

**14** When can the assets of an Estate be distributed?

Section 47 of the Administration Act essentially restricts the ability of an Executor (for Probate) or Administrator (for Letters of Administration) to distribute the net assets of an Estate to beneficiaries for a period of 6 months from the date of the grant of Probate or Letters of Administration. For the Executor or Administrator to distribute earlier puts them legally at risk.

The need, in certain circumstances, for an option election pursuant to the Property (Relationships) Act may also be a factor in delaying an Estate distribution.

So, if you are ever a beneficiary, do not expect to be able to collect your legacy straight after the funeral. You need to accept that the Executor or Administrator has a number of legal responsibilities to fulfil and that Parliament has given a minimum of 6 months to undertake those tasks.

**15** What are Letters of Administration?

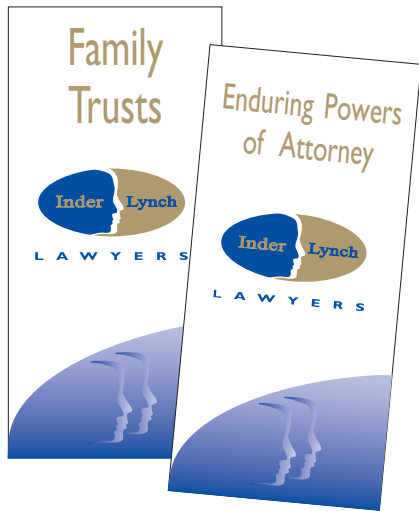
Where there is an Intestacy, the Administration Act requires an application by the next of kin of the deceased be made to the High Court for an Order to Administer the assets of the Estate. The Order made is called "Letters of Administration". The Order appoints the Administrator. The Administrator must administer the Estate in accordance with the Administration Act and he or she has no discretion to vary the terms of distribution.

**16** What is the Family Protection Act?

This Act of Parliament entitles immediate family members of the deceased including defacto partners (both past and present) and in some circumstances the partners children to bring a claim to the Family Court seeking to have the terms of the Will changed. To succeed, the claimant must satisfy the Court that the deceased had a "moral duty" to provide for the claimant in the Will and that the terms of the Will did not satisfy that moral duty. The extent of the moral duty depends upon the particular family circumstances.

**WHY HAVE A FAMILY TRUST?**

What is involved in setting up a Family Trust and what are the advantages?



**WHAT ARE ENDURING POWERS OF ATTORNEY?**

Do I need them and who should be my Attorney?

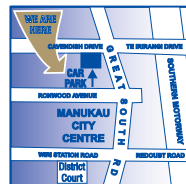
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**Wills & Estate Administration**



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# Important facts about Wills and Estate Administration

## 1 What is a Will?

It is a legal document which sets out your wishes as to who should receive your assets when you die and appoints the person who you wish to administer the Estate (the Executor).

## 2 What is an Executor?

The Executor is the person or corporation appointed by you to carry out your instructions after your death. You may appoint more than one Executor. An Executor may be a member of the family, a friend, your lawyer or other professional advisor, and may also be a beneficiary.

## 3 What is a Beneficiary?

The Beneficiaries are the persons or charities to whom you wish to leave your assets.

## 4 What is a Testamentary Guardian?

Your Will may, if you wish, name a Testamentary Guardian or Guardians for your infant children. A Testamentary Guardian does not necessarily have the immediate care of your children after your death, but that person would have the major say in the care of your children.

## 5 Are there risks in my writing my own Will?

Yes there are. The Wills Act 1837 is quite specific as to the form, content and manner of execution of your Will. If there is not full compliance with the requirements of the Act then it is likely that you do not have a valid Will. Some people attempt to prepare their own Will using a pre printed form but unfortunately they frequently make errors resulting in an invalid Will.

## 6 What is a Memorandum of Intent?

It is a document, usually prepared by you at the time you make your Will, setting out your reasons,

- Why certain people have been made beneficiaries

- Why others have been left out of the Will
- Why certain people have been bequeathed particular assets
- Why others have not

In many situations a Memorandum of Intent will not be required. However, if you anticipate that there could be a dispute after your death then such a memorandum would be useful evidence of your intentions.

## 7 When should I update my Will?

If you already have a Will then you should regularly consider whether it may be out of date. Your circumstances and the circumstances of the people named in your Will can often change.

Good reasons for reviewing your Will are:

- Birth of a child
- Commencing a relationship
- Ending a relationship
- Death of a family member, executor or beneficiary
- Significant change in your assets

Your Will should be reviewed regularly, certainly at intervals of not more than five years.

## 8 Are there differences in the law for Wills between marriage relationships and de facto relationships?

Yes there are.

If you have an existing Will and then get **married**, your Will is automatically revoked upon the new marriage unless the Will is stated to be in contemplation of that marriage. The Will needs to be carefully worded to ensure that it remains a valid Will after your marriage.

For **de facto relationships**, your existing Will continues to be valid even if you enter into a new relationship. It is

therefore **essential** that upon ending a relationship, but before commencing a new relationship, you review your Will.

## 9 What is Probate?

In most Estates when a person dies leaving a Will, Application is made to the High Court for a Grant of Probate. The sealed grant, called Probate, gives the Executors the authority to deal with the assets in accordance with the terms of the Will. Probate is required when the assets include land or substantial monetary assets.

## 10 Who is responsible for paying Estate debts?

The Executors of your Estate will collect in the assets of your Estate. They have the responsibility of paying all debts from those assets. The Estate liabilities must be paid or allowed for before there can be a distribution to the beneficiaries under the Will.

## 11 What are options A and B in the Property (Relationships) Act?

Section 61 of the Property (Relationships) Act requires the surviving spouse of a marriage or the surviving de facto partner of the deceased to choose between:

- Making an application under the Property (Relationships) Act for a division of relationship property (called "option A"); or
- Electing not to make an application under the Act (called "option B").

In electing option A, the surviving spouse or partner ceases to be a beneficiary under the Will of the deceased and ceases to have any entitlement on an Intestacy if the deceased died without a Will.

In electing option B, the surviving spouse or partner is entitled to receive property under the terms of the deceased's Will or; if no Will then, an entitlement on an Intestacy.

The Act does not allow the surviving spouse or partner to claim both under the Act as well as take a share under the Will or on an Intestacy. There is a time limit for making the choice and specific forms to be signed. If no election is made within the time frame allowed then the Act deems that the surviving spouse or partner has elected option B.

The preferred option will depend upon a number of factors including the nature of the relationship, the nature and value of the assets, whether the deceased had been in any prior relationships and the terms of the deceased's Will.

## 12 What is an Intestacy?

If you die without a Will your Estate is said to be Intestate. In this event the Administration Act directs what is to happen to your property and assets. This may not accord with your wishes, and in some cases the result may be unfair, cause unhappiness or even hardship. Administration costs on an Intestacy are likely to be greater than in the case where there is a Will.

## 13 What is a testamentary promise?

Pursuant to the Law Reform (Testamentary Promises) Act 1949, if a person rendered services to or performed work for the deceased and a promise is made by the deceased to reward that person for those services or work then that person may bring a claim against the Estate of the deceased where that promise has not been fulfilled either by a legacy in the deceased's Will or by some other remuneration provided by the deceased. Such services would not include services that arise out of the natural consequences of life within a close family group.

Regardless of the dollar amount or the property actually promised by the deceased, the Court has a discretion to award an amount which is reasonable in all the circumstances (frequently, the Courts have awarded less than the amount promised by the deceased).