**Taking Instructions for a Will:**

A Checklist for Solicitors

Compiled by the

**ELDER LAW, CAPACITY AND SUCCESSION COMMITTEE**

UPDATED August 2018

**Disclaimer:**

This publication has been produced solely for solicitors and law practices to provide general information to assist solicitors to take instructions from a client for a will. It is a general guide only and is not exhaustive of issues which may be encountered. While every care has been taken in the production of this publication, no legal responsibility or liability is accepted, warranted or implied by the authors, editors or The Law Society of New South Wales and any liability is hereby expressly disclaimed.

COPYRIGHT NOTICE

© 2018 The Law Society of New South Wales, ACN 000 000 699, ABN 98 696 304 966.

This work is copyright. Except as permitted under the *Copyright Act 1968* (Cth), no part of this publication may be reproduced without the specific written permission of The Law Society of New South Wales.

Contents

[Testator’s details 4](#_Toc392687298)

[Capacity 4](#_Toc392687299)

[Previous wills/arrangements 5](#_Toc392687300)

[Beneficiaries’ details 5](#_Toc392687301)

[Executors’ details 7](#_Toc392687302)

[Assets 8](#_Toc392687303)

[Liabilities 11](#_Toc392687304)

[Trusts 11](#_Toc392687305)

[Superannuation 12](#_Toc392687306)

[Distribution of estate 12](#_Toc392687307)

[Infant Children 16](#_Toc392687308)

[Disposal of body 16](#_Toc392687309)

[Authorisations 17](#_Toc392687310)

**Will Instructions**

**Date:**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

# Testator’s details

|  |
| --- |
| Full name: |
| Alternative name: |
| Address: |
| Postal address: |
| Occupation: |
| Identify testator using Lawcover Client Identification Checklist |

# Testamentary Capacity

|  |
| --- |
| Date of birth:Age: |
| Is there any doubt about the client’s testamentary capacity? |
| If there is doubt about testamentary capacity:* Refer to the Law Society guide “[When a Client’s Mental Capacity is in Doubt: A Practical Guide for Solicitors](https://www.lawsociety.com.au/sites/default/files/2018-03/Clients%20mental%20capacity.pdf)” or [Attorney General’s capacity handbook](http://www.publicguardian.justice.nsw.gov.au/Documents/capacity_toolkit0609.pdf);
* Interview the testator alone;
* Ask open-ended questions eg What is a will? What does a will do?;
* Take detailed instructions;
* Obtain medical evidence where possible. Refer to the [pro forma letter to doctor regarding capacity assessment](https://www.lawsociety.com.au/sites/default/files/2018-05/Proforma%20letter%20to%20Doctor%20capacity%20assessment%20-%20Will.docx); and
* Retain all notes and medical evidence indefinitely.
 |
| If it is clear that the testator lacks testamentary capacity consider the possibility of making a statutory will.Statutory wills are dealt with under sections 18-26 of the *Succession Act 2006* |

# Previous wills/arrangements

|  |
| --- |
| Has the testator previously made a will?If so, obtain a copy. |
| Does the testator have a will in another jurisdiction?If so obtain a copy. |
| Has the testator ever made a mutual will?If so, did the testator sign a mutual wills contract?If either of these are the case, obtain a copy. |
| Has the testator signed a binding financial agreement?If so, obtain a copy. |
| Is the testator aware of any other restriction on disposal of an asset? |

# Beneficiaries’ details

|  |  |  |  |
| --- | --- | --- | --- |
| **Name** | **Age** | **Dependent?****Y/N** | **Special needs/issues****eg pension, vulnerable, FPA, bankruptcy, divorce/separation** |
| **Spouse** |
|  |  |  |  |
| **De facto spouse** |
|  |  |  |  |
| **Former spouse(s)** |
|  |  |  |  |
| **Children from current relationship** |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
| **Children from other relationships** |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
| **Stepchildren** |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
| **Other dependents** |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
| **Children of deceased children** |
|  |  |  |  |
|  |  |  |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  |  |  |  |
|  |  |  |  |
| **Other relatives** |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
| **Other beneficiaries** |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |

# Executors’ details

|  |
| --- |
| **Executor 1** |
| Full name: |
| Alternative name: |
| Address: |
| **Executor 2** |
| Full name: |
| Alternative name: |
| Address: |

|  |
| --- |
| **Executor 3** |
| Full name: |
| Alternative name: |
| Address: |
| **Notes** |
| Is a charging clause required?Y/N |
| Is a notice under rule 12 of the Solicitors Rules required?Y/N |

