clarity

clarityLAW

Wills and Intestacy

Summary

By making a Will which accords with the legal requirements, you can ensure that your wishes are carried out and, if you take the advice of a suitably qualified professional, minimise any tax to be paid.

Most people clarityLAW advise when dealing with Wills (and trusts) have plenty of questions - on tax, the rights of unmarried people, co-habitees, civil partnerships, guardianship of children, changing a Will, to name just a few - but we can soon put their minds at ease with simple, clear advice that is relevant to their own situation.

Why Make a Will?

A Will is one of the most important personal legal documents that you can execute. At the very least, it should name those whom you wish to deal with your affairs and assets after your death (**the 'executors'**) and set out the people whom you wish to benefit (**the 'beneficiaries'**). In addition, you may wish to cover other matters such as the appointment of guardians for infant children or specify your funeral arrangements.

By making a Will which accords with the legal requirements, you can ensure that your wishes are carried out and, if you take the advice of a suitably qualified professional, minimise any tax to be paid.

What If I Do Not Make a Will?

The provisions imposed by law if you die without making a Will (you are said to have died '**intestate**'), may not accord with your own wishes or may not cover some aspects to your own liking – for example, the age at which your children inherit any benefit to which they are entitled. It is vital, if you own any property or cash assets, to make a Will no matter what your personal circumstances may be: whether you are single, a married or unmarried couple, a couple with children or a single parent family.

Intestacy Rules

When a person dies intestate, the law imposes certain rules for the division of your assets. It is a common misconception that in the event of your death everything will pass automatically to your spouse. This will only happen if you have no other close living relatives. The table below summarises the position currently applying (please note the term spouse also includes civil partners):

English Intestacy Rules		
Surviving spouse & children	Spouse entitlement	£270,000 absolutely (the 'Statutory Legacy')
		Personal Chattels
		Half of the residue absolutely
	Children entitlement	Half of the residue absolutely (once aged 18)
Surviving spouse, no children	Spouse entitlement	Whole estate absolutely
No surviving spouse		Whole estate absolutely to nearest group of relatives in equal shares. Order of priority is: children, parents, siblings.

If you die unmarried, your partner (if any) is not automatically entitled to benefit under intestacy law no matter how long-term the relationship and even if you have children (although these children will, of course, be your next of kin). In those circumstances, your partner may be able to bring a claim against your estate under the Inheritance (Provision for Family and Dependants) Act 1975 ('the 1975 Act'). This procedure, which may involve court proceedings, can be laborious, expensive and time-consuming.
The only way to prevent this situation is to make a Will.

For case studies explaining what can happen to a family, click here (Case Studies 1 & 2).

Even if these imposed rules reflect your basic wishes, please remember that no provision is made for legacies or mementoes to friends, other relatives, charities etc, or for appointment of guardians. You may also be liable for tax that could have been avoided had professional advice been sought. In addition, a child (infant or otherwise), other dependant, or the surviving spouse may still have a claim under the 1975 Act.

Administration

The law also nominates the person who will deal with your affairs and the distribution of your estate (the 'administrator'). It is normally more costly and time consuming for the necessary paperwork to be completed under intestacy than if the individual has made a Will. In addition, if there are children under age 18, there will be costs associated with administering the statutory trusts.

Why Use clarityLAW?

There is no requirement that a Will be prepared by a qualified person. It is, however, advisable to use a legally qualified person. The three main pitfalls to which individuals executing a home-made Will commonly falls prey to are as follows:

Legal Requirements

First, one must ensure the execution of the Will complies with statutory requirements. If these are disregarded, the Will will not be valid and no amount of evidence as to your intentions will prevent the imposition of intestacy law.

Intentions

Secondly, the Will must accurately reflect your intentions. Unfortunately, it can happen that a home-made Will, or one prepared by an ill experienced professional or non-qualified person, simply does not operate at law in the way you had intended. In addition, we may highlight certain consequences or situations that you have not considered.

Tax

Thirdly, we will be able to advise you on inheritance tax ("IHT") and explain any options for structuring your Will (together with lifetime estate planning) to minimise the overall tax payable whilst at the same time considering your overall financial position within our role of financial advisers.

Will Trusts

It could be the case that the person making the Will is uncertain about the precise nature of the gifts that they wish to make, because they do not know what the financial and personal position will be of the people they wish to benefit at the date of their death and in the years following.

