



Estate Planning

What do I need to know?



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Wills

Why do I need a Will?

It is important that everyone over 18 years of age puts a Will in place to ensure that their assets are distributed in accordance with your wishes. A Will sets out:-

- Who the executors should be. An executor or executors are those who are responsible for following your wishes set out in your Will and making sure they happen.
- Who the beneficiaries should be. Beneficiaries are the people who will inherit your assets on your death.
- If you have children under the age of 18, you can specify who you would like to appoint as their guardian in the event that you die before they turn 18 years of age.
- You can also make other provisions – such as leaving certain family heirlooms (regardless of whether they are valuable or not) to the next generation.
- You can also set out your funeral directions.
- If you are moving into a retirement village, they will require that you have a Will in place.

What happens if I don't have a Will?

If you die without a Will (often referred to as dying intestate) then your estate is dealt with in accordance with the Administration Act 1977.

- Someone will need to apply to the High Court to be the 'Administrator' (rather than executor) of your estate.
- There is no provision for guardianship or for bequests to be made.
- The assets of your estate are dealt with in accordance with the Administration Act 1977. Your spouse or de facto partner will be entitled to your personal items and the first \$155,000 of your estate as well as a share of the rest of your estate. Other family members, such as children, siblings or parents, may also be entitled to a share of your estate.

What doesn't a Will cover?

- Any assets owned by a trust. Those are dealt with in accordance with the trust deed.
- Property that is jointly owned – such as a jointly owned bank account, or a house where it is jointly owned (see under the heading "Ownership Types" in our "[First Home Buyers](#)" booklet.)
- A Will won't override any property relationship claims that may be made, or debts that are owed. These will need to be dealt with as part of your estate.
- A Will doesn't deal with incapacity during your lifetime as it only comes into effect once you have died. If you would like to deal with incapacity, Enduring Powers of Attorney will need to be prepared. Further details can be found under the Enduring Powers of Attorney heading below.

What happens to my children under 18 if I die?

You should include a provision in your Will to appoint a guardian. Because this is a big responsibility for the guardian, you should discuss that with the person before naming them as guardian for your child in your Will.

That person named then becomes what is called a 'testamentary guardian' on your death. The testamentary guardian can make decisions about the upbringing of your children if you die – such as education, health, and cultural matters.

A testamentary guardian isn't necessary the day to day carer of the child, but they make the decisions about the upbringing of the child. If the testamentary guardian wishes to have day to day care of the child, they should apply to the Family Court for a Parenting Order.



I made a Will years ago before I got married. Do I need to update it?

It depends.

For a Will to continue to be valid after your marriage or civil union, it must have been made in contemplation of that marriage or civil union. This can either be done by explicitly stating that the Will is made in contemplation of the marriage or civil union, or if it can be clearly shown that this the Will was made in contemplation of your marriage or civil union.

Ideally, if you are thinking of doing a Will, and about to enter into a marriage or civil union, then please let us know so we can include a clause in your Will confirming that it is made in contemplation of your marriage or civil union. That avoids any doubt as to whether it was made in contemplation of the marriage or civil union.

I made a Will years ago, but am now separated from my partner. Do I need to update my Will?

Yes.

Under section 19 of the Wills Act 2007, where a Separation Order is made under the Family Proceedings Act 1980 or an order dissolving the marriage or civil union under the Family Proceedings Act 1980 is made, then any provisions made in a Will referring to the previous spouse or partner will be read as if that previous partner or spouse had died before you.

However, unless you have a formal Separation Agreement or Separation Order in place, the fact that you are separated may not be enough to trigger this requirement.

If in doubt, once you are separated, you should also update your Will. If you own land or a house with your ex-partner or ex-spouse, don't forget to check the ownership of that property to make sure that it is owned as tenants in common.

How do I make a Will?

Contact one of the members of our commercial team to assist. You can also download our Will instruction form and send this in to us. There is a charge for us to prepare a Will, and we can advise the likely charges when we speak to you.



Enduring Powers of Attorney

What is an Enduring Power of Attorney?

An Enduring Power of Attorney ("EPA") is a legal document that lets you appoint someone to make decisions for you if you lose mental capacity. An EPA document is on a prescribed form under the Protection of Personal and Property Rights Act 1988 ("PPPR"). There are two types of EPA:-

- **Property.** Your attorney can make decisions about your assets (house, car, bank accounts, investments). You can have this EPA come into effect as soon as it is made, or only if you lose capacity.
- **Personal Care and Welfare.** This only comes into effect if you lose capacity. Your attorney will make decisions for you about your care – including medical decisions, and housing decisions (such as where you will be cared for – at home or in a care facility).

