

LEONARD GRAY SOLICITORS

Wills, Tax and Estates Department

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A Guide to Making a Will

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These notes are intended to be a general overview of the law in relation to the subject detailed above.

Legal advice on the issues and the application to a particular case should still be obtained.

This constitutes our understanding of the law as at April 2008.

THIS SECTION

- The Testator/Testatrix
- The "estate"
- Jointly held assets
- The Intestacy Rules
- Mental capacity
- Procedure
- Further advice

Why make a Will

This section of the guide describes why it is worth considering making a Will, what would happen if you didn't and who can actually make a Will.

A Will quite simply sets out how the assets that you own should pass on your death. A Will is normally drawn up by a Solicitor and signed at the Solicitor's office. Every Will is different and how complex or simple a Will is depends very much on the circumstances and estate of the person who is going to sign the document.

The document

1. Testator/Testatrix

The Testator (male) or Testatrix (female) is the person who is actually going to sign the Will.

2. Estate

When the term "estate" is used in the context of Wills it generally refers to all of your assets collectively. It will include all of your assets both tangible and intangible so as items such as your house, clothing and cars fall into your estate, so will bank balances, shares and other investments held in your name.

3. Jointly held assets

You can only give away in your Will assets that you own. If you hold assets jointly with, for example, your spouse it is likely these assets may pass by survivorship independently of your Will to the surviving co-owner. This is often the case with jointly held bank accounts and homes.

In respect of land, there are two ways in England and Wales that such land can be vested between co-owners. The first is on the basis of a "joint tenancy" and this is often the way that married couples hold their homes. If one co-owner of a house wishes to give their half share of a house into a trust or onto someone other than the other co-owner, such a gift would fail if the property is held on a joint tenancy.

The second way that land may be held is on the basis of a tenancy in common. This is where co-owners hold land in certain proportions (often equal shares but not always) which can be gifted through a Will onto individuals or organisations other than the surviving co-owner. This arrangement is more common with, for example, young couples each of whom may wish their interest in a property to pass back to their own families if they were to die.

Most bank accounts and jointly held cash investments will be held so that they pass direct to the survivor on the first death. A gift of any land or investments which pass to a surviving co-owner automatically will therefore be ineffective in a Will.

4. What happens if you don't make a Will?

Many people choose to leave to chance how their estates will be dealt with on their death for a whole variety of reasons. Often people don't get round to making a Will or believe (often mistakenly) that their estate will pass to their family in the way they want it to in any event.

The way your estate will pass in the absence of a Will is dictated by the Intestacy Rules. How these Rules would effect you depend on your own family circumstances but the following examples (which are not intended to be exhaustive) give some insight into this:

- If you are married then £450,000 of your estate and all of your personal chattels will pass to your spouse absolutely with rest of your estate being divided into 2 equal parts. One part will be held on trust for your spouse for the duration of their life, then to qualifying relatives who survive you. The other part will pass immediately to any qualifying relatives who survive you.
- If you are married with children then £250,000 of your estate and all personal chattels will pass immediately to your spouse absolutely. The rest of your estate will be divided into 2 equal parts. One half will be held on trust for your spouse for the duration of their life, then to your children. The other half will pass immediately to your children in equal shares.
- If you are unmarried with children your entire estate will pass to your children in equal shares even if you have a "common law" partner.
- If you are unmarried with no children and your parent(s) have survived you, your estate will pass to your parents in equal shares.
- If you are unmarried with no children and your parents have both predeceased you, your estate will pass to your brothers and sisters in equal shares. If you have no brothers and sisters your estate will pass to your half brothers/sisters. If you have none of the aforementioned relatives your estate will pass to Grandparents and if they too have predeceased, then to Uncles/Aunts.

- If you have no surviving family or descendants of the family members mentioned then your estate may pass to the Crown, ie, the Government.

It is easy to see that in many circumstances the Rules of Intestacy will not satisfactorily deal with your estate. Even if the Rules would in your present circumstances operate to pass your estate to the right people, there is nothing to say that your family circumstances will not change so that the distribution would no longer be satisfactory. All of this uncertainty can be removed by the preparation of a Will.

5. Who can make a Will?

Anyone over 18 years can make a Will. There are some exceptions to this minimum age limit but these will not be covered here.

In addition, the Testator must be able to pass a test for mental capacity. The test for mental capacity is threefold:

- a) The Testator should appreciate the fact that he is making a Will and understand its effect/importance.
- b) The Testator should understand the extent of the property of which he is disposing.
- c) The Testator should appreciate the claims to which he should give effect, ie, the natural choices for beneficiaries.

If a Testator does not have sufficient mental capacity then they cannot make a Will. In some cases it is very difficult for a Solicitor to form an opinion on this and a Doctor may have to be involved in order to provide an opinion.

