

Contents of the Will

Executor(s)

You must choose one or more persons to be nominated as the Executor(s) of your Will.

The Executor “stands in the shoes” of the deceased person and applies for the a Grant of Probate, and then completes the administration of the estate, in accordance with the provisions of the Will.

It is of course far more common to appoint a member of the family (or a close friend) as Executor, because they would not normally apply for “commission”. Even if they do, he/she/they would be unlikely to be awarded commission if he/she/they are also (a significant) beneficiary. So, a possible claim for commission can be circumvented by leaving the Executor a legacy “in lieu of commission”, or by making the appointment conditional upon he/she/they **not seeking** commission.

If you have business interests, it is advisable that you choose at least one (1) Executor with some commercial experience.

Gifts & Bequests

After appointing an Executor(s), it is then necessary to nominate those persons who are to benefit from your estate.

You are able to make specific bequests of assets or leave the whole of your estate (or particular assets to classes of beneficiaries) in nominated shares or proportions.

It is also possible to grant a life interest in particular assets to someone, in circumstances where the **use** of the capital and assets can be available for “A”, and then be left to another person, in due course upon A’s death. An example would be allowing your spouse to have the use of the family home during his or her lifetime, with the house then becoming the absolute property of your children upon the subsequent death of your spouse (or possibly upon remarriage, leaving the house, or entering into a new a defacto relationship).

Another example would be leaving the income received from shares or an investment property to a particular person during his or her lifetime, with the asset passing absolutely to some other beneficiary on that person's death.

Life estates are often set up to protect residual beneficiaries from possible "misadventures" in marriage.

The creation of limited or life interests and/or the disposal of some assets **may** however have significant capital gains tax implications.

Property and cash can be left to a child under 18 (to receive at some later specified age) and should be held 'in trust', on their behalf, until the child reaches the specified age. In such circumstances it is of course necessary to nominate a competent person or company to act as trustee for the minor beneficiary, to manage the entitlement of that beneficiary in accordance with the laws applying to trustees until the minor beneficiary reaches the applicable age. This is usually called a "testamentary trust".

It is also possible, and often prudent, to allow for advances to be made to a minor, from his or her entitlement, for education, maintenance and benefit, and particularly so if the child suffers from a particular disability or dependency.

It is also necessary to provide for any number of contingencies in the event that the nominated beneficiaries do **not** survive you.

NB:

Property owned by the deceased **jointly** with a spouse or any other person passes automatically to the survivor by virtue of the right of survivorship and not by operation of the Will, and such property does not form part of the deceased's estate. In NSW, property which is owned by more than one person, but not owned or stated to be owned as "joint tenants" is then deemed to be owned as "tenants in common", and may be held in equal or unequal specified shares. If it is intended that the property be held as "joint tenants" then specific use of the word "joint" is required.

Probate

A Grant of Probate is the Order that is made by the Supreme Court, which confirms that the Will that is relied upon is in fact the **last** Will of the deceased, and that the person(s) nominated as the Executor(s) of that last Will has satisfied the Court that he/she/they are the persons to whom the Court should grant such an Order.

So, the nominated Executor(s) 'prove' to the Court that they are the persons entitled, and hence they will be granted "Probate".

The Court Rules require that an Application for a Grant of Probate (and/or Letters of Administration) should be made within six (6) months of the Testator's death. If the Application is not made within that period, an explanation of the reasons for the delay may have to be given (in the form of an Affidavit).

Letters of Administration upon Intestacy

When a deceased dies and he/she has not left a Will, he or she dies "intestate", and his or her estate passes to the next of kin in accordance with the rules of intestacy, as set out in the *Succession Act 2006* (the "Act").

In those circumstances, where a person dies intestate, the Court will appoint an Administrator to carry out the administration of the Estate, and the Court order is then known as "Letters of Administration".

If a deceased leaves a Will which only distributes **part** of the his/her estate – the deceased dies "partially intestate". (If a Will validly appoints an Executor but there is still a partial intestacy, Probate will be granted to the Executor with the partial intestacy then being dealt with in accordance with the intestacy rules.)

Letters of Administration are also required if a sole Executor renounces his or her appointment **or** dies before completing the realisation and distribution of the estate

Hidden Traps

Succession Act 2006

Persons who believe that he/she should have received a benefit in your Will and who do **not** – can, if they qualify, apply to have the provisions of the Will changed.

The Succession Act 2006 enables a class of persons (i.e. husband, wife, children, de facto spouse, former spouse and other persons who may have been a member of household or grandchild **and** who may have been wholly or partly dependent upon the deceased at sometime during the lifetime of the deceased person) to apply to the Court for an order making adequate provision for **their** further maintenance, education and/or advancement out of the Estate.

Any entitlement to be provided for is calculated as the date of hearing of the Application, based on the needs and circumstances at that time.

We will need to be made aware of the circumstances which may give rise to such a possible claim for relief, and the likely comparative claims of all the existing and/or possible beneficiaries, as well as particulars of any acknowledgment by you now, as to the possible claims.

Attorneys and Guardians (i.e. appointments pre-death)

A practical problem can often arise if different persons are appointed to the role of attorneys under Power of Attorney **and** a Guardian under an Appointment of a Guardian.

**See also publication Powers of Attorney and Enduring Guardians – “Planning Ahead”

(For further information please also see our website at www.fglaw.com.au/estate)