

## WILL QUESTIONNAIRE

### Hints

---

#### H1. WHAT IS THE TRUSTEE/EXECUTOR?

A Will needs to nominate a person or persons who will administer your estate when you die. This person is known as the Trustee or the Executor. Their role is to ascertain what assets are owned by you, what your liabilities might be, to ensure that the liabilities are met out of your estate, and then distributing the balance of your estate to persons nominated in your Will as your beneficiaries. It is preferable to check with that person before you nominate them in your Will to be your Trustee as simply nominating someone as your Trustee is not binding on them and they can elect not to be your Trustee following your death. The role of the Trustee/Executor is important and as such the person nominated by you should be responsible and trustworthy. It is also helpful if they live close to where your assets are located, however this isn't essential. Whilst they should be made aware that you wish them to be your Trustee on your death there is no need for them to see the Will prior to your death.

---

#### H2. WHAT IS A SPECIFIC GIFT?

These are gifts of your property to "beneficiaries" (see H6 below) nominated by you in your Will. Any property that you have (other than property which you own as a joint tenant with another person (see FAQ2)) is able to be gifted in your Will. Typically jewellery and family heirlooms are specific gifts given in Wills, however there is no limit as to the nature of property that you can give or to whom you can make the gifts. Caution is required, however, because if a specific item of property is nominated in your Will, such as "my Toyota Corolla motor vehicle, registration number 123ABC" and at the time of your death you do not own that vehicle but have previously disposed of it and replaced it with another vehicle then your beneficiary will not receive the vehicle you currently own. If you wish to leave the vehicle you own at your death to a particular beneficiary then your Will should simply refer to "the vehicle owned by you at your death".

---

#### H3. DO YOU WISH TO LEAVE JEWELLERY, HEIRLOOMS OR OTHER PERSONAL PROPERTY TO SOMEONE?

Care needs to be taken that should you specify a particular piece of jewellery or a particular heirloom and that item is no longer owned by you at the time of your death the nominated beneficiary will receive nothing. They will not receive an alternative piece of jewellery or heirloom or the cash equivalent. Any items of personal property not specifically nominated will form part of the residuary of your estate and go to the Residuary Beneficiaries (see H6). If you simply want all your jewellery divided between your children and you have no particular wish in terms of who gets what, then provision can be made for them to select what they want, or you can leave it up to the discretion of the Trustee to determine who receives which item. Alternatively you can describe your wishes to your Trustee in a Memorandum of Wishes.

---

#### H4. DO YOU OWN A LIFE INSURANCE POLICY OR HAVE AN INVESTMENT WITH AN INSURANCE COMPANY OR A BANK?

A life insurance policy can be owned by someone other than yourself and you can nominate who the beneficiaries under that life insurance policy are. The benefit of making such a nomination in the insurance policy rather than the Will is that the proceeds from the life insurance policy will not form part of your

estate and will be paid by the insurance company directly to the beneficiary. This means that creditors of your estate can not access those moneys and the nominated beneficiary will receive the whole of the life insurance proceeds without deduction. Consideration therefore needs to be given to whether you want any of the proceeds to form part of your estate, or whether you want all of the proceeds to go straight to a beneficiary.

---

#### H5. WHAT IS A SOLE BENEFICIARY?

Typically people in a marriage or stable domestic relationship want to leave the majority of what they own to each other and for their domestic partner to be their Trustee/Executor (a "Mutual Will"). If this is your wish, consideration should be given to what will happen to your estate in the event of your domestic partner dying before you do. Be aware that if you are preparing Mutual Wills, if your domestic partner dies before you, you will receive all of their assets. When you subsequently die, your Will determines what happens to all of the assets that were owned by you and your domestic partner. If you and your partner have children together then typically provision is then made for your assets to go to your children, however if there are no children or if you have children from previous relationships then careful consideration needs to be given to how your joint assets will be distributed following the death of both of you. An important legal consideration is that if you and your domestic partner die contemporaneously then at law, the older of the two of you is deemed to have died first. The assets of the older will pass to the younger partner whose Will determines what happens to your joint assets.

---

#### H6. WHAT IS A RESIDUARY BENEFICIARY?

A Beneficiary is simply a person nominated by you in your Will to receive your assets. The Residuary Beneficiary is that beneficiary (or those beneficiaries) who receive the assets after debts have been paid and specific gifts (see H2 above) have been distributed. The Residuary Beneficiary might typically be your domestic partner, or your children if you have any, or your family members.

---

#### H7. WHAT IS A TESTAMENTARY TRUST?

A "testamentary trust" is essentially a discretionary family trust established under the terms of a will. The assets that form part of the estate will be held in trust for a potential beneficiary until the termination of the trust (for example, in the event the beneficiary reaches a nominated age).

#### **Key Roles**

##### **Trustee**

The Trustee (or the Directors of the nominated corporation) sees to the administration of the testamentary trust assets in accordance with the terms stipulated by you and within the powers afforded to them.

