



**PAVE THE WAY**

vision to action through planning

# Preparing to Make a Will

What to do before visiting your solicitor

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Pave the Way

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Pave the Way works with families to clarify their vision for their family member with a disability and to plan to implement that vision. As part of our work, we aim to assist people with accurate, relevant and timely information to help with planning.

Our aim is not to duplicate what is already available or to be a one-stop-shop of detailed facts on every topic. We aim instead to highlight areas that people may wish to explore further in their planning. Some information will be in the form of printed Fact Sheets designed to raise questions about a topic and to be starting points for exploring possibilities. Other information will come from talking with Pave the Way staff or through hearing about the stories of other families and their experience of the “facts behind the facts”.

Information is an important part of the process of planning. Without information, our dreams may take longer to take shape or may be limited by not knowing what is possible. Information is not the starting point, however. At Pave the Way we believe that planning must begin with a clear vision for the life we want. If this is clear then information can help to put that vision in place. If we are not clear about what we want then our dreams may be limited by any information we might find.

Information can help us translate our vision into reality. It cannot create or direct that vision.

Printed information quickly becomes out of date so it is important to check details before any planning decisions are made. We also encourage families to contact us to talk more about any of the printed information when it becomes available. At Pave the Way we do not believe that there is a quick fix to the question of creating and securing a good life. We can only offer to assist families in their efforts to clarify their vision and to plan. Providing information is one part of that work.

# PREPARING TO MAKE A WILL

## What to do before visiting your solicitor

It is important to make a will so that we control how our assets are distributed when we die. This is particularly important when there is a family member with a disability who may be more dependent than other family members on receiving an adequate share of the estate assets. Careful planning and preparation before making a will can help ensure that what is written reflects what we hope for in the life of our son or daughter.

The following notes are designed to help think through some of the practical and more theoretical issues involved in preparing to meet with a solicitor. Many of these questions apply generally when making a will. Some are particular to the situation when there is a person with a disability in the family.

### What to think about beforehand

Legal and financial planning is just one part of the whole picture for families in thinking about the future for family members with a disability. Any decisions about wills, trusts and guardianship must first be shaped by a clear vision for the best possible life that can be imagined for them. This vision, and the planning to make that a reality, will direct the decisions made about questions such as the future of the family home, how assets are divided or the possible need for a trust. Some of these decisions will be easier to make if families have established a network of supportive people who share their vision. It is especially important to talk with other family members about these issues before seeing a solicitor.

#### ***Thinking about the person***

- What do they hope for in their life?
- What are your hopes and dreams for your son or daughter?
- What is realistic in all the circumstances? Think about the size of your estate and the interests of other family members who will receive a benefit.
- How could the arrangements in your will affect the vision and plans you have for your son or daughter's future? (where they live, their social contacts etc)
- What support (other than financial) will be needed when the family is no longer able to provide it?

#### ***Thinking about financial issues***

It is important to seek your own financial advice, as each family situation is different. Taxation and Social Security regulations are complex and can change. These are some of the questions you may need to consider.

- How will support arrangements for your family member be funded?
- If they will live in their own home, or the family home, will there be adequate funds for maintenance, insurance and rates of the property?
- Be aware of the potential Social Security implications of trust arrangements e.g. when assets are given, or regular payments from a trust are made, to a person on a pension. Obtain advice about whether a "Special Disability Trust" is applicable to your situation.
- Be aware you may need professional advice about potential tax implications of trust arrangements.

#### ***Thinking about roles***

The appointment of executors, trustees and guardians is one of the most important decisions when preparing wills, especially in the context of a family member with a disability. The same person can act in all of these roles, if they have appropriate experience and skills, but it is undesirable to place all the responsibility in one person. Ideally you should appoint at least two executors and trustees and you might want to appoint separate people as guardians of your children, given the different nature of that responsibility.

Disclaimer: Nothing in this paper is to be taken to be specific legal advice to any reader, who should obtain their own legal advice particular to their circumstances.

