

a guide to Wills and Enduring Powers of Attorney

These days, estate planning is more than deciding who will benefit from your assets when you die. In the past, it was sufficient to make a Will setting out your wishes, but modern family structures and lifestyles mean a more comprehensive approach is called for. The aim of estate planning is to minimise emotional and financial hardship for the people you care about and leave behind.

An up to date Will is still the cornerstone of a good estate plan and when drafting a Will you should also consider having Enduring Powers of Attorney in place to provide for your personal care and welfare, as well as the ongoing management of your assets and financial arrangements if you become incapacitated.

What is a Will?

A Will is a document that gives instructions for the orderly distribution of your assets after you die. Your Will identifies who will benefit from your estate (i.e. the beneficiaries) and details what possessions, property or other assets you want them to receive. It also allows you to designate guardianship for dependants or make specific personal requests such as funeral arrangements.

A Will allows you to:

- Provide fairly and adequately for your family and any other beneficiaries you choose.
- Arrange for the orderly sale and distribution of your assets where necessary, as well as the management, conservation and growth of any assets to be retained in trust.
- Provide for payment of outstanding liabilities.
- Appoint a competent executor and trustee to carry out the instructions of your Will and administer your estate.
- Appoint a guardian for your children.
- Set up a trust to meet the ongoing needs of those you wish to benefit.

Who needs a Will?

Everyone over the age of 18 should make a Will. It is the only way to ensure that your assets are distributed according to your wishes.

What's more, a Will should also be updated regularly to take into account any major life changes, such as getting married or divorced, having children and grandchildren, or the purchase or sale of major assets. If your Will is not kept up-to-date, it may no longer be valid. A valid and current Will allows you to retain control over what happens to your assets on your death.

If you die without a Will, your property and belongings will be distributed according to the requirements of the Administration Act 1969. In other words, if you do not have a Will, the law decides arbitrarily 'who gets what' out of your estate, regardless of the needs of those close to you.

SO WHAT HAPPENS TO MY ASSETS IF I DON'T HAVE A WILL?

If you have a spouse or partner, but no children or parents ...	▶ The entire estate is left to your spouse or partner.
If you have parents, but no spouse or partner or children ...	▶ The entire estate is left to parents equally.
If you have a spouse or partner and children ...	▶ Your spouse or partner receives the first \$155,000 and all the personal chattels plus a third of the remainder of the estate. Your children receive the rest of the estate.
If you have a spouse or partner and parents but no children ...	▶ Your spouse or partner receives the first \$155,000 and all the personal chattels plus two-thirds of the remainder of the estate. Parents receive what remains.
If you have children but no spouse or partner ...	▶ The entire estate is left to your children equally. If any have died their children take their share.
If you have no spouse or partner, children or parents ...	▶ The entire estate is left to certain blood relatives, but if there are no such relatives then to the Crown, which may decide on an appropriate distribution.

Do I have enough assets to have a Will?

Everyone should have a Will regardless of what assets they hold. Assets are more than just money and residential or commercial property. You may want particular items of sentimental value to be left to specific individuals.

How do I choose an executor and trustee?

When making your Will you must nominate someone to act as executor and trustee. This person ensures that, on your death, the terms of your Will are carried out.

Choosing the right executor and trustee is important. The duties of an executor and trustee can be complicated, time-consuming and difficult. Duties performed may include Inland Revenue formalities, filing for probate, dealing with claims against the estate, distribution of assets as instructed by the terms of the Will, holding assets on trust for a time (for example if any beneficiary is under age) or selling assets.

Although the appointment of the executor and trustee is your decision, it is essential that your executor and trustee can be trusted to carry out your wishes and also has the required experience, time and skills necessary to do so.

Choosing an independent trustee like Guardian Trust offers many distinct advantages for the administration of your estate.

You will have peace of mind knowing:

- Your estate is promptly administered because of special legal privileges given to trustee companies. This means your beneficiaries can have a portion of your assets on hand quickly for their personal needs, even while some details of settling your estate are still being finalised.
- All estate matters are confidential and only those persons with a right to know about your affairs are given information, ensuring the confidentiality of your assets and beneficiaries.
- Beneficiaries are consulted and advised at each stage and kept informed of all progress during the administration of your estate.

- Guardian Trust has no vested interest in the estate, therefore we act impartially between interested parties, thus avoiding conflicts that can arise in such situations between grieving family members.
- Your estate will be handled by a professional manager who is experienced in estate administration - often a complicated and demanding process, requiring a detailed understanding of the law, taxation and accounting.
- Accounting systems will ensure statements of accounts are accurate and available to beneficiaries on an on-going basis.
- We will be there when the time comes to administer your estate - a situation which may not be true of a family lawyer, a family member or friend. Guardian Trust is firmly established in New Zealand, with origins dating back over 125 years.
- Guardian Trust has access to various agencies throughout the world allowing for faster administration of overseas assets.
- We have a number of branches around the country. If you move, your Will can be transferred to your local branch.

How do I appoint a guardian?

