MAKING A WILL (2nd Edition October 2008)

GTC Law
GilbertTurnerCoomber

This leaflet refers to the current law of England & Wales which, from time to time, may change. In particular, tax information changes annually. This leaflet is not a substitute for seeking up-to-date professional advice and, in particular, advice specific to your needs.

WHAT IS A WILL?

A Will is a document that comes into effect when you die. In it you identify what you want to happen to your property after your death. You would appoint individuals or a firm as executors (sometimes called trustees or administrators) to be responsible for the administration of your estate in accordance with the terms of your Will.

The Will document therefore needs to give your appointed executor all the powers needed to comply with your wishes. It can minimise the effect of taxation, 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. In short, it enables you to clearly state the preferred destination of your assets.

In the absence of 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, your spouse and children would share an estate exclusively if they survived you. Your spouse would be entitled to a fixed statutory legacy and the remainder would be left in two trust funds partly for the benefit of your spouse and partly for the benefit of your children.

These same intestacy statutory rules also require specific people to act as the administrators of your estate whether or not they have the necessary skills. Administrators assume the same degree of responsibility as executors appointed under a Will (see below). This could prove to be traumatic if, for example, you have been married or entered into a civil partnership 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 order to prepare a draft Will for you to consider, complete the client questionnaire provided with this leaflet giving your personal status (for example whether you are currently married or in a civil partnership, or whether you have been previously married), the nature of your family (whether you have any children under 18); the needs of your family and any other dependents (for example a handicapped child or elderly relative) and the things you own and their approximate value; ownership of your home and whether it is owned by you alone or jointly with somebody else; your savings and investments, jewellery and pension arrangements would also 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

I OWN FOREIGN PROPERTY

Where foreign property is concerned we would strongly advise you consult a lawyer in the jurisdiction of which the property is situated. This is because we cannot advise you on the legal issues concerning foreign property in respect of the country concerned, and cannot safely advise you on the effect of a gift of foreign property post death.

WHAT DOES THE EXECUTOR DO?

In each Will, executors are appointed. These are the people you choose to administer your estate.

Gilbert Turner Coomber Solicitors – 188 – 190 Hoe Street, London E17 4QH
Tel: 020 8509 6800 – Email: enquiries@gtclaw.co.uk – www.gtclaw.co.uk

The Executor is responsible for:

- Identifying the assets and debts
- Realising any assets to meet any debts
- Distributing any balance to your chosen beneficiaries

A single individual can act on their own as an executor but it is usually best to appoint two people or more (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. 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. Executors can also administer a Will even if they are a named beneficiary in the Will.

It is best to choose a business-like person or someone you trust 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 or friends or relatives. You can appoint professional people such as a solicitor or an accountant or even a bank. Professional people will 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. Whoever you choose to appoint as executor or executors should be asked if they agree and are willing to act before you appoint them.

WHAT ABOUT GIFTS ?

These take two substantial forms:

- 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 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.

Substitutionary gifts do not only have to apply to the residuary estate, 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, which is where trustees are appointed to manage the assets for the benefit of a group of beneficiaries. There are different sorts of trust, but either you are specifying that a particular person or persons can have the right to the income from that fund while they are alive and then the capital be disbursed 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 a 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 they 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.

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

There will be a certain amount of jargon, which is unavoidable. This is to give your executors (and any trustees) the right powers to manage your estate effectively. The law is complex and lawyers are aware of decisions by judges in cases where the wording of Wills has been interpreted. Human life and 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 prepare an inappropriate Will.

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ESTATE PLANNING

A Will can help in minimising the impact of taxation on your estate. If you own substantial assets (and in some parts of the country owning a home can be significant) your estate may be caught by **Inheritance Tax (IHT)**. 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 annually reviews the threshold for the nil-rate band). Everybody 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 or in a civil partnership.

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.

THE PROCESS

Once you have completed the questionnaire and provided us with all the information, then we can produce a draft Will with explanatory notes on the terms of that Will. If you have any questions or second thoughts then this gives you the opportunity to raise them. Once you are happy with the terms then an engrossment 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 and returned the Will for us to check a certified copy will be sent to you for safe keeping at home and suggest you place the original in our Will Safe until you want to alter it.