## ***Executor***

The executor is the person or people appointed in the will to distribute and deal with the directions in the will. Points to consider about whom to nominate for this role include:

- The age and health of the person;
- Whether they understand and share your vision for your son or daughter;
- Any conflicts of interest that may arise;
- The complexity of the task;
- Proximity - it would be easier if the person nominated lives in the same State;
- Naming two executors in the will in the event of one person being unable to continue in the role;
- If no executor is named in your will, the Supreme Court will appoint an Administrator.

## ***Trustee***

The role of a trustee is to manage any trust fund set up under a will.

See [Thinking about Trusts](#) below.

## ***Guardian***

A guardian will look after your children and make all the decisions you would make as a parent.

- If your children are under 18 years of age consider appointing a testamentary guardian who will have responsibility for the child's long-term welfare.
- Consider who would best fulfill your wishes in this role, especially in terms of health issues and where your child will live and go to school. This appointment will last until the person reaches 18.
- It is not possible to appoint a guardian for an adult with a disability in a will. Guardians and financial administrators for adults can be appointed only by the Queensland Civil and Administrative Tribunal. However, an adult with a disability does not necessarily need to have a formal guardian or financial administrator appointed.

## **Thinking about the beneficiaries - people you provide for in your will**

- Who do you need to provide for?
- Who will receive your assets if the original beneficiaries die? (the residual beneficiaries)
- What is the best way to divide your assets? Fair does not necessarily mean equal. What is fair may depend upon each family member's needs and your ability to meet these needs using your resources on your death.
- Are there any specific articles or personal effects you wish to give to a particular person?
- Think about the best way to leave assets to your son or daughter with a disability. Can they manage money and make a will? If so, leaving assets to them would be no different from leaving assets to anyone else in your will.
- If your son or daughter cannot manage money or make a will the assets you leave to them will need to be protected, for example, through a trust (see: [Thinking about Trusts](#) below).
- Be aware of informal arrangements that leave the share of the person with a disability to other family members. Such arrangements may not be secure enough to ensure that other people look after your son or daughter's best interests.
- If adequate provision is not made for the person with a disability the Public Trustee or other person acting on behalf of the person with a disability may make an application to the Court for further provision out of your estate. Establishing a trust may be a more reliable way to make sure that the assets you leave for them are actually used for that purpose.

## Thinking about trusts

A trust allows for money or property to be transferred to one person (*the trustee*) who will manage the assets for the benefit of another person or class of person (*the beneficiary*).

- Consider the advantages of different kinds of trusts.
- Who will be the trustees? (Trustees are appointed in the will to control and administer the assets in a trust for the benefit of the nominated person)
- Consider people who understand and will follow your vision for your son or daughter, or at least take advice from others who do so.
- Ideally you will appoint at least 2 trustees.
- Consider asking people who are more likely to outlive you.
- Consider potential conflict of interest for trustees in how the money is to be spent. If a trustee can expect to receive money left in a trust when the beneficiary dies they may be less likely to spend adequate money for the benefit of the person with a disability.
- Consider writing a *Memorandum of Wishes* to include with your will. This is not legally binding but can give trustees a clear indication of how you want your assets to be used for your son or daughter.
- Seek up to date advice about potential tax and Social Security implications of different kinds of trust arrangements.

### Trusts

- **Fixed Trust:** gives clearly defined instructions to the trustee as to how the money should be used. Directs and limits the trustee's power. Shortcoming is that money out of this trust is likely to be classified as income. It is also inflexible so does not allow for changing personal circumstances or government policy.
- **Discretionary Trust:** allows flexibility in the use of the money and so has fewer limits on a trustee's powers. The appointment of trustees is very important as this role has great discretion in how the money is used.
- **Hybrid Trust:** a combination of a fixed trust and a discretionary trust.
- **Special Disability Trust:** the primary purpose must be for 'care and accommodation needs'. Important to seek advice on the benefits and limitations of these trusts.
- **"Inter vivos" Trusts:** can be established before you die. A trust created during your lifetime is created by a separate document and does not form part of a will. The trusts are set up while you are alive for the benefit of another person. It is important to seek advice from your solicitor or accountant about the benefits and limitations of such a trust. Special Disability Trusts can be either "inter vivos" or set up under a will.

