



Planning for the Future – Wills & Enduring Powers of Attorney

February 2016
Rabia Javed
Senior Associate – Estate Planning and Probate

Disclaimer

The information provided by Slater and Gordon in this presentation is general in nature and should not be relied upon as legal advice.

Legal advice should be sought for specific matters.





| About me

KEY ELEMENTS OF PLANNING FOR THE FUTURE

- + WILL – management, control and distribution of your estate
- + ENDURING POWER OF ATTORNEY – appoint a trusted person to make decisions about financial, legal and personal and lifestyle matters
- + ENDURING POWER OF ATTORNEY (MEDICAL TREATMENT)– appoint a trusted person to make decisions about making decisions regarding medical treatment on your behalf

THE ORDER OF THINGS

- + To protect yourself **during your lifetime**, you should have:
 - + An Enduring Power of Attorney (Financial)
 - + An Enduring Power of Attorney (Medical Treatment)
 - + An Appointment of Enduring Guardianship

- + To protect yourself **on your death**, you should have:
 - + A Will suitable for your personal and financial circumstances



WILLS

WHY MAKE A WILL?

Ensure:

- + ...the right assets...
- + ...go to the right people...
- + ...at the right time...
- + ...in the right manner (i.e., to minimise disputes)...
- + ...net of the right tax (as little as possible)...
- + ...with the minimum cost.

© Slater and Gordon Limited 2015
7

WHAT IS A WILL?

A Will:

- + Is a LEGAL DOCUMENT
- + That appoints an EXECUTOR
- + And deals with ESTATE ASSETS

© Slater and Gordon Limited 2015
8

THE EXECUTOR

- + The Executor appointed under a Will becomes the legal personal representative of the deceased
- + The Executor is responsible for the administration of the deceased's estate in accordance with the contents of the deceased's Will
- + The Executor or Executors may be family members, friends, professional advisors, trustee company or a combination of these people
- + You should always appoint at least one initial Executor and then a substitute in case your first choice is unable or unwilling to act

© Slater and Gordon Limited 2015
9

CONTENTS OF A WILL

For an effective Will, the following issues should be considered:

- + Executors and trustees
- + Guardianship for minor children
- + Specific gifts
- + Funeral and medical wishes
- + Provision for beneficiaries who suffer an incapacity
- + Provision for beneficiaries with a dependency (e.g., drugs)
- + Consideration of blended family issues – ie life interest or Mutual Will Agreements
- + Life interests and rights of residency
- + Testamentary and protective trusts
- + Superannuation
- + Business succession
- + Control of family trusts

© Slater and Gordon Limited 2015
10

“I HAVE A WILL BUT IS IT CURRENT?”

Many Wills “fail” because they are not regularly reviewed. Here are some important things to remember:

- + Marriage revokes a Will entirely
- + Wills survive divorce BUT divorce cancels an ex-spouse’s appointment as executor and any gifts made to them
- + Some Wills do not cover the birth or death of beneficiaries and / or executors
- + Some assets you acquire may not be controlled by your Will
 - + Jointly owned assets
 - + Superannuation and life insurance proceeds
 - + Trust assets
- + Some people dispose of assets prior to their death that are specifically gifted in their Will

© Slater and Gordon Limited 2015
11

WHAT ARE THE CONSEQUENCES OF NOT HAVING A WILL?

- + Court application to appoint administrator
- + Asset distribution by statutory formula without regard to the deceased’s wishes
- + What is certain?
 - + There will be additional and unnecessary legal costs
 - + The deceased’s wishes will not be taken into account
 - + The deceased will not get to choose who controls their estate
 - + There will be additional delays in distributing assets to your family
 - + Your estate may be more exposed to claims
- + Causes additional stress to family and loved ones who are already grieving.

© Slater and Gordon Limited 2015
12

Estate Succession Planning is a three-part process involving

1. Identification of personal assets and those in clients broader estate such as assets owned jointly, or owned by trusts or companies
2. Identification of potential risks including, a clients early death, divorce, bankruptcy or on their death a beneficiary a beneficiary's exposure to risk – including inability to manage money
3. Then design and implement a plan that incorporates all assets and takes into account flexibility to accommodate future changes, risk minimisation, tax minimisation and succession issues.

© Slater and Gordon Limited 2015

13

**Slater
Gordon**
Lawyers

The need for Personal Estate Planning

"BUT IF YOU PLAN YOUR ESTATE PROPERLY, YOUR HEIRS WON'T HAVE ANYTHING TO FIGHT OVER. ARE YOU SURE YOU WANT THIS?"



© Slater and Gordon Limited 2015

14

**Slater
Gordon**
Lawyers

Asset ownership & control

Home

- Self
- Joint

Superannuation

- Superannuation fund

Investments

- Self
- Joint
- Company
- Trust

Insurance

- Individual Beneficiary
- Super fund

Business

- Self
- Jointly
- Company
- Trust

Personal items

- Self
- Joint
- Business

Questions

Who owns or controls them?

What are the commonly owned assets ?