The Trustee has the day to day management of the testamentary trust assets and should be someone who is financially savvy but who will also administer the Trust Fund in accordance with your wishes.

You should consider appointing more than one Trustee to jointly perform this role.

##### **Principal**

The main function of a Principal is to remove/replace the Trustee if and when required. This could, for example, arise if the Principal believes that the Trustee is not administering the Trust in accordance with their powers or in accordance with your wishes.

Given that this is the main function of a Principal, we suggest that you nominate a person that is distanced from the Trustee but who still has the ability to monitor the administration of the Trust Fund and who is not afraid to exercise their power.

## Alternative Principal

The Alternative Principal is a person that the Will Maker nominates to act in the role of the Principal if the Principal were to be removed from that role. The most common scenario's where this happens is if the Principal resigns from their role or passes away.

## Beneficiary

These individuals, class of individuals or entities are entitled to receive a distribution of the income and/or capital of the testamentary trust assets, which is made at the discretion of the Trustee.

If you require further information about Testamentary Trusts, please contact us.

---

### H8. DO YOU HAVE INFANT CHILDREN?

If you have children under the age of 18 then you should nominate who you would like to act as legal guardian of those children following your death. On your death typically the other parent of the children will become their guardian, however your Will should make provision for circumstances where both parents are deceased. As part of your estate planning you need to consider how the guardians will raise your children and cover the cost of raising your children, and what wishes, if any, you may have in relation to how the children are raised. Details of this can be expressed in your Memorandum of Wishes.

---

### H9. DO YOU WANT TO HAVE YOUR BODY DEALT WITH IN A PARTICULAR MANNER?

Not everyone has a specific wish on how they would like their body to be dealt with following their death. In the absence of any express instructions in your Will then your Trustee and your family will make arrangements for you to be buried or cremated. However, by having a provision in your Will you will provide them with some guidance as to what they should do. Bear in mind that if you wish your body to be relocated to be buried then the cost for the repatriation of your body will be borne by your estate and provision needs to be made in your estate for those added costs.

---

### H10. DO YOU HOLD SHARES IN A PRIVATELY OWNED COMPANY (I.E. A PTY LTD COMPANY)?

The shares, which are the asset you hold, can be disposed of in accordance with the terms of your Will. The assets of the company can not. Who you direct to hold your shares after your death shall determine who the directors of the company will be, and those directors will determine what happens to the assets held by the company

---

### H11. DO YOU HOLD ASSETS IN A FAMILY DISCRETIONARY TRUST OR OTHER TYPE OF TRUST?

As stated in H9, assets held by a trust do not belong to you and accordingly cannot be dealt with in your Will. However, provision can be made for the assets held in a family trust which you control, to be dealt with in accordance with your wishes if the trust is correctly structured and appropriate provisions are included in your Will. Where the trust is a unit trust the asset to be disposed of in your Will will be the units held in that unit trust. You should obtain a copy of the trust deed establishing your trust and give it to us to review as part of the preparation of your estate plan and your Will.

---

### H12. DO YOU CARRY ON A BUSINESS?

If you carry on a business, consideration needs to be given to the nature of the business you carry on and what your wishes are for the conduct of that business should you die. How your business is dealt with after your death may depend upon:

- (a) whether you have business partners who would want to acquire your interest in the business;
- (b) whether the business is able to be run in your absence;
- (c) whether the business has intrinsic value and is able to be sold;

- (d) whether you own the business in your own name as a sole trader or as a partnership with another person; or
- (e) whether it is owned by a company or trust that you control.

If the business is owned by a company or a trust rather than you personally then your Will can not effectively deal directly with the business assets. Your Will can only deal with property that you own personally such as shares in the company that owns the business. If you have assets in a company or a trust then read H10 and H11.

---

### **H13. DO YOU OWN SUPERANNUATION?**

Most working people these days have a superannuation fund. You can nominate a beneficiary of your superannuation fund by completing a Binding Nomination Form and giving it to the trustee of your superannuation fund. A Binding Nomination Form is effective for three years only. The benefit of making such a nomination is that the proceeds from your superannuation fund on your death will go to that beneficiary and will not form part of your estate, therefore creditors of your estate (people to whom you owe money at the time of your death) cannot get access to those funds. You can nominate more than one beneficiary of your superannuation policy and you can nominate yourself as one of those beneficiaries so that some of the superannuation funds forms part of your estate. This could be important to ensure that there are sufficient funds in your estate to pay your funeral and other expenses (which are paid in priority to your creditors), and if you wish to leave cash to a beneficiary to ensure that they receive that cash. It is important to note that on your death the assets of your estate will be distributed in the following order of priority:

- (a) payment of your funeral and other testamentary expenses;
- (b) payment of your creditors;
- (c) any specific gifts that you have specified in your Will;
- (d) any general gifts specified in your Will;
- (e) distribution of the balance (residuary) of your estate to the Residuary Beneficiaries.

