

## **MAKING A WILL**

### **1 Introduction**

These notes aim to explain, briefly, the main reasons why it is desirable to have a will, some of the matters you will need to consider in making your will, and the information your solicitor will need to advise you on the best will to suit your wishes and circumstances. Most wills are neither complex nor expensive to make.

### **2 Why make a will?**

Everyone who has property and who cares about what will happen to it on his or her death should make a will. If you die without one, your money and possessions may be distributed to people you do not believe should inherit them.

By making a will, the testator (the person who makes a will) will be able to determine the way in which his or her assets will be dealt with after death. It will also be possible to ensure that the people he or she wishes to benefit will do so, and in the manner intended.

If a person dies without a will (known as dying "intestate") certain statutory rules govern the division of the estate and how it is to be dealt with after the death.

These rules will often operate to frustrate a person's wishes and lead to unsatisfactory and even disastrous results, especially for those with business or farming interests.

It is *not* the case, as commonly thought, that if a person dies without a will the entire estate will necessarily pass automatically to the spouse. If he or she is survived by a spouse and children and the value of the estate exceeds (at present) £125,000, the children (legitimate or illegitimate) will be entitled to share in part of the estate. This is one common instance where the estate can pass to people the deceased did not intend to benefit.

Timely action may save your heirs from having to pay large amounts of tax. We may advise you to use a trust, either to save Inheritance Tax or provide an element of control in special cases, such as where a beneficiary is unable to look after his or her own affairs.

### **3 Provision for dependants**

In most cases, the testator will be survived by a spouse and/or children. It is only fair to them that thought should have been given to their position after the testator's death and how best they should be provided for. This is also an opportunity to review the financial position of dependants and what further financial arrangements are required for their benefit.

The terms of the will can have a major impact on how the testator's assets can be used to meet the domestic and financial circumstances arising.

### **4 The contents of a will**

The format of a will tends to follow a fairly regular pattern and the basic contents of a will will be:

#### **(i) Executors**

These are the people appointed by the testator under the will to administer the estate. They will also usually be appointed to act as trustees of any trust arising under the will.

It is important that the testator chooses people who are competent to fulfil this role and to deal sensibly with the administration of the estate and the beneficiaries.

They are usually members of the family, close personal friends or professional advisers. It is sensible in most cases to have at least two executors.

**(ii) Guardians**

These are the people who will act as guardians of any young children on the death of the survivor of the testator and spouse. Clearly the testator and spouse will need to give careful thought as to whom they would like to take on this responsibility.

**(iii) Legacies**

This is merely the lawyer's term to describe certain gifts made by the testator under the will. It is often the case that a testator wishes to make certain special gifts to members of the family, relatives or friends. The legacies are usually:

- (a) gifts of money - for example, to relatives, friends, godchildren or charity
- (b) gifts of specific items - such as a picture, piece of furniture or item of jewellery
- (c) gifts of real property such as land or a house.

Legacies may be given to the recipient in various ways but are usually either outright gifts or gifts on attaining a given age, such as 21, or gifts on specific trusts, for example, for a person to have the use of it for life and thereafter on the death of that person the property will pass to others in the manner wished by the testator.

**(iv) Residue**

This is the part of the estate which is left after all debts, expenses, taxes and legacies have been paid out by the executors. It will normally represent the bulk of the estate. There are a number of ways in which this might be dealt with under the will depending on what the testator wishes to achieve. Some of the more usual forms are:

- (a) an outright gift of the residue to the surviving spouse and/or the testator's children
- (b) a simple trust whereby the surviving spouse will be entitled to the income of the residue for his or her life and thereafter the capital of the residue will pass to the children in stated proportions at a given age  
(The testator may wish to give a spouse a life interest rather than an outright interest if he or she will require the help of the trustees of the will in managing his or her affairs or if he or she wishes to ensure that on the spouse's death the residue must then go to the children or other beneficiaries who have been chosen.)
- (c) a trust in favour of the testator's children or other named beneficiaries, who will take the residue on reaching a given age in stated shares
- (d) a two year discretionary trust which gives the executors complete discretion as to how to deal with the assets in the testator's estate as between a specified class of people whom he or she may wish to benefit. Provided that the executors exercise their discretion within two years of the testator's death, the dispositions resulting from the exercise of the trustees' discretion should have no adverse Capital Gains Tax or Inheritance Tax consequences. This can be a particularly useful device where for family, business or tax reasons, maximum flexibility via a discretionary trust is required in order to enable the executors to deal with the estate in the most appropriate and beneficial manner after the testator's death. This is mentioned below.

