

THE LIFE CYCLE OF FAMILY WEALTH

Making and updating a Will: a crucial estate planning tool

BACKGROUND

Making a Will is a vital part of any estate planning exercise. Sharing wealth with family and other loved ones in the most tax efficient way possible, is a priority for most people. Their aim is to provide for partners and ensure that children are supported financially to achieve their goals, whether those include buying a property, or starting a family or business.

Given this strong desire to share their wealth, it is concerning that nearly two thirds of adults in the UK do not have a valid Will in place. Statistically, a high proportion of these will continue to have no Will at their death. This means that their estates will be distributed to whichever family member stands in line to benefit under the intestacy rules, and with no choice of who acts as executor.

WHAT HAPPENS IF YOU DON'T HAVE A WILL?

As an example, if someone dies intestate (without a will) leaving a spouse and children, the spouse will have the right to:

- Administer the estate.
- Inherit all the personal belongings.
- Inherit a legacy of £270,000 and one half of the remaining estate.



The balance of the estate will pass to the children in equal shares. This will rarely be the result that the deceased would have chosen.

In fact, dying intestate can be the catalyst for serious friction within a family that, in the worst cases, may end in litigation. Every family is different, with unique dynamics between family members that a Will

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can help to accommodate.

A testator may be part of a cohabitating couple, or in a second marriage or civil partnership. There may be children or step-children (or both) with whom they may or may not get on. They may have adopted children or, increasingly, their children may have been born by way of surrogacy, which raises its own inheritance issues. Adult children or step-children, in turn, may be in difficult relationships with spouses, civil partners, boyfriends or girlfriends.

It is also worth noting that intestacy can have unfortunate inheritance tax consequences which it may be possible to mitigate with a Will.

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WHY MAKE A WILL?

Such complex relationships provide strong reasons for individuals to ensure they have a Will in place. However, even those with more straightforward family arrangements should make a Will to ensure that their spouse, civil partner or other partner, children and members of their wider family, receive the gifts and shares of their estate that they wish to leave, and that the people they wish to administer their estate are appointed to do so.

Many people also choose to appoint guardians for their children in their Wills. While this can be a good approach, choice of guardians can sometimes be one of the most difficult decisions for a couple to make. As such, it is important not to hold up signing a Will because this issue remains outstanding. Once guardians are chosen, a separate deed can be drawn up or a couple's Wills can be updated, whether by making a new Will, or using a separate document, known as a Codicil, which is read as if it was part of the Will itself.

LIFE EVENTS AND OTHER REASONS FOR UPDATING A WILL

There are many reasons for updating a Will. A testator's choice of executors or guardians may be out of date. They may have changed their mind about legacies; who should benefit or how much they should receive.

There may be a statutory reason, for example, where trusts have been set up in a Will that now need to last into the grandchildren's generation and beyond. Before April 2010, the fixed period a trust could last was limited to 80 years. This has been extended to 125 years, and Wills that pre-date this change should be changed to take advantage of the longer period.

Significant life events may affect the validity of an existing Will, or the nature of the legacies within it.

Marriage or civil partnership

Unless a Will is made expressly in contemplation of marriage or civil partnership, it will be revoked automatically on either of these events taking place. As such,

couples getting married or entering into a civil partnership should ensure that they make new Wills or Codicils, either in advance, clearly stating their intention to marry or become civil partners, or as soon as possible following the ceremony.

The arrival of children

The arrival of children is an exciting, but incredibly busy time. However, it is obviously important to ensure that children are properly provided for in the event of a parent's untimely death. Many Wills will already include gifts in favour of future children, but even if this is the case, it is important for parents to re-visit their Wills to ensure that such gifts continue to reflect their intentions.

Divorce, second marriages or civil partnerships and second families

Divorce or the dissolution of a civil partnership does not invalidate a Will, but instead the Will is read as if the former spouse or civil partner had pre-deceased the testator, and his or her estate passes accordingly. While this may be what the testator would want, that may not always be the case. In any event, it is a good idea to revisit the terms of a Will following a divorce.

Once again, any subsequent marriage or civil partnership will invalidate a pre-existing Will unless made in contemplation of this event, so individuals should review their Wills before, or as soon as possible after, getting married. This is particularly important, because consideration will be needed to ensure that legacies take account of any children (or grandchildren) of the previous marriage, as well as the needs of a new family.



