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Family Law

Notes For Family Law Clients Regarding Wills And Enduring Powers Of Attorney

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If you have separated from your spouse you need to consider whether you should make a new will. You may have made a will in the past which is now inappropriate because it gives all your assets to your spouse and you no longer wish this to occur. Alternatively if you have never made a will the distribution of your assets on your death imposed by the law might not be what you want.

If you divorce your spouse then any will made prior to the divorce is void in respect of any gift in the will to your spouse or any appointment of your spouse as your executor.

However a separation does not revoke any part of a previously made will. Therefore it is the period of separation prior to a divorce that may be the most critical.

IF YOU HAVE NO WILL

If you are married with children and you die without a will then your spouse is entitled to the first \$100,000 of your estate and one-third of the remainder of your estate and your children are entitled to two-thirds of that remainder.

If you are married and have no children and you die without a will then your spouse is entitled to all of your estate.

To overcome these statutory imposed outcomes, and produce a different outcome, you need to make a will.

JOINT ASSETS

Any assets that are owned jointly by a husband and wife automatically pass to the survivor upon the death of one. This occurs regardless of the terms of the will of the deceased. Therefore you cannot gift any part of assets which you own jointly with your spouse in your will. This applies to jointly held bank accounts and jointly owned property. Most

husbands and wives own their home jointly.

It is possible for two people to own a property as tenants-in-common in equal shares, or some other proportions, rather than as joint tenants. If you own an interest in an asset as a tenant-in-common you can gift your share in the asset to someone in your will because upon your death your share in the asset passes to your estate and is therefore governed by the terms of your will.

If you have separated and you and your spouse own property as joint tenants you may both be able to agree to alter the basis upon which you own the property to a tenancy-in-common. This requires the lodging of a transfer signed by you both with the Titles Office. Bank accounts and investments which are owned jointly can be divided into two equal holdings if the parties agree.

If a couple own all their assets jointly then a will made by one of them purporting to gift assets to say the children will be ineffective upon the death of the first to die.

Nonetheless if you have separated it is still worthwhile making a will now to cover future circumstances. For example, if you die and Family Court proceedings have commenced seeking orders in relation to property your executor can continue those proceedings on behalf of your estate. Then, if assets eventually pass to your estate as a result of those Family Court proceedings, they will be distributed in accordance with your will.

It is also sensible to make a new will while obtaining advice about your family law issues as it can be a task which is easily forgotten once those issues are resolved.

IF YOU DIE BEFORE ISSUING PROCEEDINGS SEEKING PROPERTY ORDERS

If you die between separation and divorce and legal proceedings have not been commenced in the Family Court seeking orders in relation to property your executor cannot commence those proceedings on behalf of your estate. Only those assets which you own at your date of death will pass to your estate for distribution in accordance with your will. If you do not have a will they will be distributed as set out in an earlier paragraph headed "If you have no will".

SUPERANNUATION

Any superannuation benefits payable on your death, which might include not only your superannuation account but proceeds of life insurance held by your superannuation fund, are not necessarily distributed in accordance with your will. The trustees of the superannuation fund

have a discretion to pay your superannuation benefits to your spouse, to your children whether they are dependent upon you or not, to anyone who is financially dependent upon you, to anyone who is in an interdependency relationship with you, or to your estate. Only if the benefits are paid to your estate will their distribution be governed by your will. Some superannuation funds invite members to make a nomination of a beneficiary to receive death benefits. These are usually not binding on the trustee.

Some superannuation funds offer members the option of making a binding nomination, that is a nomination which binds the fund trustee. The nomination must be to one of the allowable recipients referred to in the above paragraph. Very few industry funds offer binding nominations but most self-managed superannuation funds and most retail funds do offer these.

You should seek advice about superannuation nominations when giving instructions in relation to your will.

You may have previously made a nomination, whether binding or non-binding, in favour of your spouse. You may wish to alter this. Alternatives would be to nominate your estate, provided you have made a will, to your children if you have any.

Superannuation trustees can pay your superannuation benefits to your spouse regardless of you and your spouse separating. Therefore in the period of separation before divorce or Family Court orders covering your superannuation, you may wish to inform the trustees of the superannuation fund about the breakdown in your relationship. If you do not want the fund to pay all or any of your superannuation

benefits to your spouse you should explain why.

ENDURING POWERS OF ATTORNEY

If you have appointed your spouse as your enduring power of attorney, whether financial or medical, that appointment is not revoked by separation or by divorce. Therefore these powers remain in place unless and until you revoke them in writing. In those circumstances we suggest that you make new enduring powers of attorney which will revoke any earlier ones if you have separated.

Harwood Andrews has a Wills and Estates Department dedicated to succession planning which can assist you in any of the matters discussed above.

If you wish to make an appointment to review your will or your power of attorney please ask our receptionist to make an appointment for you while you are at our office, or telephone on 5225 5251 to arrange an appointment at your convenience.