How the residue is dealt with depends very much on what the testator wishes to achieve and the terms of the will dealing with residue which may take a number of different forms depending on the circumstances of each individual or family.

**(v) Discretionary trusts**

Any gifts between spouses, whether during their lifetime or on death, are exempt from Inheritance Tax. In addition, every person may give up to £242,000 to other people free of Inheritance Tax.

Take the example of a couple who have assets worth £484,000. In their wills they each leave all their estate to the survivor. There will be no tax on the first death as the gift between spouses is exempt. However, on the second death only £242,000 will be free of tax and tax will become payable at 40% on the remaining £242,000.

Suppose, however, they had separated their individual assets - so that each of Mr. A. and Mrs. A. had £242,000 worth of assets in their respective sole names. In their wills, they could leave £242,000 to, say, their children instead of their spouse. This sum would be free of tax. There would be no tax payable on either death - a saving of 40% of £242,000. It is, however, important that the assets are held individually. If they are in joint names they will pass automatically to the survivor and will not pass under the will, thus defeating the object of the exercise.

The obvious drawback to these arrangements is that the surviving spouse may not be able to manage on their own assets, which now total only £242,000. At the time of making the will, we do not know when it will come into effect, nor the financial position of the surviving spouse upon the death of the other spouse. It is, however, possible for each spouse to leave whatever the tax free sum may be on their death into a discretionary trust. The potential beneficiaries of the trust could be the surviving spouse, children, grandchildren and any other people the testator may desire. The surviving spouse, as one of the trustees of the trust, is given up to two years from the death of their spouse to decide whether he or she can afford to pass to the other potential beneficiaries any part of the trust fund. If he or she decides to pass over the whole of the £242,000, that will be free of any tax. If it is decided that all the fund is required by the survivor, no tax will be payable as an exempt gift. Tax will, of course, become payable on the second death, but at least the survivor's position has been protected whilst at the same time retaining the option of saving tax had circumstances been different. The advantage is that the decision can be made within two years from death, with full knowledge of all the facts, as opposed to having to reach a decision now, when we do not know when the testator will die nor the financial circumstances which will apply at that time.

Thus, a discretionary trust retains the option of saving tax if the surviving spouse can afford to do so. There is a requirement to file tax returns for the trust during its administration and so fees will be incurred in this respect. Other than this, there are no adverse consequences.

#### **(vi) Administration clauses**

These will often form the longest part of the will. They are specifically included in order to help the executors and trustees of the will to administer the estate and any continuing trusts which may arise under the will.

Executors and trustees are given certain administrative powers by statute and under the general law. However, in practice these do not cater for many special circumstances that may arise in the estate, either by virtue of the assets comprised in it, or the way in which the testator wishes the will to be structured. The administration clauses will usually contain investment powers or restrictions on the trustees; extended power to apply income and capital for the benefit of (usually minor) beneficiaries under the trusts of the will; special powers to enable the trustees to deal with any land (especially farmland) or business interests in the estate; and a charging clause to enable any professional adviser who is appointed to be executor and trustee to be paid his usual fee. The object of these powers is to help the executors and trustees in administering the estate or the trusts to the advantage of the beneficiaries under the will and to ensure that they have enough flexibility to enable them to do so in what is now a fast changing, fickle economic climate.

The intestacy rules do not contain these extended powers, which is one of the reasons why serious difficulties can and do arise in administering an intestate estate, especially where there are business or farming interests.

#### **(vii) Attestation clause**

This is the name given to the clause at the end of the will where the testator has to sign the will. If the will is to be valid, it has to be signed in strict accordance with statutory rules.

## **6 Instructions for a will**

There are obviously many things that a solicitor will need to know before he can advise his client properly in making a will. It will help the solicitor greatly if, at the outset, you make available the following information:

- (i) Full details of your family, including full names, ages and occupations
- (ii) Full details of your assets and those of your spouse with their approximate values.  
A rough guide to the likely items is as follows: house, stock exchange investments, shares in private companies (majority/minority holding), building society account, bank account, business interests and assets, life insurance policies, pensions, land, personal possessions.  
Details of the children's assets, if any, might also be relevant.
- (iii) Details of any trusts or settlements which you may have set up in your lifetime or in which you or your family may have interests
- (iv) Executors, together with their full names and addresses
- (v) Guardians, if appropriate, together with full names and addresses
- (vi) Full details of any legacies which you might wish to give together with the full names and addresses of the legatees
- (vii) Your wishes as to how you would like your estate to be dealt with on your death.

