

## Wills and Probate

### A Guide to Making Your Will

This is a document referring to the law of England & Wales only, which changes from time to time. Tax information changes annually. It is not a substitute for professional advice that is up to date and specific to your needs.

#### Why do you need a Will?

Everyone who owns a house or has other assets should make a Will to safeguard the future of their family and loved ones. If you do not leave a Will, your possessions will be divided among your family without regard to your wishes. If you are married, your husband or wife or civil partner will not inherit all your possessions unless you leave very little or have no children, grandchildren, parents, brothers or sisters or nephews or nieces.

If you live with someone but are not married or in a civil partnership, your partner will have **no automatic right** to inherit any of your assets. You may have promised to leave items to people during your lifetime but without a Will, these promises will not be carried out.

If you die without a Will, there is invariably more delay and expense while enquiries are made to find out who is entitled to a share of your possessions. Even distant relatives may have to be traced and this will only add to the stress.

#### The advantages of a Will

A properly drafted Will avoids problems and allows you to leave your possessions to whoever you want. You can appoint guardians to look after your children and Executors or Trustees who will look after the financial arrangements until the child is old enough to do so. You can also make special arrangements to look after infirm or handicapped members of your family.

Whilst it is desirable to try to arrange your affairs in a tax efficient manner, your main aim should be to deal with your affairs in the way you wish - tax saving is an added bonus rather than a reason for making a Will.

#### Inheritance Tax

There are complex rules relating to Inheritance Tax, but generally, Inheritance Tax is payable on that part of your estate which exceeds the nil-rate band (a person's tax free allowance) at 40%. The nil rate band is £312,000 with effect from 6 April 2008. The Government have changed the Inheritance Tax system by allowing a person's nil-rate band to be transferred to their surviving spouse or civil partner if this has not been used on their death.

There are various other exemptions and reliefs from Inheritance Tax. Tax Efficient Wills involve making the most of these reliefs as well as preserving assets for future generations. Please see our separate information sheet.

#### Lasting powers of attorney

A Lasting Power of Attorney is a document whereby a person (the Donor) gives another person (the Attorney) power to act on his or her behalf in his name in regard to his financial affairs or personal welfare. Lasting Powers of Attorney are a special type of Power of Attorney which remain valid even when the Donor becomes mentally incapable of dealing with their own affairs.

The rules governing Lasting Powers of Attorney are very strict and must be in a prescribed format. Further information is given on our separate information sheet.

#### Other useful information

- Marriage or entering into a civil partnership automatically cancels a Will unless special terms are included in the Will
- You should make a new Will if you divorce or separate
- A Will should be regularly reviewed and may need to be changed if your family or financial circumstances change
- Will Trusts are useful if you wish to preserve assets for your children or other relatives (such as in second marriage scenarios).

#### What is a Will?

A Will is a document that comes into effect when you die within which you identify what you want to happen to your property after your death. In it you appoint individuals or a firm or a trust company to be responsible for the administration of your estate in accordance with the terms of your Will. The Will therefore needs to give them all the powers they need to do this. It can minimise the effect of taxation, it can include express provisions about the disposal of your body and who you would want to be responsible for the guardianship of your minor children.

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#### What are the Rules of Intestacy?

Without a Will a set of statutory rules are imposed, called the Intestacy Rules, which effectively leave everything to your next of kin in a fixed order. For example, a spouse and children may share an estate exclusively if they survived you. The spouse would be entitled to a fixed statutory legacy and the remainder would be left in two trust funds partly for the benefit of the spouse and partly for the benefit of the children.

These same statutory rules also require specific people to act as the administrators of your estate whether or not they have the necessary skills. This could prove to be traumatic if for example you have been married before and have adult children from your first marriage and are survived only by them and by children from your second marriage. All of them would be equally entitled to act as administrators in your estate. They may not even have met or communicated with one another.

#### What is involved in making a Will?

In order to prepare a draft Will for you to consider we would meet with you or ask you to complete a client questionnaire. This covers information such as your personal status (for example whether you are currently married or whether you have been previously married), the nature of your family (for example whether you have any children and if so whether they are under 18); the needs of your family and any other dependents (for example a handicapped child or elderly relative), the things you own and their approximate value (for example your home and whether it is owned by you alone or jointly with somebody else and if so how, your savings, other investments, jewellery

and pension arrangements) which affect the advice which will be given. It may also be that you have some significant debts, the most obvious being a mortgage. Again the nature of the debt and its value will affect our advice

#### What goes in the Will?

Any Will has to identify clearly and correctly the person who is making it and this would therefore include reference to any names by which you are known other than your birth name especially if you hold assets in the chosen name.

#### What are executors?

In each Will executors are appointed. These are the people you choose to administer your estate. They are responsible for:

- Identifying the assets and debts;
- Realising any assets to meet any debts; and
- Distributing the residue to your chosen beneficiaries.

One person can act as an executor but it is usually best to appoint two or more executors to a maximum of four. This ensures that there will be a substitute in the event of one of the executors dying or being unable to act or if in your Will you are providing gifts to be managed for the benefit of other people (known as trusts) then the same people can continue to act as executors and trustees.