Instead of making outright gifts in the Will, the person making the Will may prefer to have a Will which delays the decision as to who shall benefit on their death until a later date. It could be that the person making the Will would be perfectly happy for the beneficiary to receive income from assets in the estate but not the capital. This can be achieved by including trusts in the Will and authorising the trustees to determine the matters after death. Who will benefit and the extent to which they will benefit will depend upon the terms of the trust and/or the trustees' discretion.

There are a number of possibilities for you to consider when planning a Will, which delay the ultimate choice of beneficiary after death. A trust is usually involved and in each case the succession and taxation implications must be balanced carefully.

It is a common misconception that trusts are only the preserve of the super rich engaged in aggressive tax planning. That is far from the case. Tax planning is rarely the main driver in utilising Will trusts, protection of assets from others (**click here for Case Study 3**) and protection of the beneficiary (**click here for Case Study 4**) being common reasons.

Whilst Wills can be straightforward, simple documents, they can also be, through necessity, complicated. Such documents require experienced tax and trust practitioners to prepare them.

For further explanation of trusts please see the separate clarityLAW Research Notes on the subject.

Choosing The Executors And Trustees

Executors' Overriding Duty

Your executors' duty is to deal with your assets and implement your wishes under the terms of your Will. If any money is left 'in trust' under your Will, the executors automatically become trustees of the trust fund unless you direct otherwise.

Whom to Appoint

The main choices of executors are your family and friends, or your professional advisers (such as solicitors, accountants and financial advisers). Alternatively, you may have a combination of any of these.

It is perfectly possible to appoint as executor somebody whom is also to benefit under the Will, including a spouse. If your Will provides that young children may inherit, or constitutes a trust, it is sensible to appoint at least two executors. You should consider the age and personal commitments of relatives or friends before selecting them for this role. Before signing your Will you should also ask your chosen executor if he/she is willing to shoulder this responsibility in the event of your death. A trustee role may go on for a long time.

If your Will includes a trust, the identity of your trustees can be very important, particularly if the trust gives the trustees any element of discretion as to whom they can benefit under the terms of the trust, or there is a potential for conflicting interests under the trust.

Expert advice can assist you in the decision making process.

Professional advisers, such as lawyers or accountants, may charge a fee for their role in acting as executors. However, do bear in mind that your family and friends, if appointed, will usually seek professional assistance anyway in dealing with the administration of your estate.

clarity

Choosing Guardians

Automatic Appointment

For anyone with infant children, it is imperative to consider appointing guardians in the event of death. The child's surviving parent is normally automatically guardian on the death of one parent (provided this survivor has 'parental responsibility' under the Children Act 1989). You can, however, appoint guardians who only act if both of you die whilst the children are aged under 18.

Role

Guardians do not automatically have day-to-day care and control of the child but would be involved in any decision concerning responsibility for day-to-day care. Many people do wish to appoint guardians they hope will assume day-to-day care. In any event, guardianship of any child is a great responsibility and you clearly should seek the consent of any person whom you wish to appoint as a guardian before executing the Will.

Requests to Guardians

You may include in the Will any particular wishes you have with regard to your children's upbringing – for instance you can request that your children stay together or continue to be educated as you had planned. These requests are best expressed as non-binding wishes (in the form of a letter addressed to them and stored with your Will) since changes in circumstances may render them inappropriate. It is obviously sensible to discuss such preferences with your intended guardians.

Providing for Your Family

Conflicting Interests

Our lawyers will advise you on balancing the respective claims of your spouse and your children. We will also discuss the advantages of setting up trusts for their benefit, rather than leaving them your assets outright. You will also be advised on the methods of inheritance tax mitigation in making effective provision for your family.

Statutory Intervention

Unlike the law of some other countries, the law in England and Wales does not demand that your Will provide for your family. However, if you fail to make proper provision for your spouse or someone who has been financially dependent on you, they may be able to claim a share of your estate under the Inheritance (Provision for Family and Dependants) Act 1975. Given the costs and delays which can be involved in proceedings under this Act, it is important to seek guidance if you feel your intended Will provisions pose any problems in this area.

Tax Planning

Tax Efficiency

One of the main reasons for instructing our lawyers to prepare your Will is to ensure that you are aware of the inheritance tax implications of your intended bequests. Together we can consider the means of minimising this liability whilst at the same time ensuring your instructions are met.

Inheritance tax is paid not only on the value of all assets you own at death, but also takes into account any gifts you have made in the preceding seven years, and any trust funds from which you receive income.