Please complete the enclosed form if you would like us to prepare a draft will for your consideration

## **7 Jointly owned property upon separation**

If you separate from your partner and jointly own a property, you should carefully consider your position because, in the event of your untimely death, the property will pass automatically to your former partner (unless this was addressed when you purchased the property and the property is already held as "*tenants in common*") by way of survivorship. This can be avoided by serving a "*Notice of Severance of the Joint Tenancy*" upon your former partner and by preparing a will leaving your interest in the property to a nominated beneficiary. The notice of severance is a relatively simple document that we can draw up at short notice.

## **8. Enduring powers of attorney**

In the past, if you became mentally incapable of managing your financial affairs it was necessary for somebody to apply to the Court of Protection to appoint a receiver to deal with matters for you. This was often a costly and drawn out procedure.

However since 1985, it has been possible to create an "*enduring power of attorney*" by which you appoint one or more people, of your choice, to give authority to act on your behalf. There is a prescribed form which has to be used, and you can impose various restrictions, such as whether the power is only to come into operation when you are becoming mentally incapable, whether any transactions should be specifically forbidden, or whether two attorneys must act together.

It is not possible to enter into an enduring power of attorney once somebody becomes mentally incapable of understanding the effect of the document.

If you would like more information, please contact **Dorothy Jackson** who is a clerk with the firm who will be pleased to answer any queries you may wish to raise.

## **9. Financial services**

PH Lawyers Direct (a division of Pearson Hinchliffe) is the one of a few firms of solicitors in the North West of England to have its own in-house financial services department. We are able to offer completely independent

and impartial financial and investment advice. You have the additional comfort of knowing that you can rely on the trustworthiness and integrity you would expect from a firm of solicitors. We offer a free initial consultation.

Clients who stand to benefit most from a solicitor's financial advice are:

- Recipients of lump sums seeking advice on tax-efficient investments
- Elderly people needing a helping hand to look after their finances
- Divorcing spouses needing to divide their assets and to provide for family protection and school fees
- Clients wishing to provide family protection, savings and retirement planning
- Business owners wishing to protect their own and their family's interest
- Trustees and charities with investment requirements
- House-buyers seeking mortgage advice.

PH Lawyers Direct's independent financial team can select the best form of contracts to suit your requirements, using the most up to date research software.

Our advice can often reduce the tax on your savings, so you and your family can enjoy more of your income.

Our detailed knowledge of trusts and Inheritance Tax planning can help you to minimise the tax effect on the money and possessions you leave after death.

Successive governments have made clear that the value of the state pension and other benefits will diminish in years to come and you will need to make your own arrangements for a financially secure retirement. Our team of advisers has enormous expertise in pension and retirement planning.

Your house is usually the most expensive purchase you will make in your lifetime. We can help you to find the best and most economical way of financing this purchase. Also, in conjunction with our conveyancing department, we can ensure that the process of buying your house runs more smoothly.

***To arrange your free consultation***

**Contact Phillip Aspey, head of our financial services team, on 0161 785 4549,  
07836 506128, or e-mail [jpaspey@phlawyersdirect.co.uk](mailto:jpaspey@phlawyersdirect.co.uk)**

*This firm is regulated by the Financial Services Authority in the conduct of investment business*

**10. Conclusion**

Making a will requires careful thought and judgement. Despite this, many people do not give this aspect of their affairs the attention it deserves. Many simply do not make a will at all. This is less than fair on the testator's dependants as there are many cases where failure to make a proper will produces unhappy results and involves substantial cost in trying to rectify the position after the death, all of which could have been avoided if proper attention had been given to the matter in the first place.

These notes are intended to help clients in considering the main implications of making a will. The notes are not an exhaustive summary of all the provisions that can be made and advice should be sought in specific cases. The notes have been prepared for clients of this firm only, and should they come into the hands of anyone else they should consult their own solicitors.