How is an EPA different to a Will?

An EPA is different to a Will and is only applicable whilst you are alive. An EPA will come to an end on your death. A Will only comes into effect on your death.

Why do I need Enduring Powers of Attorney?

An EPA lets you appoint a trusted family member or friend as your Attorney to make decisions for you. When setting up the EPA's, you can put restrictions around decisions that your attorney is allowed to make. In addition to this, if you are moving into a retirement village, they will require that you have EPA's in place.

What happens if I don't have an Enduring Power of Attorney?

If you lose mental capacity and don't have EPA's in place, the only option is for someone to apply to the Family Court to be appointed as a Property Manager (in relation to property matters) or a Welfare Guardian (in relation to personal care and welfare matters). This is an expensive process, and typically these orders need to be renewed every three to five years.

This process is more expensive than putting EPA's in place.

What doesn't an EPA cover?

An EPA doesn't cover:-

- Where you are a trustee of the trust, it does not permit your attorney to step into your place as trustee. If you have lost capacity, the remaining trustees must remove you as a trustee either under the terms of the trust deed, or if there are none, pursuant to the Trusts Act 2019.
- Where you are a company director. An EPA doesn't permit your attorney to sign documents in your capacity as director. If you lose capacity, you should be removed as a director.

When and How is my Enduring Power of Attorney activated?

As mentioned above, an EPA for Property can be set up so that it comes into effect immediately on signing. Otherwise, it can come into effect if capacity is lost.

An EPA for Personal Care and Welfare only comes into effect if capacity is lost.

In most cases, it will be a doctor who determines whether capacity has been lost. They are required to comply with section 99D of the PPPR Act and sign a certificate confirming that the person has lost capacity under that Act.



How do I get an Enduring Power of Attorney prepared?

Contact one of the members of our commercial team to assist. You can also download our EPA instruction form and send this in to us. There is a charge for us to prepare an EPA for you, and we can advise the likely charges when we speak to you.



Living Will (or Advance Directive)

What is a Living Will?

A Living Will, often referred to as an Advance Directive, is a written document that outlines your preferences for medical treatment if you become unable to communicate or make decisions due to illness or incapacity. It's not legally binding, but it can provide guidelines to your loved ones or medical staff so that they can respect and follow your wishes when making decisions.

What is in a Living Will?

Living wills can include instructions about life-sustaining treatments, resuscitation, pain relief, and other care preferences. They can set out your requests that in circumstances where you don't have any mental awareness of the world around you, that you are to be kept comfortable, but that you are not to be placed on any life supporting system.

How does a Living Will differ from an EPA in relation to Personal Care and Welfare?

- A Living Will is not legally binding – it expresses your wishes. An EPA is legally binding once in force.
- An EPA for Personal Care and Welfare covers all aspects of care and welfare decisions, whereas a Living Will is just in relation to medical treatment.
- A Living Will doesn't appoint one person to act, it is a general statement of your wishes. An EPA is the appointment of a person to act in your place.

In short, a living will guides medical care, while an EPA appoints someone to make decisions for you. Both are important tools for future planning.

How do I get Living Will prepared?

Contact one of the members of our commercial team to assist. There is a charge for us to prepare a Living Will for you, and we can advise the likely charges when we speak to you.



Reverse Mortgages

What is a Reverse Mortgage?

A reverse mortgage is a type of loan provided to a homeowner that allows them to convert part of their home equity into cash without selling their home or making monthly mortgage payments. Unlike a traditional mortgage where the borrower pays the lender, in a reverse mortgage the lender pays the homeowner a lump sum.

With a reverse mortgage, you can receive funds as a lump sum, regular payments, or a flexible line of credit. A mortgage is secured over your home to secure the funds lent.

When do I repay the funds?

You retain ownership of your home, and no repayments are required until you sell the property or move into long-term care, or die. Interest compounds monthly and is added to the loan balance, which grows over time. Interest rates are typically much higher than other 'usual' interest rates available.

You can generally repay the loan earlier if you wish.

What are the advantages?

- You have access to cash to spend during your lifetime.
- You can remain in your home and free up some of the equity in your home to spend during your lifetime.
- You will not need to make payments of that loan until you shift out of your home or die.

What are the disadvantages?

- Interest can accrue on the amount lent quickly, and increase rapidly.
- If you have to shift out of your home into care, you may receive less money than you expected, and not have enough to purchase a unit in a retirement village.
- There will be less money available for the beneficiaries of your estate.