You will see therefore that if some cash is left to your estate then it will be used first to pay for your funeral and other testamentary expenses before the funds are made available to your creditors.

## Frequently Asked Questions

---

### **FA Q1 DO YOU WISH TO FORGIVE DEBTS OWED TO YOU?**

It may be that during your lifetime you have loaned money to individuals or to companies or trusts in which you have an interest and consideration needs to be given to whether or not you wish those debts to be forgiven at your death. If you do not have a provision in your Will for the forgiveness of the debts, or some other documentation in place which has the effect of forgiving the debt at the time of your death, then your Trustee/Executor has a legal obligation to pursue the payment of that debt even if it is from a close family member or an entity in which you have an interest. Careful thought needs to be given on this issue as debt forgiveness can be used as an effective estate planning tool.

---

### **FA Q2 DO YOU OWN REAL ESTATE AS A JOINT TENANT WITH ANOTHER PERSON?**

Property, including real estate, can be owned by more than one person. When you purchase real estate jointly with another person part of the information required to be given to the Lands Department is how you each hold your interest in that land. Typically a husband and wife own property as "joint tenants". People who are business partners might own property as tenants in common. The difference is that if you own property as joint tenants then on the death of one of you the survivor automatically becomes the owner of the whole of the land (this is called the "survivorship rule"). If you own property as a tenant in common then on your death your interest in that property forms part of your estate and can be distributed in accordance with your wishes in your Will. If you own property as a joint tenant then you cannot dictate to whom your interest in the property will pass on your death as the property will not form part of your estate. The survivor automatically acquires your interest. Where property other than real estate is owned jointly, such as money in a bank account, furniture or a motor vehicle, at law you are deemed to own the property as joint tenants (in the absence of any evidence to the contrary). The survivorship rule applies and the person with whom you jointly acquired that property becomes the sole owner of the property. It doesn't form part of your estate.

---

### **FA Q3 DO YOU PROPOSE TO GIVE PROCEEDS HELD IN A PARTICULAR BANK ACCOUNT TO A BENEFICIARY?**

If the bank account is solely in your name then you can identify the bank account and state that the proceeds are to go to a particular Beneficiary. The Beneficiary will then receive whatever is in that bank account at the time of your death. If the bank account is closed that Beneficiary will not receive any proceeds at all. If it is your wish to leave a Beneficiary a sum of money then it is better to nominate the amount of money they are to receive rather than refer to the bank account.

---

### **FA Q4 DO YOU OWN PUBLIC COMPANY SHARES?**

Shares in a public company (such as BHP) can be left to a Beneficiary. If the shares held by you are in a private company (a Pty Ltd company) refer to H10 and FAQ7.

---

### **FA Q5 DO YOU WANT TO LEAVE MONEY TO CHARITY?**

If you wish to leave money or assets to charity then the proper name of the charity needs to be inserted to ensure that the gift is effective. If it is a cash donation that you wish to make then you need to structure your affairs such that there are adequate funds in your estate to make that gift. If you have concerns about your Will being challenged and the charitable gift not being made, you can always make the gift during your life time rather than make the gift from your Will.

---

**FA Q6 DO YOU WANT TO DONATE YOUR ORGANS?**

A provision in your Will that you wish your organs to be donated will be ineffective if your Will is not read by your Trustee for several days after the date of your death. For your organs to be useful they need to be removed from your body immediately after your death, and accordingly you should register your wish with the appropriate authorities to ensure this is to occur, such as the Australian Organ Donor Register.

---

**FA Q7 DO YOU HAVE AN INTEREST IN A COMPANY WITH A NON-FAMILY MEMBER?**

If your interest in the proprietary limited company is with a business partner who is not a family member then you need to consider some business succession planning. This potentially will include an agreement with your co-shareholders to allow them to acquire your shares following your death. If you have a shareholders agreement then the shareholders agreement may make provision for your shares to be acquired by your co-shareholders. Potentially a similar provision might be found in the constitution of the company. It is important for you to provide to redchip lawyers a copy of your shareholders agreement (if any) and a copy of the company's constitution as their terms will have an impact on the terms of your Will.

---

**FA Q8 WHAT IS A MEMORANDUM OF WISHES?**

A Memorandum of Wishes is a document separate from your Will which advises your Trustee/Executor of how you want your Trustee to deal with certain things within your estate. This might include:

how you want your personal property distributed;

if you have infant children how you want them to be raised (for example, if you have any wishes in relation to schools you want them to attend or their religious affiliations); or

if you have property held in a trust or a company how you might want the Trustee to exercise their discretionary powers.

It is important to note that the Memorandum of Wishes is not binding on the Trustee, and should the Trustee not follow the wishes in your Memorandum of Wishes then the beneficiaries can take no action against the Trustee. It is however a useful tool for expressing your wishes to your Trustee about many of the things that cannot be expressed in your Will. Your Will should make specific reference to the Memorandum of Wishes, thus notifying the Trustee of its existence. The Memorandum of Wishes should be kept with the Will for the same reason.