# Assets

|  |  |  |  |
| --- | --- | --- | --- |
| **Asset** | **Ownership****Sole?****Joint?****Tenant in common?** | **Value** | **Location of deeds/certificates/ policies etc** |
| **Real property** |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
| **Household contents & personal effects** |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |

|  |
| --- |
| **Bank accounts** |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
| **Shares (public companies)** |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
| **Shares (private companies)** |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
| **Units in managed funds** |
|  |  |  |  |
|  |  |  |  |
| **Units in property/other trusts** |
|  |  |  |  |
|  |  |  |  |
| **Life-insurance** |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
| Is there a nominated beneficiary? |
| **Loans by the testator** |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
| **Employment benefits on termination** |
|  |  |  |  |
|  |  |  |  |
| **Interest in deceased person’s estate** |
|  |  |  |  |
| **Motor vehicles** |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
| **Digital assets** |
|  |  |  |  |
|  |  |  |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
| Advise testator to inform executor of all digital asset passwords |
| **Assets legally but not beneficially held (e.g. on trust)** |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
| **Other assets** |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |

# Liabilities

|  |  |  |  |
| --- | --- | --- | --- |
| **Debt** | **Creditor** | **Amount owing** | **Secured/unsecured** |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |

# Trusts

|  |  |  |  |
| --- | --- | --- | --- |
| **Name of trust** | **Trustee(s)** | **Beneficiaries** | **Assets** |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
| List all trusts in which the testator is an office holder or named beneficiary.Obtain copies of the trust deed & financial statementsAscertain vesting date of trust |

# Superannuation

|  |  |  |  |
| --- | --- | --- | --- |
| **Name of fund** | **Trustee** | **Members** | **Death benefit** |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
| Ascertain position in relation to the testator’s death benefit nomination – binding or otherwise, lapsing or non-lapsing. |

# Distribution of estate

|  |
| --- |
| **Specific gifts** |
| **Asset** | **Beneficiary** | **Value** |
|  |  |  |
|  |  |  |
|  |  |  |
|  |  |  |
|  |  |  |
|  |  |  |
| **Life estate/right to reside** |
| Asset: |
| Beneficiary: |
| Terms: |
| Remainder beneficiaries: |
| **Testamentary trusts** |
| **Trust 1** |
| Trust name: |
| Trustees: |
| Beneficiaries: |
| Appointor: |
| **Trust 2** |
| Trust name: |
| Trustees: |
| Beneficiaries: |
| Appointor: |
| **Trust 3** |
| Trust name: |
| Trustees: |
| Beneficiaries: |
| Appointor: |
| **Trust 4** |
| Trust name: |
| Trustees: |
| Beneficiaries: |
| Appointor: |
| Special terms of trust(s): |
| **Special disability trust (model deed to be incorporated)** |
| Trust name: |
| Trustees: |
| Beneficiary: |
| Appointor: |

|  |
| --- |
| **Residue** |
| **Beneficiary** | **Asset/share of estate** | **Value** |
|  |  |  |
|  |  |  |
|  |  |  |
|  |  |  |
|  |  |  |
|  |  |  |
|  |  |  |
|  |  |  |
| **Substitute beneficiaries** |
|  |  |  |
|  |  |  |
|  |  |  |
|  |  |  |
|  |  |  |
|  |  |  |
| **Charities** |
| **Charity 1** |
| Full name:Registered address:ABN: |
| Obtain bequest clause: |
| **Charity 2** |
| Full name:Registered address:ABN: |
| Obtain bequest clause: |

|  |
| --- |
| **Charity 3** |
| Full name:Registered address:ABN: |
| Obtain bequest clause: |
| **Estate liabilities** |
| Issues:* Taxes including CGT;
* Taxes payable by non-resident beneficiaries;
* Estate debts
* Locke King’s Act
 |

# Infant Children

|  |
| --- |
| **Guardian(s) of infant children** |
| **Guardian 1** |
| Full name: |
| Address: |
| Relationship: |
| **Guardian 2** |
| Full name: |
| Address: |
| Relationship: |
| **Note:*** When is the appointment to take effect?
* Are the powers of the guardian to be extended/limited?
* Is there to be financial provision for the guardian?
 |

# Disposal of body

|  |
| --- |
| **Testator’s wishes as to disposal of body** |
| Burial: Y/N |
| Cremation: Y/N |
| Specific instructions as to disposal: |
| Reserved plot: Y/NDetails: |
| Specific instructions in relation to a funeral: |
| Organ donation: Y/NAny restrictions: |

# Authorisations

|  |
| --- |
| Authority to provide copy of will to executor? Y/N |
| Authority to provide copy of will to attorney under power of attorney? Y/N |
| Authority to inform executor of relevant information in advance of death? Y/N |