

Kowhai Programme

Support for families, whānau & carers

Legal Matters

The Importance of Having a Carefully Considered, Up-to-Date and Validly Executed Will

Why should you have a Will?

- It gives comfort to your family, that your wishes are heard and followed.
- It is sometimes described as a final letter to your family.
- A Will is not required for estate administration if you don't own a house and you have less than \$15,000 in any bank or other institution.

It is a legal document and there are consequences of not having one

- If a person dies "intestate", i.e. without a Will then the law sets out which family members share your estate. This will depend on whether you are survived by a spouse or partner, have children, surviving parents, siblings, grandparents, grandchildren, aunts and uncles.
- Not having a Will means your assets may not go to the person you would have intended them to go to.
- Not having a legal Will causes delays and distress to your family and may be expensive to resolve.
- If you have no family your estate will pass to the Crown.

Your Will is personal

- It ensures your property will be passed on according to your wishes.
- Specific gifts, such as family heirlooms, mementoes, artworks or other precious items will go where you intended.
- Instructions for the distribution of your other assets amongst your spouse/partner, children, grandchildren, other family members or friends or to charities.
- You can stipulate who you would like to take care of your pets.
- Funeral instructions can be included in your will.
- It is useful to have information on your bank accounts, investments, properties, insurances etc. kept with your will.

Validity of a Will

- It needs to be in writing.
- Signed and dated by you, together with two witnesses who are not beneficiaries.
- If you marry your Will is automatically revoked unless you specify the will is made in contemplation of that marriage.
- A divorce does not invalidate a will so it is important to update your Will if personal circumstances change.

- You can prepare your own Will, but if you don't get it quite right it can be more expensive than not having one at all.
- Any jointly owned assets (e.g. House or bank accounts) pass to the survivor, with or without a will.

What your Will should include

- That it revokes any previous Wills.
- Appointment of an Executor and Trustee.
 - ◆ Executor's role – manages the distribution of the will-maker's possessions.
 - ◆ Trustee's role – manages any inheritance until it can be transferred to the beneficiaries, e.g. when a beneficiary reaches a certain age.
- Guardians for young children.
- Instructions as to how you want your possessions (money and assets) distributed.
- Names of people to receive specific items in your possession.
- "Vesting date" – the date each child may receive their inheritance.

Other Details to Consider

Joint property automatically passes to the survivor. If all property, e.g. house, bank accounts, etc. are jointly owned then they pass to the survivor.

- **Ownership of your home**
 - ◆ "Joint Tenancy" –
 - If the Title has the names of the owners and does not relate to "shares" then full ownership goes to the survivor.
 - ◆ "Tenants in Common" –
 - If the Title has the names of the owners and refers to "shares" then the will-maker's share of the house will go to who is named in his/her will.
 - ◆ "Life Interest" –
 - To a person dependent on the will-maker – the right for someone who is not the owner to continue living in the house.
 - Couples who own the house as "tenants in common" would usually give a life interest to the other person.
 - When a life interest ends, the property will pass to the beneficiaries nominated by the will-maker in the Will.

- **Family Trusts**
 - ◆ Property owned by a Family trust is not a personal asset and accordingly a Will doesn't apply to that property.
 - ◆ If the will-maker is a Settlor or a Trustee of a Family Trust.
 - The Family Trust will continue even if the will-maker has died.
 - A Family Trust is administered by the Trustees of the Family Trust, which is a different role to the Trustees of a Will, although they may be the same person or people.
 - Property transferred to a Family Trust is property belonging to the Family Trust and not property to be included in the Will.
 - Consider forgiveness of any debts owed to the will-maker by the Family Trust.
 - Consider nominating a replacement Trustee of the Family Trust.
- **Funeral Trust Funds**
 - ◆ Advance payment can be held in a solicitor Trust Account.
 - ◆ Advance payment can be made through a Funeral Director.
 - ◆ A pre-paid funeral, up to \$10,000, will not be taken into account if applying for a subsidy for long term residential care.

Enduring Powers of Attorney (EPOA)

EPOA documents allow you to appoint a trusted person or persons to make decisions on your behalf in relation to some or all of your affairs.

It is a power of management and/or guardianship given to someone you choose while you are mentally competent but which enables the management of your affairs if you lose mental capacity. Deciding on your own EPOA, who is going to make decisions for you, gives you better control over what happens in the event you lose the capacity to take care of your personal or financial matters due to accident or illness.

Having an EPOA can save time, money and unnecessary stress on your family. If you lose mental capacity and do not have an EPOA than an expensive application to the Family Court can be required. The person who applies to the Family Court to be appointed as your care and welfare guardian, and your property manager, may not be the person you would have chosen.

There are two types of EPOA – Property and Personal Welfare

Property

- This applies to money, assets, information and administration of your affairs generally. You can appoint one or more attorneys to act for you and they can act separately or together (jointly).

- You can appoint successor attorneys to act in place of your “first choice” attorney in the event they are unable to act for you.
- You can stipulate whether your attorney acts for you while you have mental capacity or whether they can only act for you once you lose mental capacity.
- Your attorney can pay bills on your behalf and they can sign documents on your behalf.
- You can require your attorney to consult with other members of the family.
- Your attorney may have to make decisions about whether or not to sell your house should you require rest home care, and can make an application for rest home subsidy on your behalf.
- Be clear about what you want from your attorney, discuss with them where you keep your relevant documents.

Personal Care and Welfare

- You may only appoint one attorney to act on your behalf for this, but you are still able to appoint a successor attorney should your appointed attorney be unable to act.
- This document enables your appointed attorney to make decisions about your personal care only if you have been assessed by a medical doctor as being mentally incapable.
- Your attorney can make decisions, should you need to go into care, about which home or hospital you are to go to. They can also be called upon to assist in decisions about life support.
- Your attorney cannot refuse medical treatment intended to save your life.
- Sadly anyone can have an accident or become mentally incapable without warning. No-one knows when they are going to need EPOA.
- Like a Will, an EPOA can be revoked or replaced any time while you are mentally capable.
- Ideally all adults should have an EPOA.

Enduring Powers of Attorney – Forms

The EPOA documents can be found at <http://superseniors.msd.govt.nz/finance-planning/enduring-power-of-attorney/> and you can complete most of the information on the documents yourself BUT your signature on the documents must be witnessed by a solicitor or a qualified legal executive. If you are unsure, please seek legal advice.

Most rest homes like EPOAs to be in place when you take up residence there.