



MAKING YOUR WILL

At whatever age, after a person's 18th birthday regardless of wealth it is vital to have a Will. Without one, a person's final wishes may not be properly carried out, and dependants may not be adequately catered for. In this uncertain world, a Will should be a matter of urgency for anyone who lacks one.

This leaflet will provide a background to the process of making a Will. It explains some of the common terms and situations that are encountered in writing a Will and will explain to the reader some of the requirements and aspects of the laws involved.

This together with the questionnaire that you will be asked to complete will give a solid foundation for discussions with Austen Whetham and Guest who review each client's requirements in depth in order to create a Will which is a precise and effective legal document.

Why choose AWG to prepare a Will?

- We have a highly experienced team of Will drafting solicitors
- We place our clients' interests first and ensure that they are given first-class, independent advice
- We make every effort to explain things clearly
- We will not place ourselves in a position of conflict between parties involved
- We will act sensitively
- We will explain at an early stage on what basis customers will be charged and tell them our costs as soon as it is clear how much work is required to fulfil the writing of the Will to our joint satisfaction.

This section explains how Wills work and gives definitions of the terms you will come across.

The Testator

Generally in the past anyone leaving a Will or in legal terms a "Testator" had full and free power to dispose of his or her property and assets on death in any way they wished (provided that they observed certain standard formalities).

Sensibly, this freedom has been reduced so that it is no longer possible to leave dependants destitute. However, this now means that it is even more important to get professional help when writing a Will in order to ensure that your wishes are adhered to.

A testator may still leave outright gifts, which is all that is usually required, or by incorporating Trusts into their Will, Testators can choose the way their assets are dealt with over many years.

Always avoid intestacy because:

When someone dies without making a Will (intestacy), the legal rules governing the situation will hardly ever relate exactly to the wishes of the deceased. It is common that the Will maker hoped to benefit people in a completely different way to the way the intestacy rules dictate and the administrators have limited powers to put things right. (See our leaflet on Intestacy).

“Executor” or Executors”

This is the person or people responsible for ensuring that a Will is carried out in the proper manner and that all the instructions that have been left have been fulfilled.

Anyone who writes a Will can choose an Executor who will deal with their **estate** (all their belongings and assets). That choice should be exercised carefully and the Testator should have the fullest confidence in whom is appointed, both for professional competence and knowledge of family circumstances.

The Testator is not tied to using the solicitors that he or she commonly uses in order to draw up a Will. Sometimes the beneficiaries of the estate may live a long distance away for example so it could be prudent to appoint a local solicitor to act on their behalf when the time comes.

If you are appointing family members it is a good idea to appoint someone who is younger than you.

You can of course appoint your surviving spouse or civil partner.

You may also want to appoint other family members.

Sometimes it is sensible to appoint a professional, especially where there are children from previous relationships on either or both sides.

The duty of an executor is to collect the real and personal estate of the deceased and then distribute the net estate to the persons properly entitled under the Will (once any Inheritance Tax and debts of the deceased are paid).

The executors are under a duty to take reasonable care to preserve the value of the deceased’s estate.

Any person who is of full age and capable of managing his own affairs may be an executor.

Trusts and Trustees

If a **Trust** is set up (whereby some or all of your assets are legally assigned to someone else to administer them on your behalf), under a Will it is usual that the Executors are also the **Trustees** (the people who do the administering). In certain cases separate Trustees may be appointed, for example where there is a literary estate, and it is vital that there should be a Trustee with specialist expertise.

In the case of a business interest it may be sensible to appoint the accountant as a Trustee. There are all sorts of factors to bear in mind which AWG will be delighted to assist you with.

Validity of a Will

For a Will to be valid it must be made in accordance with the law of the country where it was **executed** (written), or where the Testator was usually living (domiciled) (or a national of).

