

## YOUR WILL AND ESTATE PLAN

QUESTIONS	IN AUSTRALIA	IN PHILIPPINES
Your home State / Province		
Do you have existing Will?		
Real estate property you own		
Personal assets you own Eg bank accounts, shares, car		
Private Company share, director? Family Trust beneficiary, trustee?		
Loans / Debts owed <b>to</b> you By whom? In writing? Terms?		
Liabilities, debts <b>you</b> owe Eg mortgage, personal loans, credit cards etc		
Spouse – wife, de facto		
Children and their age(s)		
Your executor and alternative		
Guardian of kids etc		
Your death wishes Eg funeral, cremation, organ donor, back to Australia etc		
Specific Gifts Eg money, car, house, RSL, charity		
General / Residuary gifts Balance of estate Eg all to wife, then to kids etc		
Power of Attorney General / enduring Financial, Medical, Guardian		
Superannuation Benefits Fund name, receive pension?		
Life Insurance policy? Who is beneficiary?		
Digital assets Login facebook, bank, email		

# GENERAL NOTES ON WILLS

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## IF THERE IS NO WILL

Dying without having made a valid will is also known as dying intestate. It is a common belief that if you die without a will your property is taken by the government. This is not correct, however legislation in Philippines and each State in Australia sets out a system for dealing with your estate. If you die without a Will and have assets in Australia, a close relative will usually apply to the Supreme Court for a grant/order for Letters of Administration to give them legal power to deal with the assets, usually in accordance with the applicable State intestacy formula (and which differs from State to State).

This may create major headaches for those left to clean up after you. And it may take a long time, perhaps years, not to mention possibly large legal or other bills, for your assets to be released and distributed. Getting your affairs in order gives peace of mind as well as expediting estate administration.

You should be aware of Philippines inheritance law and tax, which is not covered here, and applies according to many variables such as the existence of any spouse and/or children, whether you are citizen or alien, residence etc.

And you should be aware that certain assets may not necessarily form part of your estate, ie they may have to be distributed according to different laws, eg where you own property jointly (eg with wife) or superannuation accounts.

## **BEFORE DOING A WILL**

You need to consider what assets and liabilities / debts you have and where they are located – it is best to draw up a list (eg bank account in Philippines, property in NSW, mortgage in NSW etc). You should also make a list of where any important documents are stored, eg property title deeds, company share certificates, trust deeds, superannuation documents, birth/marriage etc.

Whomever you appoint as executor will then get a court order necessary to deal with those assets, to sell or distribute, to reinvest etc. according to your Will and / or the relevant law (ie where the asset or liability is located). A lawyer can assist in this process. IT IS A VERY IMPORTANT DECISION.

**Who needs a Will?** You generally need to do a Will if you own assets and:

- are in a domestic (previously known as a de facto or same sex) relationship and you want your partner to inherit anything
- have children and you want to make arrangements for someone of your choice to care for them should you die (although your wishes may not take effect if the person you choose is not the appropriate person to care for the children)
- want to make special gifts to people from your possessions, whether they are family members or not
- want part or all your estate to go to somebody outside the family, such as charities.

## **MAKING A WILL**

You can buy will kits from a number of sources, hire a lawyer to draft a Will for you or do it yourself, eg using the proforma provided, which has been designed to comply as far as possible with both Filipino and Australian State laws (which generally provide for overseas Wills to be valid in Australia provided the relevant formalities are observed). Wills made under Australian law can also be valid in the Philippines. All Australian States now recognise Wills made under the International Convention (Washington USA 1973).

If you are making a will it is important to make sure it is done properly. It can be very stressful for those close to you if your will does not do what you intended - remember, you will not be around to explain what your intentions were. Another note details some of the broader principles of estate planning.

You should get legal advice to make sure that your will properly expresses your wishes – in particular you should get a review from a Filipino lawyer who may well be the notary who formalises the Will under Philippines law.

Your money, property, possessions and other assets are referred to as your estate. The people you choose to inherit your money or other gifts from your estate are known as the beneficiaries of your Will.

When making a will, it is common to name someone as the person you want to handle things for you after your death. This person is called the executor.

The executor of your estate is usually your partner, someone in the family, or another person you know well and can trust. Sometimes lawyers may offer to be the executor of your estate. They will charge for their work, as do State Trustees if appointed. These costs are paid out of money in your estate.

When you die, your debts become debts of your estate. The debts can be paid from money in the estate and if necessary, property can be sold in order to pay the debts. It is not your family's responsibility to pay your debts after your death. Debts of your estate must be paid before beneficiaries can claim their inheritances under the Will. Some inheritance tax may also be payable.

Funeral costs are generally paid from your estate. If you die without enough money to pay for the funeral, then the person who arranged the funeral pays.

Do a draft first, and once it is settled to your satisfaction, go to a Notary office to execute the Will (this is the preferable way) or arrange execution yourself if that is not necessary eg if you only have Australian assets and there are no issues under Philippine law, in which case two not three witnesses will do.