What other things do I need to know?

- You must continue to take insurance over the property. The provider will need to be noted as an interested party. You will need to keep your rates payments up to date.
- Before signing up for a reverse mortgage, you should consider the other options available to you:-
 - Taking a personal loan;
 - Downsizing to a less expensive house;
 - Using any savings or investments;
 - Borrowing money from family.



Residential Care Subsidies

Who pays for my care if I am assessed as needing full-time permanent residential care?

You do. Unless you meet the criteria for a Government Residential Care Subsidy ("RCS").

If you met the criteria for the RCS, the cost of your care is paid directly to the hospital or rest home by Health New Zealand – Te Whatu Ora. Your New Zealand Superannuation is then reduced, but you still receive a personal allowance and clothing allowance.

What are the criteria for receiving the RCS?

- Your age. You must be over 65, or 50-64 if you are single and have no dependent children.
- You must be assessed as needing long term residential care in a hospital or rest home.
- Your assets must be less than \$291,825.00*, or \$159,810.00* if you don't wish to include the value of your family home and car. Your family home isn't counted if it is the main place where your partner or a dependent child lives. This exemption for the family home does not apply if the family home that your partner or dependent child lives in is owned by a Trust.

* These amounts are adjusted annually on 1 July to reflect changes in the cost of living.

If you choose to include the value of your family home in your assets, you need to find out its value. This is usually the equity you or your partner have in the family home – being the value of the property less any debts owing in relation to the property. If you are already living in a Retirement Village, the value of a Licence to Occupy ("LTO") unit or Occupation Right Agreement ("ORA") is calculated as the surrender value (if any) that would be paid to you or your partner under that LTO or ORA.

What is the definition of a family home in relation to a RCS?

A 'family home' is the main place where your partner or dependent child lives.

It can be:

- a residential property
- a property occupied under a LTO or ORA
- a life interest in a property owned by a partner/spouse as tenants in common, Family Trust or an Estate
- an apartment
- a granny flat
- a motor home; or
- a boat.

What my Assets considered to include when applying for a RCS?

Assets include (but are not limited to) the following items:-

- cash, savings and/or investments including shares
- life Insurance policies with a surrender or cash asset value
- investment properties
- loans made to others (including family members and family trusts)



- boats, caravans and campervans
- ORA or LTO
- Family home and motor vehicle BUT ONLY if:-
 - you don't have a partner; or
 - if you have a partner and you are both in long term residential care; or
 - if your partner is not in long term residential care but you have included your assets based on the \$291,825 asset threshold.

What don't my Assets include when applying for a RCS?

- pre-paid funeral expenses for you and your partner of up to \$10,000 each, if they're held in a recognised funeral plan
- personal belongings such as clothing and jewellery
- household furniture and effects

What if I have sold my assets?

If you have sold any assets, they will not be counted in your means assessments, because you no longer own the asset. However, if you sold your assets in exchange for a debt that remains owing to you, then that will be considered an asset. Any sale of substantial assets would need to be of 'fair market value'.

What about my income?

There is no restriction on the amount of income that you are entitled to receive. However, income above an exempt amount will be factored in to any application for a RCS.

I gave some money to my children 3 years ago. Does that count?

Yes. Any gifts you have made will be taken into account

1. Gifted assets in the last 5 years

- You may gift assets of up to the value of \$8,000.00 per year, for each year in the last 5 years (from when you apply for the subsidy). These gifts will not be counted in your asset calculation.
- This is a total of \$40,000.00 of any assets you and your partner (even if they've died) have gifted in the last 5 years. NB in any given year the maximum you can gift is \$8,000.00.
- If your partner applies at the same time, this amount will double to \$80,000 (but the Ministry of Health won't count \$40,000.00 each if you apply at different times).

2. Gifted assets longer than 5 years ago

- Gifts up to \$27,000 a year of any assets you've gifted longer than 5 years ago (from when you apply for the subsidy). \$27,000 is the total amount between you and your partner (even if they've died).

3. Sold assets in exchange for a debt

- Assets that you have sold will not be counted in your means assessment. This is because you no longer own the asset.
- However, if you sold your assets in exchange for a debt then the outstanding debt that is owed to you will be considered an asset.