You can use your Will to protect your children's well-being. If you have young children you want to make certain that they will have the best possible upbringing in your absence. You may wish to choose a relative or close family friend to act in this capacity. If you do not appoint a guardian in your Will, the courts will decide.

How do I keep my Will up-to-date?

When you make a Will it is important to update it whenever there are major changes during your lifetime.

Marriage (or re-marriage) usually revokes a Will and therefore anyone getting married should make a new Will. Likewise, if you have separated or divorced, or there are other special circumstances such as adopted children, or children with a disability, you may need to make special provisions for them in your Will.

Regardless of major changes in your life, we recommend you review your Will every three to five years. As professional advisers, Guardian Trust will automatically include you in our Wills review programme. At regular intervals we will contact you by letter prompting you to review your Will and make any necessary alterations should your circumstances change.

Is there anything else I need to consider?

Although you are free to dispose of your estate as you wish, in New Zealand there are three key pieces of legislation which may impose certain obligations on you when you make your Will. It is important to be aware of what is covered by these pieces of legislation and how they may affect the provisions you have made in your Will.

Below is a brief introduction to the three pieces of legislation that could affect your Will.

The Property (Relationships) Act 1976

Since 1976, the law has required that after separation or divorce a married couple should divide their matrimonial assets equally unless there are exceptional circumstances. From 2002, this rule has also applied to a couple who remain together until one of them dies. It also applies to civil union and de facto partners, including same-sex couples. The definition of a 'de facto couple' is fairly broad. It is not just a matter of 'living together' but also whether two people are regarded as a couple by those who know them.

When one spouse or partner dies, it is assumed that all assets are relationship property and therefore should be shared equally unless there is evidence to prove otherwise. It is therefore important that you record in writing which assets you consider to be your own separate property. If there is any doubt about this, you should consider a "contracting out" agreement for which you will need independent legal advice.

In general, the rules about equal sharing apply only after a couple have been together for three years. However, there is a specific exception in the case of a married or civil union couple who are still together when one of them dies. In that case, the three year limit does not apply: the presumption of equal sharing is applicable.

Where a couple separate after less than three years together, the courts look to the contributions of each person and where the assets came from. There are also special rules where a person has more than one partner (either at the same time or one after the other).

On death your surviving spouse or partner will have six months to choose between taking what they have been given under the Will or claiming a half-share of the relationship property. If they choose the second option they will be deemed to have abandoned everything they were given under the Will. However, your Will can say that your spouse or partner is to benefit under your Will even if he or she decides to bring a claim under the Act.

Questions to think about when making your Will are:

- Will your partner receive less than half of the total relationship property under your Will?
- Is there a previous spouse or partner who may have a claim because division of relationship property has not yet been finalised by court order or by binding agreement (an agreement where each of you has independent legal advice under the Act).

Of course if you leave everything to each other in your Will (with provisions for your children to benefit equally once you have both died) then the Act may not be of great concern to you.

The Family Protection Act 1955

The Family Protection Act 1955 gives certain family members the right to claim against your estate if they do not feel they have been adequately provided for under your Will. The family members who have a right to claim are: a spouse or partner (civil union or de facto partner and including same-sex partner), children, grandchildren, step-children (including in some circumstances the child of a de facto spouse), and parents.

Step-children can only claim if they have been supported by you immediately prior to your death, or were legally entitled to have been supported. Parents may only claim if they were being, at least partly, maintained by you immediately prior to your death, (or entitled to be maintained) or there is no spouse, child, grandchild or step-child who can claim.

In determining the extent to which a claim against an estate should be met, the court considers many factors, such as whether you had a moral duty to provide for the claimant, the claimants need for financial provision etc.

When you are giving instructions for a Will to be prepared, we would suggest that you ask yourself whether you have excluded any of the following beneficiaries from your Will, or left them a limited entitlement or an entitlement which is less than they might otherwise expect to receive (e.g. unequal treatment of children)?

- Your spouse or partner.
- A child or children.
- A grandchild or grandchildren.
- A step-child or step-children, including any child or children of your de facto partner who you are or should be supporting.
- A parent whom you are presently supporting.

Law Reform (Testamentary Promises) Act 1949

The Law Reform (Testamentary Promises) Act 1949 provides that:

1. If someone has performed work or services for you during your lifetime (and this generally excludes the normal day to day services another member of your family household may routinely provide, such as cooking, cleaning etc.); and
2. You have made either an expressed or implied promise to make some provision for that person in your Will in return for those services, and
3. You then fail to make that provision

...that person may claim against your estate to enforce that promise.

When you are giving instruction for a Will to be prepared, we suggest you ask yourself:

- Is there anyone who is presently providing you with services, paid or unpaid, who would have the expectation of being included in your Will?
- Have you promised to provide for someone in your Will in exchange for work or services provided?

General

If you answered yes to any of the above questions, please discuss the particular issue or issues with your Guardian Trust adviser who will provide you with, or refer you for, specific advice.

