring powers they must be 20 or over when taking on the role, a New Zealand resident, not bankrupt and not be suffering from any legal incapacity.

What protections do I have if I appoint an attorney under an enduring Power of Attorney?

Attorneys have a **duty to consult** and must consult both you and any person who has been specified in the enduring power of attorney. An attorney for property should always consult with you unless there is a medical reason preventing you from understanding the matter.

If separate attorneys are appointed for property and care and welfare, both attorneys must consult regularly to ensure your interests are not prejudiced through any breakdown in communication between them. The property attorney may be asked to pay medical bills to allow the personal care and welfare attorney to undertake their duty. The care and welfare attorney must consider the financial implications of any decision in respect of the donor's property.

Attorneys must **provide information on exercise of powers** to anyone specified in the POA who is to be able to request information or a lawyer appointed by the Family Court.

While a donor is "mentally incapable", an attorney can **only act to benefit the donor**, unless it is authorised by the Family Court. When creating the power of attorney, you can specify provisions for when an attorney can benefit themselves or others.

An attorney is able to recover expenses reasonably incurred and professional fees. Receipts or other reasonable evidence must be retained.

You can set up an enduring power of attorney through a lawyer or trustee corporation.

Powers of attorney stop when the person to whom the power relates dies, therefore they are not a substitute for a Will.