4. Gifting assets in recognition of care

- Assets you've gifted to someone who's provided you with a high level of care are not counted in your means assessment if:



- You received care for at least 12 continuous months in the last 5 years and gifted these assets to the carer in the last 12 months (from when you apply for the subsidy).
- Lived in the same home as the person providing the care.
- You were not receiving any funding for home-based disability support from the Ministry of Health, e.g., Home Support, meals on wheels.
- Have been able to stay in your home because you received care which meant you didn't need to get this payment.
- Other things to consider:
 - the person providing the care cannot be your partner or dependent child
 - the type of care needs to be necessary to help you around the home, e.g. help with bathing or toileting.
 - Your gifts in recognition of care cannot be more than \$40,000, when combined with other allowable gifting in the last 5 years (from when you apply for the subsidy).

The information contained here is not an exhaustive list of what is 'allowed' and what is 'not allowed'.

Taking the thresholds into consideration, planning ahead, such as annual gifting, can help significantly in the event that you need to apply for a subsidy in the future and thereby helping you meet the asset/income threshold.

At this stage, there is no time limit on how far back financial records will be looked at. Each application is looked at separately, and some may be looked at over a longer period. There is no way you can absolutely plan for any possible future changes to RCS. All you can do is plan with the rules they are now and adapt to any future changes, where possible. It is therefore advisable to seek legal advice well in advance of when you think you may need care so that planning can commence as early as possible.

Not all situations are the same. Please reach out to us for further information. We would be more than happy to meet with you to explain in more detail how gifting may affect your situation or the situation on a family member.

We can also provide assistance you in planning ahead and protecting assets, in the event that in the future you do need long term care.



Property Ownership and Residential Care Subsidies

What is a Life Interest Will?

A life interest Will typically gives the surviving partner or spouse the right to live in the family home and receive income from certain assets for life, while ownership of those assets passes to other beneficiaries (often children) after the surviving partner or spouse dies. This structure can help with estate planning and sometimes with eligibility for subsidies.

A life interest Will can also be useful where there are children from previous relationships – it provides a mechanism to provide for a surviving spouse, with the funds to then go to the children from that prior relationship.

How does a Life Interest Will affect a Residential Care Subsidy (RCS)?

If a couple owns a home jointly and one partner or spouse goes into care, when the first partner or spouse dies, the surviving partner or spouse will continue to own their share of the home, but will also have a life interest (ie, they are entitled to continue to live in the home) on the half of the home owned by the estate of the deceased partner or spouse. This means that if the surviving partner or spouse needs to go into care, they only own a half share of the house, which reduces their assets when applying for a subsidy. The surviving partner or spouse will qualify for a subsidy sooner because only their share (not the share of the deceased partner or spouse) counts toward the asset threshold.

What do I need to do?

You need to ensure that you have changed the ownership of your property to 'tenants in common in equal shares'. We can check the title to your home, and assist you with putting that in place if it is not already done.

Your Wills will then need to be updated to provide that on the death of one of you, the survivor still retains 'possession' and control of the property in practical terms. In your Wills, you would record that the survivor has the 'right to continue to occupy' what is now the Estate's share of the property. This allows the survivor to remain living in the property, or sell it in substitution of another property during their lifetime or until they enter another relationship or go into care themselves.

It is important that this expiry date is put on this 'right to occupy' – either the death of the survivor or until the survivor goes into care themselves, or permanently vacates the property. If this is not done, there is a risk that if the survivor goes into care, the Ministry of Social Development would include the Estate's share of the property as part of the assets of the survivor, and include that figure in the assets of the person applying for the RCS.

At the time of the 'expiry date' the deceased's share would be distributed to the residuary beneficiary(ies) of the Will of the deceased (e.g. the children of the deceased), thereby removing the asset and the income from any RCS means assessment undertaken by the survivor.

What if my house is in a Trust? Does this affect getting a RCS?

Assets in a Trust are not usually counted in the RCS test. However, as set out above, if you have gifted assets to the Trust and those gifts exceed the thresholds set out above, these may be included as your personal assets for the purposes of the RCS assessment. Given the value of homes today and the relatively low gifting threshold limits, this can be an issue.

If you are a beneficiary of the trust, you may be assessed as being entitled to the income from the Trust, and you may be assessed for RCS purposes on that as well. It is also expected that if you are a beneficiary of a Trust, then the trust has a duty to provide for you. This may also impact your eligibility for a RCS.



Contact Us

Please do not hesitate to contact us on 03 379 3880 to discuss how our commercial and property team may be able to help.

Disclaimer

The information in this booklet is current as at the date of publication and is only intended to provide general comments about the law. Young Hunter accepts no responsibility for reliance by any person or organisation on the content of this booklet. For further information or specific advice please contact our commercial and property team who will be happy to assist.