大成 DENTONS KENSINGTON SWAN

The importance of a Will

By Henry Brandts-Giesen and Silvia McPherson of Dentons Kensington Swan

August 2021

As lawyers involved in preserving and enhancing family wealth we regularly meet with clients to discuss their objectives and risks. For some clients a key priority is building a diversified portfolio of family assets to benefit current and future generations and the community in which they live. It is therefore surprising how often we realise that a client does not have a will or has not reviewed their will in recent years.

Some clients will have a will which has been superseded by important life events such as marriage, new born children, divorce, starting a business, and a substantial increase (or decrease) in wealth. We also remind our clients that weddings and funerals always seem to bring out family differences and a will can help protect against such disputes.

Having a will in place (and regularly reviewing it) is very important.

What is a will?

A will is the expression of a living person's wishes concerning the disposition of property, to take effect after that person's death. It sets out to whom your assets should be distributed after you die. Although making a will is voluntary, it is very important that we make one so that our loved ones and dependents are adequately looked after when we pass away.

A will typically expresses a person's wishes for the division of assets amongst family and friends as well as any special requests. A will can include:

- instructions for payments of all debts and liabilities;
- gifts to named individuals, charities, schools, or groups;
- testamentary trusts for individuals as alternatives to outright gifts;
- an appointment of guardians for children;
- instructions in relation to education and welfare of the children;
- specific terms relating to a family business or a family discretionary trust (if any);
- funeral and burial/cremation instructions; and
- the appointment of executors to carry out the instructions.

What happens if you don't have a will?

A will lets you choose who will inherit what you own. If you die intestate (without a will), the rules of intestacy will determine what happens to your assets. However, intestacy law is archaic and does not adequately protect modern families (such as de facto partners).

In such situations, the estate will be distributed according to the Administration Act 1969 and the administrators may have to trace relatives to ensure that the deceased's estate has been distributed to the correct people. This incurs significant costs for the estate, particularly where professional services and insurance are obtained in the administration process to ensure that all beneficiaries have been accounted for.

Generally, the people who would receive assets of your estate under the Administration Act 1969 have some form of legal relationship with you. For example, a spouse, children, parents, amongst others. The Administration Act 1969 does not make provision for giving specific items to people or gifts to friends or charities and distributions in accordance with its provisions can have unintended, detrimental consequences if you own a business or other complex asset classes.

Who gives effect to a will?

A will appoints executors to manage your estate. These are generally people trusted by you to fulfil the terms of the will.

Executors are responsible for carrying out your wishes as stipulated in the will and making sure your debts are paid and any remaining assets are transferred to the right people. Executors may also act as trustees of a trust set up by the will or that has been set up during your lifetime.

