JUSTICE OF THE PEACE TRAINING DAY - 8 JULY 2017

WILLS

Media reports one half of New Zealanders do not have a Will, and in the under-40 age bracket that jumps to 70%.

What is a Will?

A Will contains instructions about what someone wants done with their property when they die and how they want their dependants (spouse, civil union partner, de facto partner, children etc) to be looked after. As far as that person and their family is concerned, it could be the most important paper they ever sign.

Justices as witnesses

Justices of the Peace are often called upon to witness people signing their Wills.

The statutory powers and functions of Justices are set out in the Justices of the Peace Act 1957.

[These are to take oaths and declarations under the provisions of the Oaths and Declarations Act 1957 or by any other enactment, and to carry out such functions to exercise such powers as are conferred on Justices by the Criminal Procedure Act 2011, or by any other enactment.]

Justices of the Peace carry out some tasks not as Justices of the Peace (i.e. authorised by statute) but because a person is a Justice of the Peace (i.e. authorised by the government department, institution or agency wanting the task carried out). This includes witnessing signatures and certifying copies as true copies.

Witnessing a Will is not a task of a JP. You are often approached though, as Justices, to witness a Will. A witness to a Will needs no special qualifications, except they should not be a beneficiary of that Will.

The Manual covering your Ministerial Duties as Justices advises that because the witnessing of a Will is not carried out as a JP, you should not write 'JP' after your name. On that basis, you would be witnessing the Will in a private capacity.

One of main drivers of people seeking you out to witness a Will is likely to be the perceived cost barrier of completing a Will with a Lawyer or other professional. Increasingly, there are services being provided online for DIY Will kits and the like, or kits that can be purchased from Whitcoulls or other booksellers.

That being the case, I thought it was worth talking to you about some of the formalities around Wills, the need for people to take advice, and what can go wrong with trying to complete a Will without the proper advice tailored specifically to the individual's personal circumstances.

Who can make a Will?

Anyone of sound mind who is at least 18 years of age 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 they are a seagoing person.

When is a Will required?

A Will is important for most people and particularly in the case of having assets in excess of $15,000. This is because under the Administration Act, formal administration is required to deal with any asset in excess of $15,000. This would mean on the death of the account or asset owner, Probate of a Will or Letters of Administration in the absence of a Will, will be required.

A person should make a Will when they marry or enter into a civil union or de facto relationship or when they have children. Any existing Will is automatically revoked (cancelled) when a person marries or enters into a civil union, unless it has been made in contemplation of that particular marriage or civil union which is best explicitly stated in the Will itself. This applies even if a person marries or enters into a civil union with a person who is a beneficiary under their existing Will. Wills should also be revised if a relationship ends. Where a person separates from their spouse or civil union partner with the intention of ending that marriage or civil union, provisions in the existing will relating to the spouse or partner will remain valid until formal Separation Orders are made by the Court or the marriage or civil union is legally dissolved – that is, the parties have divorced. A Separation or Relationship Property Agreement does not revoke a Will. So a person will need to change their Will if they want to exclude a spouse or partner before a Separation or Dissolution Order is made. When someone divorces, any provision made for their ex-spouse or civil union partner under their Will will be void unless the will-maker has made it clear in the Will that they want them to remain valid.

The situation is different for de facto partners. Entering into a de facto relationship or ending a de facto relationship does not revoke an earlier Will. This means an existing Will benefiting someone other than the current partner remains valid and may disadvantage the current partner.

How much certainty does a Will give?

A Will does not necessarily give more control over the destination of property than dying without a Will. Some statutes such as the Property (Relationships) Act, Family Protection Act and the Law Reform (Testamentary Promises) Act allow certain

people to challenge a Will. For this reason, it is important for someone making a Will to get legal advice relevant to their particular circumstances in order to minimise the chances of a Will being challenged. In the course of taking Will instructions, we as Lawyers will ask questions of the will-maker about their relationship and family circumstances. We are then able to provide tailored advice to them, relevant to the provisions they intend to make. We can also ask them about any promises they may have made to anyone in relation to provision out of their Estate.

A Will can also be challenged if the will-maker was under duress when it was made, or if the will-maker lacks capacity at the time of making the Will. With claims of this type, evidence provided by the Lawyer or other professional who prepared the Will will become quite important as may be the evidence of the witnesses to the Will.

What if you die without a Will?

Where someone dies without a Will, the Administration Act specifies how that person's property will be distributed. In some circumstances this may have a result which is not desired. Where someone dies leaving a spouse or civil union partner or surviving de facto partner, but no children and no parents, the spouse takes the chattels and the remainder of the Estate. Where the person is survived by a spouse or partner and children, the spouse or partner takes the chattels and the balance of the Estate is divided:

A As to the first $155,000 to the spouse or partner;

B As to one third of the balance of the Estate, to the spouse or partner; and

C As to two-thirds of the balance of the Estate for the children.