Does my Will control each of these?

© Slater and Gordon Limited 2015

15

Potential Challenges

- + Are there any individuals who may claim to be wholly or partially dependent on you (including step-children or an ex-spouse) who you have not included as a beneficiary?
- + Has anyone provided unpaid or 'less than market' value care to you?
- + Has anyone helped you build your estate assets, for example; who has worked in the business or on a farm and has been paid less than market rates?
- + Are there any other children not previously mentioned?

© Slater and Gordon Limited 2015

16



Enduring Powers of Attorney (Victoria)

Post 1st September 2015



Powers of Attorney - post 1st September 2015

- + *Powers of Attorney Act 2014* and *Powers of Attorney Regulations 2015* – effective 1 September 2015.
- + Enduring Power of Attorney (combination of previous Enduring Power of Attorney (Financial) and Appointment of Enduring Guardian).
- + Enduring Power of Attorney (Medical Treatment) – no change (*Medical Treatment Act 1988*).
- + (Also, General Non-Enduring Power of Attorney).



Enduring Power of Attorney

- + An Enduring Power of Attorney enables a person (the principal) to authorise an eligible attorney/s to do anything on behalf of the person that a person can lawfully do by an attorney.
- + These matters may relate to personal or financial matters or both:
 - + Financial matters – financial, property and legal matters.
 - + Personal matters – relating to the principal's personal or lifestyle affairs, including any legal matter that relates to the principal's personal or lifestyle affairs.
- + The principal can appoint more than one alternative attorney and specify whether those attorneys are to act **together** (jointly), **together or separately** (jointly and severally), **by majority** (where 2 out of 3 attorneys in agreement can act) or **alternatively** (Attorney B is appointed as the alternative attorney for Attorney A).

© Slater and Gordon Limited 2015

19

Enduring Power of Attorney (cont.)

- + The Act also specifies matters for which power cannot be given to an attorney including:
 - + to make or revoke a will or power of attorney for the principal;
 - + to vote;
 - + consent to marriage or divorce;
 - + consent to the principal entering a sexual relationship; or
 - + consent to an unlawful act.

© Slater and Gordon Limited 2015

20

Enduring Power of Attorney (cont.)

- + An eligible attorney is an individual:
 - + Who is over 18 years.
 - + Who is not an insolvent under administration.
 - + If a financial attorney, who has not been convicted or found guilty of an offence involving dishonesty or if so, has disclosed this to the principal and the disclosure has been recorded in the EPA.
 - + Who is not a care worker, health provider or accommodation provider for the principal.
- + A trustee company is an eligible attorney for financial matters.
- + The Public Advocate is an eligible attorney for personal matters.

© Slater and Gordon Limited 2015

21

Enduring Power of Attorney (cont.)

- + Personal and financial attorneys can have separate and different commencement dates.
- + Personal and financial attorneys can have different conditions and instructions imposed on their powers.
- + For example, the principal may specify that:
 - + Attorneys A, B + C are attorneys for financial matters and that they operate in a 'majority decision' way; whereas
 - + Attorneys D + E are for personal matters and operate as joint attorneys.

© Slater and Gordon Limited 2015

22

Enduring Power of Attorney (cont.)

- + A principal may specify when their attorney's power is to commence, which may be:
 - + immediately on the making of the power;
 - + when the principal ceases to have decision making capacity for the matter/s; or
 - + any other time, circumstance or occasion.
- + The Enduring Power of Attorney can be revoked:
 - + through the execution of the prescribed revocation form;
 - + on the death of the principal; or
 - + on the death or loss of decision making capacity of the attorney insofar as it gives power to that attorney.

© Slater and Gordon Limited 2015

23

**Slater
Gordon**
Lawyers



Enduring Powers of
Attorney + Decision
Making Capacity

**Slater
Gordon**
Lawyers

Decision making capacity

For the purpose of the Act, a person has capacity to make a decision as to a matter (decision making capacity) if the person is able to:

- + Understand the information relevant to the decision and the effect of the decision.
- + Retain that information to the extent necessary to make the decision.
- + Use or weigh that information as part of the process of making the decision.
- + Communicate the decision and the person's views and needs as to the decision in some way, including by speech, gestures or other means.

© Slater and Gordon Limited 2015

25

Decision making capacity (cont.)

- + A person is presumed to have decision making capacity unless there is evidence to the contrary.
- + A person is taken to understand information relevant to a decision if the person understands an explanation of the information given to the person in a way that is appropriate to the person's circumstances, whether by using modified language, visual aids or any other means.

© Slater and Gordon Limited 2015

26

Decision making capacity (cont.)

- + In determining whether or not a person has decision making capacity, it is important to note that:
 - + A person may have decision making capacity for some matters and not others.
 - + If a person does not have decision making capacity for a matter, it may be temporary and not permanent.
 - + It should not be assumed that a person does not have decision making capacity for a matter on the basis of the person's appearance.
 - + It should not be assumed that a person does not have decision making capacity for a matter merely because the person makes a decision that is, in the opinion of others, unwise.
 - + A person has decision making capacity for a matter if it is possible for the person to make a decision in the matter with practicable and appropriate support.