5. What is the procedure for preparing a Will?

Generally there are two meetings carried out at the Solicitor's office, although they can also take place at the client's home or even at hospital if required. At the first meeting the Solicitor takes the instructions from the client and gives them any advice that is needed. After the meeting, the Solicitor would prepare a draft Will and send this to the client. The client would then normally contact the Solicitor and any queries can be dealt with before a date and time for second appointment are fixed during which the Will can be signed.

6. Further advice

Having read this guide, if you would like any further advice please do not hesitate to contact Clive Burrell of our office who is the head of our Wills, Tax and Estates department. He can be contacted on 01245 504904 or by email on cburrell@leonardgray.co.uk.

Points to consider

THIS SECTION

- Executors and Trustees
 - Specific legacies
 - Pecuniary legacies
 - Guardians
 - Residuary estate
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This section deals the different issues you should perhaps think about in relation to what you will need to include in your Will. Every Will is different but this part will seek to summarise some of the basic matters you should consider.

Exactly how complicated your Will may be and how many different points you may need to think about is likely to be determined by your family circumstances, your wishes as regards legacies and also your estate.

The issues

1. Executors/Trustees

An executor is someone who will act in administering your estate to take out a Grant of Representation and draw in the assets before paying out their cash value or transferring them to your beneficiaries. An executor may also have other roles to play such as dealing with any express instructions set out in the Will and/or being involved with settling Inheritance Tax matters with the Inland Revenue.

Executors are normally also named as trustees in a Will. The role of trustee is different to that of executors although they are normally always the same people. A trustee is responsible for holding money or assets on behalf of beneficiaries who for one reason or another are not entitled to the treat the capital of the asset as their own. This is when assets pass “into trust”. This may occur, for example, when a young beneficiary is due to inherit assets/money when they attain say 21 years of age but they are under that age when the Will comes into effect or if a testator leaves his house to a beneficiary for him to use for life and then to other individuals/organisations after the beneficiary’s death.

Often, couples choose to appoint the survivor of them as their sole executor on the first death on the basis that they are going to leave their entire estate to the survivor. In these circumstances naming the survivor as the sole executor keeps the administration of the estate very simple.

On the second death or if a testator is not part of a couple it is normal to appoint at least two executors/trustees. If there is any chance of a trust arising through a minor beneficiary (under 18 years of age) inheriting this will be essential anyway. There are a maximum of four executors who may formally act.

2. Specific legacies

You may like to consider whether you would like to include any specific gifts of certain items of property such as jewellery, pictures, etc to any particular beneficiary.

3. Pecuniary legacies

Also, you may like to consider whether you would like to make any gifts of certain sums of money to any beneficiaries. You could choose to leave, for example, a legacy of £500 to a friend or a charity.

4. Appointment of Guardians

If you have young children (ie, under 18) you may like to name testamentary Guardians to be appointed if you die, having survived the child's other parent where the child is still a minor. A Guardian is responsible for decisions in relation to the child's general day to day welfare, religious upbringing and any medical matters.

Such an appointment would only take effect on the surviving parent's death if the child is under 18 years of age. Anyone can be appointed as a Guardian as long as they are over 18 themselves.

5. Residuary estate

Perhaps the most important decision to make in relation to your Will is to who you will leave the balance of your estate. Your residuary estate is normally defined to include all assets you leave that do not pass by survivorship, less any gifts, funeral expenses, expenses of administering your estate and any tax that is payable.

A Will would usually be worded to perhaps leave the residuary estate of the first of a married couple to die to the surviving spouse. On the survivor's death, the Will may well specify that estate should pass to any children the survivor leaves.

There are many alternatives as to how a residuary estate may be left. This and other examples of how a Will might be set up are given in the next section.

Examples of Will arrangements

THIS SECTION

- Young husband/wife with children

- Older husband/wife with children

- Older person – no immediate family

- Wealthy older husband/wife with children

- Older person with no immediate family

As has been mentioned previously a Will is a very specific document and there is no such thing as a “standard Will”. However, this section seeks to explore what some people may commonly choose to include when instructing a Solicitor to prepare a Will on their behalf.

All Wills contain certain parts which will be common to all such documents such as a revocation clause to revoke any former Wills the Testator may have put in place previously. However, beyond that, what is included will be dictated by the Testator’s wishes, their family circumstances and the value of their estate.

What do most people do?

Young husband/wife with children

The husband and wife may choose to appoint each other as their sole Executors and then provide that everything passes to the survivor. On the survivor's death a Guardian may be appointed to look after the children if they are still minors with a friend/relative being appointed as one Executor and a Solicitor being appointed as the other. Money would then pass to the Executors who would also act as Trustees to the children and hold the money in trust for them until they attain 18 or a later age, if required.

Older husband/wife with children

Again, on the first death the whole estate may pass to the survivor and then on the second death to the children in equal shares with the provision that if any of the children die, their own children should receive their share. Possibly some specific/pecuniary gifts may be included.

Older person with no immediate family

A Solicitor may be appointed as the Executor to deal with specific gifts and legacies to more remote family members. The residue of the estate can then be divided between whatever institutions or individuals the person making the Will chooses.

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