Where a person dies leaving a surviving spouse or partner, no children but one or both parents, then the spouse or partner receives the chattels and the balance of the Estate is divided:

A As to the first $155,000 to the surviving spouse or partner; and as to the balance:

(a) two thirds to the spouse or partner; and

(b) one third to the father or mother in equal shares, or if there is only one parent, to that parent absolutely.

B If there is no partner, but there are surviving children, then all the Estate goes to the children.

C If there are no children, but surviving parents, then the Estate goes to the parents or parent surviving.

D If there are no parents, but one or more brothers and sisters, then the Estate goes to the brothers and sisters.

E In the absence of brothers and sisters, there is provision for both maternal or paternal grandparents, or one or more maternal or paternal uncles or aunts.

F In the event of none of these, all the Estate belongs to the Crown, and the Crown may (without prejudice to any other powers) out of all or any part of the Estate, provide for dependents (whether kindred or not) of the deceased and other persons for whom the intestate might reasonably have been expected to make provision.

What should a Will contain?

When you are involved in the witnessing of a Will, you will not likely be discussing with the person the contents of their Will. The contents of a Will should include:

A The naming of at least one Executor;

B Provision for payment of liabilities;

C Provision for dependants;

D Preferred guardians of any children;

E Funeral arrangements;

F Any specific bequests or gifts to charity or the like.

While someone can choose what they want to say in a Will, the law specifies how it should be said. If the wording of the Will does not comply with the law, the Will or parts of it may be invalid. For this reason, we recommend the taking professional advice. A Lawyer or other professional advisor can:

A Suggest how the Will can best and most fairly provide for family and dependants;

B Express the will-maker's wishes so they have the legal effect intended, and ensure the Will is properly drawn up and valid;

C Tell the will-maker about any alternatives the will-maker must consider including who may challenge the Will and why. This can be a complex area of law;

D Advise on the appointment of suitable executors;

E Advise on and form Trusts for beneficiaries;

F Explain extra powers available to Executors and Trustees that a will-maker might want to include in a Will and advise on the appointment of suitable people to take on these roles.

As I mentioned at the outset, cost or the fear of the cost is likely to be a barrier for some people in taking advice. When consulting a Lawyer or other advisor about a Will, the will-maker should confirm the charges that might apply beforehand. At the end of the day however, having an appropriately qualified person such as a Lawyer preparing the Will could save the will-maker's relatives and family the grief and expense of having an invalid Will or no Will at all.

In our office, when we are carrying out other work for the clients, we offer a service of preparing a Will for the client free of charge. Because of the time expended in taking Will instructions, preparing the Will and arranging to meet again with the client to sign, and if that cost was charged on a full time cost basis, and the fact that that cost might be a barrier to a client taking that advice, we offer to complete Wills on a discounted basis where the Will is being done as a standalone matter. We offer on our website a facility to answer a simple questionnaire which extracts from the client the information necessary to prepare a straightforward Will for them. Once this information is collected, we then draft a Will to reflect those instructions, and then arrange a time to meet with the client to review those instructions and the draft Will, confirm that the draft meets the intended instructions, advise as to any other issues arising, and finalise and complete the Will. This process offers efficiencies so that we are able to provide a straightforward Will at a cost of $115.00 including GST. Having looked at some of the Will kits available online, this cost compares very favourably with some of the do-it-yourself options available and has the added benefit of the client being able to take specific legal advice directed to their personal circumstances.

What are the requirements for a valid Will?

There are a number of things that can go wrong when completing a Will without qualified advice.

The requirements for a valid Will are set out in the Wills Act 2007. These include:

A A Will must be in writing;

B The will-maker must sign the document or direct another person to sign the document on his or her behalf in his or her presence;

C At least two witnesses must be together in the will-maker's presence when the will-maker signs the document or directs another person to sign the document on his or her behalf or have the will-maker acknowledge that he or she has signed the document earlier and that the signature on the document is his or her own, or another person directed by him or her has signed the document

A Appears to be a Will;

B Does not comply with the formal requirements for validity of a Will;

C Came into existence in or out of New Zealand.

The High Court may make an order declaring the document valid if it is satisfied that the document expresses the deceased person's testamentary intentions. In making that order, the Court may consider:

A The document;

B Evidence on signing and witnessing of the document;

C Evidence on the deceased person's testamentary intentions;

D Evidence of statements made by the deceased person.

Accordingly, there have been situations where Wills prepared by a will-maker in electronic form on a computer have been sought to be proved as a testamentary document and unsigned Wills have been proved.

The importance of accuracy

Even minor or unintended errors in drafting Wills can create issues when it comes to applying for Probate. Examples include missing middle names, names misspelt, occupations or references to place of residence having changed or being recorded incorrectly. If the name of the person making the Will, or the name of any of the Executors stated in the Will does not fully reflect the person's legal name, this needs to be explained in making an Application for Probate of that Will.

Another issue that can arise is where a Will is damaged in some way. A classic example is where something is paper-clipped to a Will or for some reason, someone took a staple out of a Will or dismantled a Will to make a copy. Where there are marks on a Will showing something having been clipped to it or a Will has been dismantled, the Court requires evidence to explain away that damage before granting Probate. In making the application, an Affidavit of Plight is required to provide evidence to the Court to satisfy the Court that the document before it is the entire Will and there is nothing missing.