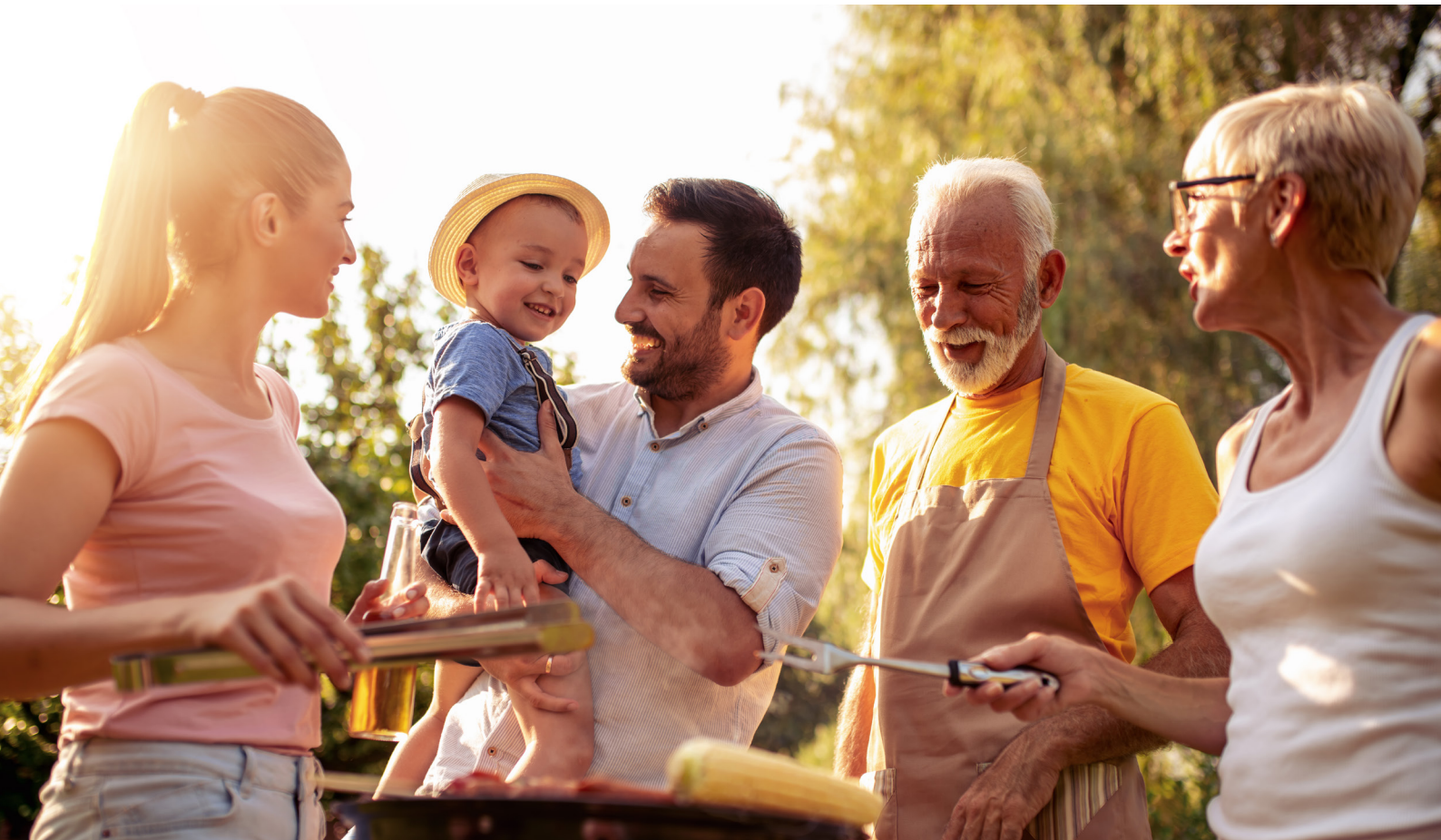
The role of executor is complicated and starts when a person dies and it usually ends when his or her liabilities are discharged and assets are distributed. It is important that the right person is chosen for the role. That person must be empathetic, trustworthy, experienced, independent, accountable to others, and have the right skills. In many cases spouses will appoint each other and, as they get older, they will appoint a child or other family member. Sometimes it is necessary for more than one person to be appointed and a professional person (such as a lawyer) is often chosen.

Without a will there is no such control over who administers your estate. One of your family members or a friend could offer to administer your estate under the laws of intestacy (and to become an 'administrator'), but would need to obtain authority to act by filing an application to the High Court to be granted letters of administration and satisfying various conditions. This may cause delays, distress to your family and unnecessary costs to your estate.

In addition, if you don't leave a will then the administrator of your estate under the laws of intestacy may have to trace relatives to ensure that they have paid out your estate to the correct people and have not left anybody out who should have been a beneficiary. This also incurs expenses to, and delays the administration of, the estate.

What happens if I die with young children?

If you have young children, a will allows you to make provision for their care by appointing guardians. Your will may also make provision for the associated costs and financial burden of caring for young



children. It may not be appropriate to pass assets directly to the child or even the guardian but if you die without a will children would receive any inheritance outright at age 18 under the laws of intestacy. A will allows you to specify that they will inherit when they are slightly older.