It should also be borne in mind that if trusts need to be included within the Will, the different forms of trusts and their specific tax treatment needs to be considered. Advice should be given not only in relation to inheritance tax, but also in relation to capital gains tax and income tax, relating to the trust on an ongoing basis.

Assets given to a spouse (either outright or under trust) or to charities both by Will and prior to death are exempt from IHT.

If you have already made or are considering making any lifetime gifts, please brief us so that we can explain fully the operation of IHT in these circumstances.

Changing an Existing Will

At Any Time

Once a Will has been properly signed and witnessed, it is valid until you change it (subject to the points on marriage and divorce mentioned below). You can only change your Will if you have 'testamentary capacity' which is a legal test for ensuring the person making the Will knows what it is they are signing.

If you wish to make minor adjustments or additions, these can often be achieved by means of a Codicil – a document supplementary to your Will.

If you want to make more significant changes, it is usually best to execute a new Will, which expressly revokes all previous Wills and specifies your new wishes.

If you have made a Will that is stored in a bank or with your solicitors, you should notify them if you execute a new Will. The latter will revoke the old Will which should be destroyed.

Review

A Will should never be considered as a 'once in a lifetime' measure. You should review it regularly to ensure it still reflects your wishes. In particular, if there are any changes in your personal or family circumstances, the Will will be ripe for review.

Such 'trigger points' for review include:

- Marriage (of self and beneficiary)
- Divorce/separation
- Birth of a child
- Increased wealth
- Tax changes
- Concerns relating to children's (or other beneficiaries') lifestyle
- Illness/disability of a beneficiary
- Bankruptcy/concerns as to a beneficiary's ability to deal with money

Remember that if you get married your existing Will is automatically revoked, and if you get divorced any appointment of your former spouse as an executor and any gift to your former spouse become invalid, but the rest of the Will remains effective.

Helping Your Executors/Trustees

Forward Thinking

It will assist your executors greatly in implementing your wishes as smoothly and as quickly as possible if you notify them once you have executed the Will and inform them where the original Will is stored. We can of course do this for you if you wish.

It can also save time if you keep a list of your assets noting where any relevant documents are held, for example the title deeds to the house, life policy documents, building society passbooks, stocks and share certificates etc. Furnishing relevant details of addresses and account numbers etc on this list will also be helpful.

This is of course a benefit in using clarityLAW in that we will be able to provide our lawyers with all the information we hold in this regard (with your permission).

Letter of Wishes

Should your Will contain a trust, your trustees will welcome a letter explaining your wishes for its implementation. The executors can then refer to your express intentions and administer the trust as you envisage. Such a letter (known as a 'letter of wishes') affords them valuable guidance. Whilst it is not legally binding, it is a very important document indeed, and careful thought should go into its preparation.

Important Reminders

- Tell your executors where your Will is stored (and who your solicitors are).
- Review your Will on a regular basis – every three years at least.
- If you get married after making a Will, the Will is automatically revoked (in other words it becomes invalid) unless it was expressly stated to be made 'in contemplation of marriage'.
- If you get divorced, your spouse will automatically become a guardian of your children if you die while they are under the age of 18, even when the Court has awarded you sole parental authority.
- If you are separated but not divorced, your spouse has the same rights under your Will (or under the law on intestacy) as if you still lived together.
- If your Will leaves a specific item to someone, but you sell or give that item away prior to your death, the named beneficiary will not be entitled to any other asset in lieu, unless of course your Will expressly provides for this.
- If you leave cash or a specific item to a beneficiary (other than your own children) and that beneficiary predeceases you, the gift is void. The next of kin of that beneficiary will not take the gift by way of substitution, unless your Will makes specific provision.

Contact Us

If you would like to discuss any of the above, or to arrange a meeting with a clarityLAW adviser, please contact your usual adviser, or clarity on:

Telephone: 0800 368 7511

Email: claritylaw@clarityglobal.com

Website: www.clarityglobal.com/clarityLAW

Risk Warning: The past is not necessarily a guide to future performance. The value of your investment and the income from it can fall as well as rise and is not guaranteed. You may not get back the full amount invested.

Our views are based upon our understanding of current legislation in England. Levels and bases of, and reliefs from, taxation are subject to change and their value to you will depend upon your personal circumstances. You should not act on any of the information without seeking professional advice.

clarity is authorised and regulated by the Financial Conduct Authority. The Financial Conduct Authority does not regulate all types of Pensions, Mortgages or Taxation Advice.

clarityLAW is brought to you in association with Taylor Vinters solicitors a firm regulated by the Solicitors Regulatory Authority

February 2022