© Slater and Gordon Limited 2015

27

Decision making capacity – The Test

Understanding the effect of the decision to make an enduring power of attorney includes understanding the following:

- + That the principal may place conditions on the power and give instructions about the exercise of the power given to the attorney.
- + When the power of attorney commences.
- + That once the power of attorney is exercisable in relation to a matter, the attorney has the same powers the principal has, when the principal has decision making capacity for that matter.
- + That the principal may revoke the power of attorney at any time when the principal has decision making capacity in relation to making the power of attorney.

© Slater and Gordon Limited 2015

28

Decision making capacity – The Test (cont.)

- + That the power continues even if the principal subsequently becomes a person who does not have decision making capacity for a matter in the power of attorney.
- + That at any time when the principal does not have decision making capacity in relation to revoking the power, the principal is unable to effectively oversee the use of the power.

© Slater and Gordon Limited 2015
29

**Slater
Gordon**
Lawyers



| Person Responsible

**Slater
Gordon**
Lawyers

Who can be a 'Person Responsible'?

- + The 'person responsible' can consent to medical treatment on someone's behalf but does not mean they are the person's 'next of kin'.
- + The 'person responsible' is defined as the first person on this list:
 - + Agent under an Enduring Power of Attorney (Medical Treatment).
 - + A person appointed by VCAT to make decisions about the proposed treatment.
 - + A guardian appointed by VCAT to make decisions about medical treatment.
 - + A person appointed by the patient as an attorney for personal matters under an Enduring Power of Attorney (post 01.09.2015) or a person appointed by the patient as an enduring guardian with health care powers under an Appointment of Enduring Guardian (pre 01.09.2015).

© Slater and Gordon Limited 2015

31

Who can be a 'Person Responsible'? (cont.)

- + A person appointed by the patient, in writing, to make decisions about medical treatment, including proposed treatment.
- + The patient's spouse or domestic partner.
- + The patient's primary carer including carers in receipt of a Centrelink Carer's payment, but not paid carers or service providers.
- + The patient's nearest relative over the age of 18 years in the following order:
 - + son or daughter (from eldest);
 - + father or mother (from eldest);
 - + brother or sister (including adopted and half siblings) (from eldest);
 - + grandfather or grandmother (from eldest);
 - + uncle or aunt (from eldest); and
 - + nephew or niece (from eldest).

N.B. Where there are two relatives in the same position (e.g., a brother and sister), the elder person is the person responsible.

© Slater and Gordon Limited 2015

32

What if there is no 'Person Responsible'?

- + If treatment is in the best interests of the patient, but there is no 'person responsible' or they cannot be found, then the practitioner must:
 - + Submit a form to the Office of the Public Advocate under Section 42K of the Guardianship and Administration Act 1986.
 - + The form sets out:
 - + the proposed treatment;
 - + why the practitioner proposes to undertake the treatment; and
 - + the efforts made to locate the person responsible.
- + Treatment can then proceed if legislative requirements are met.

© Slater and Gordon Limited 2015

33

**Slater
Gordon**
Lawyers



Guardianship +
Administration (VCAT)

**Slater
Gordon**
Lawyers

Guardianship + Administration Orders (VCAT)

- + A VCAT application may not be required in all cases where a patient does not have capacity to consent to treatment but it may be prudent to do so if:
 - + There are different views about whether someone has capacity or not.
 - + There is a dispute about the procedure or treatment to be undertaken.
 - + The procedure has significant risks or is ethically contentious.
 - + There are concerns regarding how a attorney, agent or 'person responsible' is exercising their authority.
- + A VCAT application may be required if a patient does not have capacity and a non-medical decision needs to be made, such as a legal/financial decision or general lifestyle decision.

© Slater and Gordon Limited 2015

35

Advance Care Planning

- + In Victoria a patient with capacity can sign a **Refusal of Treatment Certificate** stating they do not want specific medical care:
 - + e.g. refusal of PEG tube feeding, refusal of resuscitation (but cannot refuse palliative care).
 - + The Certificate can only be signed if the person has already been diagnosed with a specific illness and the treatment refusal only applies to that illness.
- + An **Advance Healthcare Directive** can be completed by a competent person of any age, regardless of their health status:
 - + It is an expression of a person's wishes if they become incompetent due to injury or illness.

© Slater and Gordon Limited 2015

36

Advance Healthcare Directive

- + The legal status of an **Advance Healthcare Directive** is unclear because once a person has lost capacity the 'person responsible' is authorised to consent to treatment on their behalf.
- + However:
 - + It can be an important support and guide to represent the patient's wishes for the person responsible or agent under an Enduring Power of Attorney (Medical Treatment).
 - + In an emergency situation, it provides hospitals' treating teams with information to make decisions, in the patient's best interest, in consultation with the 'person responsible'.

© Slater and Gordon Limited 2015
37



Questions?