REVIEWING & ALTERING MY WILL

Once your Will has been completed you cannot make changes by simply altering it. 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.

If the changes you wish to make are fundamental, then it is best to make a brand new Will. This avoids any misunderstanding between the wording of your original Will and any words you are substituting by Codicil.

It is vital that you take responsibility for reviewing and updating your Will regularly.

The law and taxation changes regularly so it is best to contact us to review it. It is particularly important to consider whether your Will requires altering when your personal circumstances change. For example, if you get married, enter into a civil partnership, get divorced or separated or even cohabiting.

As a rule, it is sensible to check and update your Will every three years just to make sure it is still relevant and current.

LASTING POWERS OF ATTORNEY

You can now create two types of lasting power of attorney:

1) A personal welfare lasting power of attorney and

2) A property and affairs lasting power of attorney

<u>Person welfare</u>

This authorises the chosen attorney to make decisions about the personal welfare of the donor including healthcare treatment and consent to/or continuation to medical treatment once you lack the necessary mental capacity – subject to your advanced restrictions.

Property & Affairs

This authorises an attorney to act on your behalf in relation to your property investments and financial affairs.

To discuss any aspect contained within the fact sheet, please contact us on **020 8509 6800**

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 a Court for a judge to order your estate make specified provision for them.

English Law states that a person may give his or her property to whomever he or she chooses during or after life. The **Inheritance [Provisions for Family and Dependants] Act 1975** does not change this. However, it provides that certain persons can apply to the Court if they feel that the deceased's Will, or the Rules of Intestacy, do not make reasonable financial provision for them.

THE FOLLOWING PERSONS CAN APPLY:-

- The spouse of the deceased
- A former spouse of the deceased who has not remarried
- Any child of the deceased
- Any person who was not a child of the deceased but was treated as such by them
- Any person who, immediately before the death of the deceased, was being maintained either wholly or partly by the deceased
- In addition, a recent change in the law provides that any person who was co-habiting with the deceased as husband or wife for at least two years immediately prior to the death of the deceased may make a claim

There are two standards for deciding what 'reasonable financial provision' is. If the applicant is the spouse of the deceased then they are allowed such provision as is reasonable in the circumstances, whether or not that provision is required for his or her maintenance. In all other cases the grounds relating to financial provision are what would be reasonable in all the circumstances for the applicant to receive for his or her maintenance.

In considering a claim, account will be taken as to the financial needs and resources of the applicant and those of other beneficiaries as well as the size of the estate and the deceased's moral obligations to the claimant.

With applications from a spouse or civil partner or former spouse or civil partner the Court will take into consideration the age of the applicant, the duration of the marriage or partnership, the extent of contribution by the applicant to the welfare of the family and, in the case of a current spouse of partner, what they may have expected to receive had the marriage or partnership ended in divorce or separation rather than by the death of the deceased.

The Court has further guidelines in respect of children such as consideration of the manner in which they expected to be educated or trained and in the case of co-habitees, the length of the relationship and the amount of contribution to the welfare of the family and deceased.

TRANSACTION TO DEFEAT APPLICATION

If the Court is of the opinion that, within eight years prior to the deceased's death, a transaction was carried out to defeat the above provision, such as giving property away or selling at undervalue, the court may order the recipient to provide such sum of money or property as the Court decides for the benefit of the deceased's estate. The Court will have regard to all the circumstances of the transaction and can order the return of property even if the recipient no longer holds it.

DISTRIBUTION BY PERSONAL REPRESENTATIVES AND TRUSTEES

Once the Personal Representatives or executors of the deceased's estate have distributed it, either according to a Will or through the Intestacy Rules, it may be too late for an applicant to make a claim. The Court cannot provide for any applicants out of property that has already been distributed. Consequently, the Personal Representatives cannot be made liable for wrongly distributing the estate on the grounds that they should have considered a possible application by a claimant. Generally the time limit for making such application is six months from the date of grant.