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Updates to take account of legal charges

Transferable nil rate band: Changes to the law made in October 2007 mean that it is no longer necessary to make specific provision in a Will for the use of the nil rate band (the value of a Testator's estate which can pass tax-free to any beneficiary, currently £325,000)). This band is now transferable to the estate of the surviving spouse or civil partner in the event that it is not fully utilised on the death of the first to die. When updating their Will, testators may choose to remove a nil rate band trust or other gift where one is included, in favour of a different type of legacy.

Residential nil rate band: Another, more recent, nil rate band-related change applies to estates that include a residential property that has been the main residence of the deceased. If this passes to a child or other direct descendant of the deceased, an additional £175,000 "residential nil rate band" may be available (£350,000 if the transferable nil rate band from the other spouse is available). There is a tapering of the relief for estates with a value over £2 million, so this nil rate band will not be available in all circumstances.

In most Wills, such a property would be left to a spouse and then to children, or to children directly. However, where this is not the case, testators may wish to revisit their Wills to take advantage of the residential nil rate band where it is available.

Trusts – discretionary or life interest: Historically, Wills often included a life interest trust, initially naming the surviving spouse as the life tenant (who would be entitled to



the income of the trust during their lifetime) and then for children and grand-children.

More recently, following changes made in 2006, such trusts have fewer tax advantages than in the past over discretionary trusts, at least once the surviving spouse or civil partner has died. Consequently, many more Wills nowadays for testators with a significant asset base, are set up as a flexible discretionary trust, rather than a life interest trust. The discretionary trust will name the close family members who are to benefit and will often include a power given to the trustees to add further beneficiaries at a later date.

The precise wishes of the testator are set out in an accompanying (but non-binding) side letter just as they can be with a life interest trust. The letter can say whatever the testator wishes in his or her own style. It has no specific legal format and can be updated by the testator at any time to take account of changes in circumstances and without going through the formalities of preparing a new Will.

Such a format provides significant flexibility. Testators can provide guidance to the trustees as to

how their property should be distributed, or how their business should be run, and by whom. At the same time, the trustees are not bound by these wishes, as they would be by clauses in a Will, and can adapt them to take account of different scenarios as they arise. For example, if a potential beneficiary is in a difficult relationship, or is likely to be divorced, the trustees will be able to monitor how and whether he or she receives income or capital, and consider how best to avoid an inheritance falling within a financial settlement.

Where a discretionary Will is not the solution

A discretionary Will may not suit every situation. A couple may prefer more clarity, perhaps because theirs is a second marriage for one or both of them, or they are troubled by the non-binding nature of the side letter. However, where a Will contains a trust, whether it is discretionary or includes a life interest, testators should consider carefully the level of freedom they want to give their executors, trustees and guardians (where relevant) as the ultimate decision-makers.

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INTERNATIONAL CONSIDERATIONS

Additional considerations apply to individuals with international connections. Anyone who is resident outside England and Wales, but who owns property in this country, or who is resident here with property abroad, should take advice on how best to ensure a smooth succession to their assets wherever they are located.

The domicile of the individual concerned may also be relevant. Under the general law of England and Wales, the place where an adult is domiciled may vary during their lifetime. It will depend on whether they retain their domicile of origin (generally where their father was domiciled at the time of their birth) or have acquired a different domicile of choice (the place where they intend to live permanently or indefinitely).

This may be relevant in the context of succession to their estate because under the law of England and Wales, the law of the place where property is situated governs the distribution of immovable

property (e.g. their residence or commercial property). On the other hand, an individual's movable property (e.g. cash, bank accounts, shares, works of art etc) passes according to the law of the individual's domicile at death.

For this or other reasons, in some cases, it may be advisable for an individual to have more than one Will, each dealing with property in different jurisdictions. In addition to the legal issues, practically this may help to ensure that such property can be dealt with and distributed as quickly and efficiently as possible following their death.

If a testator has more than one Will, care must be taken to ensure that those made in different jurisdictions do not contradict, or even revoke, each other. It is also vital to ensure that the intended gifts can be made under the law of the relevant jurisdiction. Legal advice in each jurisdiction in which property is held should always be taken, whether a local Will is being made, or all property is to pass under a single Will.

HOW WE CAN HELP

An up-to-date Will is essential to ensure that wealth is passed on in accordance with the testator's wishes. Therefore, if there has been a change in personal or family circumstances, it is a good idea to review an existing Will or to arrange to make one (if there is not one already).

To find out more about Wills and consider the best way to proceed, please do get in touch with a member of our Private Wealth team.



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