#### Who should be my executor?

It is best to choose a business-like person to act as an executor. If you are going to appoint more than one it can be helpful if they are local to one another. It is possible to appoint a spouse, friends or relatives. You

can appoint professional people such as solicitors or accountants or even a bank. Professional people may charge for the work but this would be little more than any professional would charge if appointed to act in the administration of the estate by your chosen executors. A lay person appointed as executor can claim their expenses but are not paid for the work they do although you can leave them a gift in your Will. The person you choose to appoint as executor should be asked if they agree and are willing to act before you appoint them.

#### What about leaving gifts?

The gifts you want to make are usually included in your Will. Broadly speaking there are two main sorts of gift:

- Specific gifts of money or items; and
- The residue (i.e. what is left after specific gifts, any costs, tax and other expenses have been met.

The residuary gift normally requires a careful description and that can run to a number of clauses in which it is identified and then allocated to your chosen beneficiaries. The idea behind a residuary gift is to ensure that there is no gap in your giving. If there was a gap (i.e. you had assets left over after the provisions of your Will had been carried out, which have not been allocated to anybody else or no-one living) then the part of the estate that is left over would have to be administered in accordance with the fixed statutory rules that apply where you have no Will.

For these reasons it is important to have not only provision for a beneficiary to receive the residue but also a substitution in the event that they may have predeceased you.

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Substitutionary gifts do not only have to apply to the residuary estate and you can provide for substitutionary gifts in relation to specific items. You can also make gifts to two people jointly so that if one of them has died the survivor would have your gift outright.

#### What about trusts?

Another option is to make a trust gift, where the trustees will be managing the assets for the benefit of a group of beneficiaries. There are different types of trusts but either you are specifying that a particular person or persons can have the right to the income on that fund while they are alive (for example) and then the capital will be distributed to other beneficiaries when they have died; or you can name a class of beneficiaries for example all your children and grandchildren and ask the trustees to exercise their discretion as to whether they accumulate the income or use it for the maintenance or other benefit of any of the beneficiaries at any time. However you might want to specify that when the beneficiaries reach a particular age such as 21 then they would have the right to their share of the capital. We can be more specific about the type of trust(s) that might be appropriate for your estate once we have seen your questionnaire.

#### Who would look after my young children?

Other provisions that a Will may include relate to the appointment of any guardians for your minor children and directions as to the disposal of your body.

#### Will my Will be full of gobbledegook that I don't understand?

There will be a certain amount of jargon, which is unavoidable. This is because to give your executors (and any trustees) the right powers to manage your estate effectively needs a set of administrative provisions.

The law is complex and lawyers are aware of decisions by judges in cases where the wording of Wills has been interpreted. Lifestyles are varied and the lawyer is trying to juggle previous interpretations of words with the wishes of the client. Simplicity is what we strive for but inevitably it may be necessary to include provisions that need some explanation because to simplify them would be in fact to prepare an inappropriate Will.

#### What does Estate Planning mean?

A Will can help in minimising the impact of taxation on your estate. If you own substantial assets (and in many cases owning a home can be significant) your estate may be caught by Inheritance Tax. This tax is predominantly a death tax payable on the value of your estate when it exceeds a specified sum, which is often referred to as the nil rate band. The Government regularly reviews how much the nil rate band should be. Everyone is entitled to use their nil rate band and often the way a Will is structured can make the most beneficial use of the nil rate band where the testator is married.

Although not payable on death Capital Gains Tax is another tax which is payable when assets are disposed of by either the executors

or subsequently by trustees managing a trust fund created under your Will. Different types of wording in your Will might reduce the impact of Capital Gains Tax.

Finally, Income Tax is applied at different rates depending upon the type of gift you make in your Will. Professional advice to understand the differences is usually required.

#### What is the process for making a Will?

Once you have completed the questionnaire with all the information then we will produce a draft Will with explanation of its content. If you have any questions or second thoughts then this will give you the opportunity to raise them. Once you are happy with the terms then a final copy of the Will is produced for your signature. There are some special rules concerning the signature of Wills and if they are not followed it will not be a valid document. Once you have signed the Will you return it so that we can check it.

We will produce a copy of your Will for you to keep at home and suggest you keep the original in our Will Safe until you want to alter it.

#### What if I want to change my Will?

Once your Will has been completed any changes you wish to make must be by formal documentation. If you wish to make a few simple changes, like the alteration of one of the names of the beneficiaries or the amount of the sum of money you are leaving to a charity, then a document known as a Codicil could be used to explain and substitute the changes. It is treated in exactly the same way as the making of a Will.

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If the changes you wish to make are fundamental then it is best to make a new Will. This avoids any misunderstanding between the wording of your original Will and the wording of the Codicil. This also avoids awkward situations in that once you die and your executors obtain a Grant of Probate (the document which confirms their authority to administer your estate) you Will and any Codicil to it becomes a public document. It can be awkward for people whose original gift in your Will has been removed by Codicil to find this out. A new Will would mean they would never know that they have previously been provided for (unless of course you told them!).

### **Reviewing your Will**

It is vital that you take responsibility for reviewing your Will regularly. Since the law and taxation changes it is best for you to contact us to review it. It is particularly important to consider whether your Will needs altering when your personal circumstances change. For example, if you get married or divorced or cohabit or separate. As a rule, it is sensible to check your Will every three years just to make sure it is still relevant and current.

### **Challenges to your Will**

Certain people may not be provided for under your Will but may be dependant upon you at your death. If you ignore them or fail to make adequate provision for them they may apply to Court for a judge to order your estate to make specified provision for them.

Call us on 01284 767766 or complete our Will Questionnaire and send it to us.