

PROBATE

TO 'WILL' OR NOT TO WILL

Life is uncertain. Planning for the inevitable by listing/recording your wishes will not only give you peace of mind as it ensures the ones you love are provided for upon your demise, it will also avoid the lengthy and often painful process that your loved ones will go through to have your assets administered if no will was prepared.

ADVANTAGES OF HAVING A WILL

The greatest advantage of having your will drafted is that you will be able to, with precision and clarity determine the distribution of all of your assets, regardless of the form those assets are in after your passing to individuals or organisations as you deem fit.

You will also be able to appoint someone you trust to become the Executor for your estate that will do all that is necessary to ensure that the terms of your will are carried out.

Last but not least, having a will executed will ensure that the speedier process of obtaining a Grant of Probate is resorted to. Upon the granting of the Grant of Probate, your chosen Executor will proceed to execute the terms of the Will and ensure your assets are distributed in accordance to your wishes as reflected in your will.

WHEN NO WILL IN EXECUTED The issues that may arise when one passes away without leaving a will are:-

- (i) beneficiaries will not have access to the Deceased's estate until/unless a Letter of Administration is obtained;
- (ii) all assets would vest with Amanah Raya Berhad (ARB) until/unless an application is made for a Letter of Administration then it will vest on the Administrator;

- (iii) assets will be distributed according to the formulas set out in the Distribution Act 1958, and not according to the deceased's wishes or the needs of the deceased's family members;
- (iv) delay in obtaining the Letter of Administration due to conflict/disputes on a variety of issues which may include deciding on the individual that is to be appointed as the Administrator of the estate; and
- (v) difficulty in ascertaining, tracing and identifying the assets owned by the deceased and hence lengthen the entire process of obtaining the Letter of Administration.

How will the assets be distributed if one dies without a Will? Section 6 of the Distribution Act 1958 sets out various scenarios for intestacy and provides a fixed formula for the distribution of a deceased's assets. The following are some examples provided in the Distribution Act 1958:-

- Leaving a spouse, children and parents: **spouse $\frac{1}{4}$ children $\frac{1}{2}$ parents $\frac{1}{4}$** ¹
- Leaving a spouse and parents but no children: **spouse $\frac{1}{2}$ parents $\frac{1}{2}$** ²
- Leaving a spouse and children but no parents: **spouse $\frac{1}{3}$ children $\frac{2}{3}$** ³
- Leaving children and parents but no spouse: **children $\frac{2}{3}$ parents $\frac{1}{3}$** ⁴
- Leaving no spouse, issue or parents, then the following persons are entitled in accordance of priority: brothers and sisters; grandparents; uncles and aunts; great grandparents; great uncles and aunts; government.⁵

WHAT MAKES A VALID WILL? For a will to be valid it must fulfil the following conditions:-

¹ Section 6(1)(a) of the Distribution Act 1958.

² Section 6(1)(b) of the Distribution Act 1958.

³ Section 6(1)(c) of the Distribution Act 1958.

⁴ Section 6(1)(d) of the Distribution Act 1958.

⁵ Section 6(1)(i) of the Distribution Act 1958.

- (i) be executed by a person who is at least eighteen (18) years old⁶ and is of sound mind⁷;
- (ii) the terms of the will must be in writing;
- (iii) the will must be executed in the presence of two (2) or more witnesses present at the same time⁸.

HOW CAN YOU START THE PROCESS OF MAKING A WILL?

The process of drafting a will usually starts with choosing and meeting your lawyer. Have a list of your assets with you and a general idea of how you wish to distribute them. Have an idea of who you would like to appoint as the executor of your estate and who your witnesses to the will are. Your lawyer will advise you of other legal issues that should be canvassed in your will (which includes but is not limited to alternative executors if the one appointed passes away before he/she can execute the terms of the trust or alternative distribution scenarios if any of your beneficiaries passes away before receiving the assets under the will).

In order to ensure that the terms of your wishes stated in the Will are accurate, specific and precise and provides for a variety of scenarios, you should engage an experienced lawyer to draft your will.

WHERE DO I STORE MY WILL?

Unlike some countries, a will registry is not readily available in Malaysia. There is no central registry where an individual can register information on the whereabouts of their will or deposit copies of their will.

It is imperative that you make known of the presence of your will and the law firm handling the drafting and the safekeeping of the same. The law firm would usually have in its possession the original copy and/or a certified true copy of the will deposited with them.

To understand more on the process, kindly contact the undersigned.

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Disclaimer: The contents do not constitute legal advice, are not intended to be a substitute for legal advice and should not be relied upon as such.

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⁶ Section 4 of the Wills Act 1959.

⁷ Section 3 of the Wills Act 1959.

⁸ Section 5 of the Wills Act 1959.