You can see from the exactness required in the making of an Application for Probate, that any savings made in trying to do a Will using a DIY kit or on your own, could be far exceeded by the additional cost incurred when Probate is applied for, in dealing with any inaccurate or missing information in the Will or other irregularities or issues. For this reason, it really is false economy for people to be doing their own Wills, without taking specialist advice.

Mutual Wills

Another specialist area is the area of mutual Wills. Partners often do Wills which mirror the provisions of each others' Wills. Mirror Wills should not be confused with mutual Wills. A mutual Will is one where two persons make Wills in which each makes provisions in relation to disposal of property on which they have agreed, and each promises to the other that he or she will not revoke that Will without making another Will that keeps their agreement in the same or a better way, or will not change the Will in a way that fails to keep the agreement in the same or a better way, and they will not dispose of, during their life, some or all of the property that the Will deals with. If the first person to die keeps the promise, and the second person to die does not keep the promise, then a person who would have received a benefit under the second person's Will, if that person had kept the promise may bring a claim against that person's Estate. So in this way, mutual Wills become binding on the parties and on the survivor after the death of the first party. For mutual Wills to be effective, the agreement made needs to be recorded in some way. This is best done in the Will itself, but evidence of the agreement can come from other sources. Just because two the provisions of two Wills mirror each other, this does not make them legally mutual Wills, i.e. Wills that are binding in the way that mutual Wills are. Accordingly, if two will-makers wish to make mutual Wills, specialist advice is necessary to ensure that there is an effective agreement to make mutual Wills.

ENDURING POWERS OF ATTORNEY

New forms

You will probably we aware that there has been a recent review of the forms used for Enduring Powers of Attorney for Property and Personal Care and Welfare matters. The idea was to make the forms more accessible to people and to reduce the cost involved in putting in place these documents. It is now possible for people to complete and download their own Enduring Powers of Attorney forms from the Seniors website.

The new forms have been in place since March, and we have already completed a number of Enduring Powers of Attorney under the new form regime. Almost universally, the feedback we have received from clients in completing the new forms is that the forms are onerous, more difficult to follow, and more wordy than the old forms used. In our experience, there has been no cost saving in the new forms. We are yet to have anyone complete the form themselves and bring it to us to complete the witnessing requirements. In our view, that would not serve to save any cost, because in not having had the original instructions, we would need to carefully review the document that they have prepared and confirm that it meets with their intentions and in order to be familiar enough to provide the advice required to complete the certificates required of the witnessing Lawyer.

Rules for witnessing donor signing

There are strict rules surrounding the witnessing of the donor's signature to an Enduring Power of Attorney. The donor is the person giving the Power of Attorney. Only a Lawyer or a qualified Legal Executive or an authorised Officer of a Trustee Corporation may witness a donor's signature. The qualified witness must be independent of the attorney appointed. The witnessing Lawyer, Legal Executive or authorised Officer is obliged to provide the donor with an explanation of the Enduring Power of Attorney and to complete a Certificate of Witnessing.

As a Justice of the Peace, you must not witness a donor's signature.

Witnessing signing by attorney

Because of the requirement for us as Lawyers to be independent of the attorney being appointed under the Enduring Power of Attorney, we have our client (the person appointing an attorney) make arrangements for the attorneys appointed to sign the documents with an independent witness. Witnessing of the attorney's signature is not subject to strict rules. Any person other than the person who witnessed the donor's signature, and excluding the donor, can witness the attorney's signature.

Because of the importance of the document though, we recommend to our clients that they have their attorneys sign with the witness being another Lawyer or Legal Executive, or a Justice of the Peace. In almost all the cases that we have dealt with, the attorney has chosen to use a Justice of the Peace for this witnessing. In doing so, you witness the attorney's signature in the usual way. There are no further duties arising and you do not need to give any advice of any kind.

Your Manual dealing with the ministerial duties that you carry out provides that because the witnessing is not carried out as a function of being a JP, you do not need to write 'JP' after your name. Without exception, in all the cases that we have had where a Justice of the Peace has been the witness to the attorney's signature, the Justice's details have been added to the document, stating their qualification as a JP.

The reason we recommend a Justice of the Peace as a suitable witness is because we consider we can rely on you to carry out certain steps when witnessing the attorney's signature.

These steps include:

A Identifying the attorney signing;

B Ensuring that the signing is completed in the correct place and that the witness details are correctly completed;

and in this way, the signing can be relied on.

While I understand why your Training Manual provides advice that you do not write 'JP' after your name when witnessing the signature of an attorney on a Power of Attorney because the witnessing is not carried out as a JP, as Lawyers preparing the document, we want you to do that because we feel more comfortable relying on you as a witness because of the qualification that you hold, in the same way as other agencies deem you as a suitable person to certify documents and/or complete witnessing.