The questions which we suggest you ask yourself are not intended to be a comprehensive list, but are simply designed to help you identify any obvious areas where you may need further advice. If you feel your personal situation may give rise to any other concerns which may impact on the way your Will should be prepared, please raise these issues with your Guardian Trust adviser. You should not rely solely on the commentary provided in this brochure.

What are the costs?

Fees charged for preparing your Will are generally very competitive and proportionate to the complexity of the work involved.

Fees for estate administration are also very competitive.

More information

Call in to any of our branches, visit our website www.guardiantrust.co.nz or telephone Guardian Trust on **0800 87 87 82** for more information.

What is an Enduring Power of Attorney?

An Enduring Power of Attorney (EPA) is a legal document appointing an attorney (an individual or an organisation) to act on your behalf. Unlike a Will, an EPA operates while you are alive.

Why is an EPA so important?

It is usually unforeseen events such as an accident, illness or even an unplanned trip away that can cause problems for you and your dependents. If, for example, you were suddenly incapacitated and had not completed an EPA, a family court order under the Protection of Personal Property and Rights Act 1988 may be the only way decisions could be made about your property and personal care.

An EPA will not only provide for unforeseen events, but can also be used temporarily, for instance, if you are going overseas and want someone to manage your investments or property until you return.

How flexible is an EPA?

You can decide how your EPA will operate. You can:

- Specify when it takes effect: immediately, sometime in the future, or in an emergency.
- Decide whether the attorney looks after all or some of your assets.
- Appoint an individual to work with your attorney.
- Cancel or change it at any time - as long as you have the required mental capacity to do so. You can cancel or revoke this arrangement at any time in writing to your existing attorney, when setting up a new EPA.

Who should have an EPA?

Anyone over 18 years of age should sign an Enduring Power of Attorney.

Who looks after the documents?

Original EPA documents are very important. As with your Will, Guardian Trust will keep your documents in safe custody. We can give a certified copy to you or your appointed attorney at any time if required.

When is the best time?

The best time to provide for maximum and ongoing control over your assets and welfare is now. Many people prepare an EPA when they complete or review their Will.

Setting up an EPA will give you peace of mind that your assets and personal welfare will be properly managed by someone you trust on a temporary or permanent basis, if you become unable to do so.

There are two types of Enduring Powers of Attorney:

- property (assets); and
- personal care and welfare.

Both can be prepared by Guardian Trust. However, while the company can be appointed as a property attorney to look after your financial affairs (running a business, filing tax returns, supervising investments, collecting rents, etc.) only a private individual can be appointed as a personal care and welfare attorney.

Your personal care and welfare attorney attends to accommodation arrangements, purchasing clothing and personal items and medical decisions. We suggest you nominate someone you trust implicitly, such as a friend or relative, to act in this capacity.

Does an EPA affect my Will?

An EPA has no effect on your Will. However, your attorney may have to make decisions which affect property that will be dealt with in your Will. For this reason you may want to complete your EPA and Will at the same time and keep them together. It may be useful to have the ability to make changes to your Will in case your circumstances change in ways you had not anticipated. Your EPA property attorney is able to ask the Family Court for approval to make changes to your Will, or to make a new Will for you, unless you specify otherwise in your EPA.

Why should I choose Guardian Trust as my property attorney?

The Protection of Personal and Property Rights Act 1988 recognises the special role of trustee companies, such as Guardian Trust, to manage assets for people.

Guardian Trust:

- Has the experience and skills to act as a property attorney.
- Offers continuity (unlike an individual, we will not die, become ill or be absent from New Zealand when needed).
- Acts impartially and independently.
- Will work closely with other appointed attorneys.
- Can be your property attorney as well as the trustee and executor of your estate, making effective decisions on your behalf with full appreciation of your wishes as expressed in your Will.
- Will ensure the legal requirements for an EPA are met.

Guardian Trust is not permitted to act as your Personal Care and Welfare Attorney.

What are the costs?

Fees for preparing your EPA are proportionate to the complexity of the work involved. We can provide you with a full estimate of costs during our preliminary discussions with you.

If Guardian Trust is appointed property attorney, fees will be charged for acting on your behalf. Information on fees can be obtained by contacting your nearest Guardian Trust branch.

Recent changes to the law regarding Enduring Powers of Attorney have come into effect to provide greater protection for vulnerable people by strengthening the witnessing requirements for EPAs. This means your signature must be witnessed by an approved person who is independent of your attorney. The same person cannot witness both your signature and your attorney's signature. This may mean additional cost to you. The cost of preparing an EPA is minimal in comparison to the cost for a family court order under the Protection of Personal Property Rights Act 1988.

Before your appointment you will need to consider the following:

- Who do you wish to appoint as your attorney for property?
- Who do you wish to appoint as your attorney for personal care and welfare?
- Do you wish to appoint a replacement attorney in case an individual named as attorney is not able to continue at some stage?
- Do you wish to add conditions, for example should the attorney be required to consult with certain people or to give them annual accounts or other information?

What about the safe custody of documents?

Over your lifetime you may accumulate a number of assets and important documentation. You may wish to keep these documents with your original Will in our custody for safekeeping.

More information

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