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LAWYERS

DISCUSSION PAPER

WHY SHOULD I HAVE A WILL?

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1. INTRODUCTION

- 1.1. “I can do my Will later”, “I don’t want to think about it”, “My family knows what I want” – These are some of the many reasons why people put off doing their Will.
- 1.2. There is no way to predict when you will die or lose the capacity to make a Will, so it is better to organise your affairs sooner rather than later.
- 1.3. This paper looks at the benefits of making a Will, and what happens if you have no Will. It also examines the danger of using Will Kits.

2. SHOULD I EVEN MAKE A WILL?

- 2.1. There are a number of benefits to having a Will. These include:
 - a) **You get to choose your beneficiaries** – A Will lets you dictate how and to whom your estate is to be distributed. This becomes particularly important if you are going through a separation or divorce. If you die without a Will, then people you do not wish to benefit (including ex-partners) can benefit from your estate (see paragraph 3 and 4 below). A Will also allows you to plan for other events, such as who will benefit if one or more beneficiaries predecease you.
 - b) **You can plan for your beneficiaries’ futures** – Mechanisms can be put in place under your Will to provide asset protection for beneficiaries who may be involved in family law matters or bankruptcy proceedings at the time of your death. It may also provide general protections for beneficiaries who are not financially-savvy, are under the age of 18 years, or suffer from a disability.
 - c) **You can choose who carries out your wishes** – Under a Will, you can name a person who will carry out your wishes and administer your estate (known as your “**Executor**”). Your Executor can organise any transfers of property and obtain the Grant of Probate (i.e. approval of the Court) so your estate can be administered. You can also name more than one person to act jointly, or can name substitute Executors who can act if you first choice is unwilling or unable to act (due to illness, age, or incapacity).
 - d) **You can make specific gifts** – If you have a particular item which you wish to go to a specific person, this can be made under your Will. Such a gift is made before expenses of your estate (e.g. tax or funeral costs) so your intended beneficiary is assured to receive their gift (provided you still own the item at the date of your death). You can also arrange for gifts to be made to charities or other organisations if you so choose.
 - e) **You can put other wishes in place** – You can nominate who will look after your children following your death (if their other parent has also died), and include funeral and other wishes.
 - f) **It gives you peace of mind** – A Will prepared correctly and meeting all the legal requirements will help ensure what you want done with your estate will occur and minimises the chance that your estate can be validly challenged.



3. WHAT IF I DIE WITHOUT A WILL?

- 3.1. Dying without a Will (i.e. dying intestate) means that your estate must be divided according to the rules in the *Intestacy Act 2010* (Tas).
- 3.2. Who benefits from your estate depends on their relationship to you. If you have a spouse (even one from whom you have separated near to the date of your death), then they usually receive the whole of your estate.
- 3.3. Your spouse will still receive the whole of your estate if you leave children who are the children of you and your spouse (on the basis your spouse will continue to provide for them).
- 3.4. If you have children to another marriage, then separate provision can be made for them, after statutory prescribed provisions are made to the spouse (including a set spousal maintenance amount, together with half the remaining estate), meaning such children may end up with very little (depending on the size of your estate).
- 3.5. People must also apply to the Court for the right to administer your estate (for “**Letters of Administration**”). There are a list of people who can apply, and their level of priority in applying. For example, a spouse has priority over children, and children have priority over other family members such as your parents, grandparents, aunts and uncles. This means someone could end up administering your estate who you believe would not be the best person or people to do so.
- 3.6. Costs of applying for Letters of Administration are taken from your estate.

4. WHY CAN'T I JUST USE A WILL KIT?

- 4.1. Nearly all the issues arising with the use of Will Kits arise due to human error. Time and again, people believe they have made a Will which meets all the legal requirements and is satisfactory to achieve their wishes, but they have not.
- 4.2. The common errors with a Will made using a Will Kit include:
 - a) no Executor is named;
 - b) the Will is incorrectly witnessed (i.e. less than two (2) witnesses or they have not completed the witnessing details correctly), or the Will is not witnessed at all;
 - c) gifts are made of assets which you no longer own or control at the time of your death;
 - d) tax implications of gifts made are not taken into account;
 - e) failure to deal with the residue of your estate once specific gifts have been made (if any);
 - f) witnesses who are beneficiaries under the Will;



- g) attempts are made to leave someone out of a Will without protections in place to prevent challenges to your estate; and
- h) gifts of assets which do not fall within the estate (e.g. superannuation, properties owned as joint tenants, or life insurance).

4.3. Another shortcoming of Will Kit Wills is that there is no real consideration regarding succession planning and asset protection. Such considerations include protections for children who:

- a) are bankrupt;
- b) have mental health issues (e.g. depression);
- c) have a disability or other handicap which means they are dependent (even as an adult);
- d) are drug or alcohol dependent; or
- e) have a risk of relationship breakdown in the foreseeable future.

The best way to avoid issues later on is to have a Will which is drafted in the best possible manner. While it may cost more than a Will Kit, having a Will prepared by a lawyer ensures your wishes are carried out, protections are in place to reduce the chance of claims, and, most importantly, gives you peace of mind about your affairs.

For further information in relation to the issues discussed in this paper, please contact either Alicia Pelham or Roger Curtis.

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