## What to take to the solicitor

Some solicitors have their own checklists for their clients to complete before the first meeting. You should contact the solicitor at the time of making an appointment to find out about this. The following list is a suggestion of what may be helpful to take with you.

- Copy of any existing or previous wills.
- List of assets and liabilities - property holdings (including those outside of Queensland), cash, deposits, investments, shares, furniture, art, antiques, mortgage, loans etc.
- Your financial statements including financial statements for each entity (company, partnership, trust) in which your family may be involved and an outline of any corporate structures affecting the ownership and control of your assets.
- Documents relating to the operation of any company, partnership or trust. For example, company rules, current statement of company details, shareholder's agreement, partnership agreement, trust deed, superannuation deed. Most of these documents can be obtained from your accountant.

- Personal and family particulars: full name, address, occupation, full names and ages of children. May need to provide marriage and birth certificates.
- Matrimonial type documents e.g. matrimonial property settlements.
- A family tree/diagram that goes up, down and sideways showing the interrelationship of various people and their status (deceased, married, widowed, divorced, defacto) can be helpful.
- Details of any other beneficiaries.
- Evidence of Social Security status if setting up a trust to operate while you are still alive.
- Details of your life insurance and superannuation, including details of whom you have nominated to receive these funds on your death.
- Name and contact details of accountant or financial advisor.

## Extra issues to consider

- Be aware that not all your assets will be covered in your will e.g. assets held as joint tenancy, life insurance and superannuation. This should be discussed with your solicitor.
- Do not wait until you are ready to make the “perfect will”. It is better to make a will and then revise it than not to have a will at all. However, be prepared to invest “time”, by yourself, discussing your options with your partner and also with your solicitor to ensure that you end up with a will that is right for your circumstances.
- Writing a will that clearly expresses your wishes is a complex matter. It is important to consult a solicitor so that your will is valid and the terms of the will reflect your wishes. It is not desirable to end up with a valid will that does not work as you expect. If a will is poorly written the results can be costly in emotional as well as financial terms.
- If you die intestate, that is, without a will, government legislation decides what happens to your assets. This decision may not be in the best interests of your son or daughter.
- Consider keeping your will with your solicitor. Keep a copy for yourself and tell family members and your executor where the original will is kept. If a will is lost it is deemed to be revoked.
- Keep all your personal papers in one place with an inventory and tell other people where to find them in case of emergency.
- A will should be revised regularly to take into account your own changing circumstances and those of your family member with a disability.
- **Fees** - We strongly recommend that, when you make initial contact with a solicitor, you discuss their arrangements regarding fees. The costs of preparing a will can be considerable as this area of law is very complex.

Pave the Way has a panel of solicitors, accountants and financial planners to whom we are happy to refer families. We do not recommend any of these firms over another. We are confident that any of them will be able to give families who have a family member with a disability the advice and assistance they need in this area. Contact us if you would like a copy of the Professional Panel.

## Further information

1. *Planning for now, tomorrow and the future*. This booklet includes more information about Guardianship & Administration and wills and trusts. Contact Pave the Way on (07) 3291 5800 or 1300 554 402 or visit [www.pavetheway.org.au](http://www.pavetheway.org.au).
2. *Planning for the Future: People with disability* and *Special Disability Trusts: Getting Things Sorted* are available at no cost from the Commonwealth Department of Families, Community Services and Indigenous Affairs (FaCSIA) on their website at <http://www.fahcsia.gov.au/our-responsibilities/disability-and-carers/publications-articles> or phone 1800 050 009. Pave the Way has copies available for loan to families.
3. The Public Trust Office provides a free will-making service, phone (07) 3213 9288 or visit [www.pt.qld.gov.au](http://www.pt.qld.gov.au). However, the Public Trust Office charge fees to act as trustee appointed under a will.

## Pave the Way

Pave the Way assists families throughout Queensland to clarify their vision for their family member with a disability and to plan to implement that vision. We encourage planning which is vision driven, 'whole of life', developmental, outside service planning and which safeguards family members in the long term. We believe it is other people who keep people safe and support the development of personal networks, including Support Circles. Pave the Way is part of Mamre Association Inc and is funded by Disability Services Queensland.