## **EXECUTING A WILL**

Ensure that you read and understand the formal requirements for execution of the Will, namely the following:

- Need for three independent adult witnesses who are in the same room as the Testator and the Notary at the same time. They must have Philippines domicile, which should include persons having an Alien Certificate of Residency (ACR).
- That no witness is under 18 years of age.
- No witness is a beneficiary of the Will or the spouse of a beneficiary.
- That all three persons (the Testator and the witnesses) use the same pen – preferably a BLUE ink pen.
- That the Testator dates the Will by filling in the day of the month and the month in the blanks appearing in the “IN WITNESS whereof I have executed this my Will .....” at the end of the document.
- That the Testator signs at the right of the brackets of the execution clause at the end of the document which begins with

the “Signed by the Testator (your full name should be here) .... ” sentence with your normal signature just as you sign a cheque.

- That the Testator and the three witnesses sign in the left margin of each of the pages of the Will, ie sideways but not on the print!
- That the three witnesses print their names in block letters, print their address, and print their occupations beneath their signatures on the page headed “Attestation Clause” below the execution clause.
- That no paper clips or staples are **attached** to the Will document (because it raises suspicion by the Probate Office of the Supreme Court of a missing, once attached, Codicil to the Will).

You should also be aware of the advantages of executing a Power of Attorney and Medical Power of Attorney under Australian and/or Philippine law. If you require any additional information contact a qualified legal practitioner.

### **IMMEDIATELY AFTER SIGNING THE WILL**

- Make photocopies of the signed Will and give them to a lawyer, notary, the executor and anyone who should have a copy. It is best to keep copies of your Will to a minimum, but if you do make further copies, write ‘**COPY**’ on each page of any copy of the Will.
- Do not attach anything to the original Will, even by paperclips, as this may place doubt on the contents of the Will. Do **not** put any staples in the Will **apart from those with which have bound its pages**.
- The original Will should be kept safe, either with a lawyer or firm of lawyers, in your bank safety deposit box, with the Registrar of Probates of the State Supreme Court or with the executor or close and trusted family members. Your branch may even provide this facility in future.
- Note on the copy of the Will or the envelope in which it is contained:
  - Where the original of the Will is lodged. It is important that it can be easily found when needed;
  - The names, addresses and occupations of the witnesses; and
  - The date you signed the original Will.
  - Keep the copy in your filing cabinet with your important papers.
- Tell the executor where the original Will is kept, and when it was deposited there.
- You may wish to make a list of your assets to assist your executor(s), as stated above. If you do, keep the list with the copy Will, **not** the original. A list of this kind does not form part of the Will itself. This list should ideally refer to the acquisition date, cost and the nature and date of any capital improvements to enable your executor(s) to complete any necessary estate tax returns.

- Once your Will has been correctly signed - but NOT BEFORE - please (with a pencil) rule a line through each page of your OLD, revoked Will, and write on it "Revoked by Will dated \_\_\_\_\_ presently held at \_\_\_\_\_, and file the old Will with the copy of the new Will".

## **LATER RECONSIDERING YOUR WILL**

If your circumstances change, or you decide you want to do things differently, you must change your will. Review the copy of your Will every two to three years or whenever a major event occurs in your family, you shift interstate or overseas, your assets or the taxation laws to make sure the Will still reflects your wishes.

If you marry, any Will you had before the marriage is generally revoked unless it specifically says that it was made with marriage in mind.

Getting divorced does not make a will invalid, but it may invalidate the gifts to divorced spouses and the divorced spouse may not be able to act as executor. For example, in Victoria any benefit conferred on a divorced spouse fails and may become part of the residuary estate. This matter is complex, especially if a divorced spouse is still named as an executor in the Will. The law regarding this area is not uniform throughout Australia. If you are contemplating a divorce, or have been divorced since making your Will, you should consult a lawyer, as divorce will not, generally, automatically revoke your existing Will.

In particular, you should consult a lawyer if:

- You change your name (for example, after marriage) or anybody in the Will changes his or hers;
- An executor dies or becomes unwilling to act as executor or becomes unsuitable due to age, ill health or any other reason;
- A beneficiary (that is, someone who has been left something in the Will) dies;
- You have specifically left any property which you subsequently sell or give away or put in trust or into a partnership or which changes its character. This applies particularly to specifically bequeathed shares in a company which restructures its share capital;
- You marry or divorce, or if you have children (including adopted or fostered children); or you enter or end a de facto relationship.
- If you wish to change your Will or revoke it or make a new Will without informing your husband or wife or de facto spouse, you may do so but you should consult a lawyer. Note, however, that where mutual wills have previously been made between two parties, special procedures may need to be taken to change one of such Wills.
- Do not add to or delete from the Will after execution. Consult a lawyer if you want to change or revoke your Will because even the simplest changes must be correctly done (by another document called a Codicil with two witnesses attesting in writing as with the original Will) or they may have serious consequences.