It may also be appropriate to set up a discretionary trust in the will to control over how and when an inheritance is paid out and utilised. Specific arrangements could be put in place under the testamentary trust to manage children's inheritance more carefully. For example, the trust could provide a child with an income after your death, rather than them inheriting a lump sum and not knowing what to do with it, or worse, being manipulated into spending it or giving it to someone else.

If you have life insurance, it may be that the policy is written so the benefit passes to a specifically drafted trust. Your executors would need to investigate such matters.

A will can ensure that assets are kept within the family and its future generations. A will may stipulate arrangements to protect a beneficiary from future relationships or going bankrupt (such as requiring that they enter into a 'contracting out' agreement with their spouse or partner in respect of potential claims under the Property (Relationships) Act 1976).

What happens if I have assets in other countries?

As a general rule a person should have a will in every country in which they hold assets. Although a will made in one country can usually deal with assets held in another country, it is often more cost effective to have a will in each country. It can save the executors from the expensive and time consuming process of having a foreign will validated in another legal jurisdiction. This is particularly problematic when dealing with foreign real estate, especially if located in countries outside the Commonwealth.

What happens if I separate?

Marriage and entry into a civil union revokes prior wills. Dissolution of marriage or a civil union does not revoke the whole of the will. Amongst other things, it revokes the part of your will that makes gifts to your former spouse or partner and appoints him or her as the executor to manage your estate, unless contrary intention is clearly shown. However, informal separation short of dissolution of marriage or civil union does not revoke a will. It is therefore essential that wills are regularly reviewed following the trigger of these key events in your life.

New Zealand law does, however, recognise that surviving civil union partners and de facto partners have the same rights as a legally married husband or wife. In addition to the option of receiving a distribution made by the will of their deceased spouse or partner (or under the laws of intestacy if they die without a will), a surviving spouse or partner may make a claim for a distribution of relationship property under the Property (Relationships) Act 1976. Nonetheless, when a person dies leaving an up to date will it makes life much easier for those who are left behind and can help avoid costly and unpleasant family and legal disputes.

What happens if I own a business?

It is important to carefully consider who you want to inherit shares or interest in your family business. A well written will can help you make sure they pass on to the right person or persons. If there is a shareholders' agreement, this may also have an impact regarding who the shares can be passed on to.

Without a will, your shareholding or interest in your family business could, under the laws of intestacy, pass to someone who is not authorised to own them pursuant to the shareholders agreement, someone who has no interest in operating it, someone without the skills or experience to operate it property or multiple people in conflict about how the business should be operated.

Someone who inherits shares in a company will have some control over wider issues, but day-to-day decision making of companies will stay with the surviving directors or partners. The best way to influence the future management of your business is to appoint other directors while you are still alive. This is a large part of the succession planning process. One option is to set up a trust to hold the shares or an interest in your family business, taking them out of your estate and making adequate provisions for your family business within the trust structure.

What if I want to change my will?

A will can be amended at any time by making a valid replacement will or altering the terms of an existing will by using a codicil. It is a good idea to review your will every few years or when you have major changes in your life. In particular, a will should be reviewed or updated when any of the following events occur:

- marriage;
- entry into a civil union;
- entry into a de facto relationship;
- dissolution of marriage or civil union;
- you separate from a marriage, civil union or de facto relationship;
- you set up or terminate a trust;
- you acquire or dispose of significant assets;
- you incur significant liabilities; or
- there are changes in law or tax rules that affect you.

Don't hesitate –make a will or review your current will!

Your will is often your last message to your loved ones and people who are dependent on you. It is a legal document that is unique to your circumstances and can help make sure your estate and your loved ones are taken care of after you are gone. We recommend that good legal advice is taken when making a will so that potential challenges can be anticipated and avoided.

Contacts

Henry Brandts-Giesen
Partner
D +64 9 375 1109
M +64 21 532 770
E henry.giesen@dentons.com

Silvia McPherson
Senior Associate
D +64 9 375 1130
M +64 21 224 6197
E silvia.mcpherson@dentons.com

dentons.co.nz

CSBrand-65734-The importance of a Will — 05/08/2021