English law requires that the Will must be in writing and be signed by the Testator. The Testator must be over the age of 18. There must be an intention that the signature is to give effect to the Will and the signature must be made or acknowledged by the Testator in the presence of two or more witnesses (also over the age of 18 and not beneficiaries or family members) present at the same time. The witnesses must then **attest** (agree that the document is genuine) and sign the Will and acknowledge their signatures in the presence of the Testator.

For the Will to be valid the Testator must be mentally capable of making the Will and must be able to understand the nature of the act and its effects. He or she must also understand the extent of the property of which is being disposed of and understand the claims of others to which they ought to action.

Revoking a Will

A Will, once made may be **revoked** (cancelled) expressly or by the execution of a new Will wholly inconsistent with the former Will. It may be revoked by destruction if done by the Testator personally. A Will is revoked by the Testator's subsequent marriage unless the Will was made in expectation of marriage to that particular person. Also benefits given to a subsequently divorced spouse will be revoked unless it expressly states to do otherwise. Divorcees who were appointed as an Executor or Trustee will also fail.

Preparation of Will

When preparing a Will as much detail as possible should be obtained of the Testator's assets and interests. AWG will provide a questionnaire indicating the type of information that should be given.

It cannot be emphasised enough that circumstances change as wealth fluctuates and families grow. The Testator's Will should be kept under review. We generally suggest every 5-10 years but sooner when there is change of circumstance.

Factors to be taken into consideration:

Of course no list of factors that a Testator should take into consideration can be exhaustive but the following matters should always be considered:

1. Who does the Testator wish to benefit principally as **residuary beneficiaries** (who will receive the main part of the estate after tax etc.) and as **legatees** (the inheritors of specific bequests)?
2. The special position of a spouse
3. The appointment of guardians where children are involved
4. Any claims that there may be under the Inheritance (Provision for Family and Dependants) Act 1975
5. Personal factors such as character, sex and age dependant relatives and family disability which may determine the way in which a gift is made
6. Special rights or privileges in relation to particular types of property such as the matrimonial home or the business
7. Inheritance tax-whether gifts are to be free of or subject to tax, and the consequent effect on the value or amount of assets taken by residuary beneficiaries
8. In some circumstances it may be sensible to have a **Discretionary Will** (this transfers all assets to Trustees to deal with in accordance with a Letter of Wishes from the Testator)
9. Has the Testator made any gifts in the previous seven years which will be taxable on the Testator's death
10. What joint property is there
11. What other things such as insurance policies or pension payments are there which could affect the tax situation or other financial decisions.

Unmarried couples

There are special factors that apply to unmarried couples. For example, the surviving unmarried partner will not inherit assets on intestacy so it is essential that a Will be made (however children of unmarried parents inherit in the same way as ones with married parents do).

If the partners are of a similar age and both die around the same time, property which passes to the survivor on the first death and then to another beneficiary on the second death may be taxed twice as the spouse exemption for Inheritance Tax purposes does not apply.

Certain co-habitees are entitled to make claims under the Inheritance (Provision for Family and Dependants) Act 1975 but the provision to be provided is maintenance rather than reasonable provision.

The surviving partner may not automatically be entitled to pension rights, tenancies, fatal accident claims etc.

Civil Partnerships

The law has been changed by the Civil Partnership Act and there are very many reasons why same-sex couples will not form a registered Civil Partnership.

Under that Act Civil Partners will be treated for tax purposes including the Inheritance Tax spouse exemption in the same way as spouses. Before entering into a registered Civil Partnership legal advice is recommended.

Foreign Element

When foreign assets are involved, considerable care is required. The general rule is that Testators living in the UK should make separate Wills under the law of each country where assets are located.

Where a universal English Will is made the duties of an Executor in relation to foreign assets are by no means clear. Usually an Executor will need an authorisation from the foreign court before dealing with overseas assets.

UK Executors have a duty to disclose assets to the Inland Revenue and pay Inheritance Tax even on foreign assets. Sometimes there is a liability to tax imposed by the foreign country on which relief may be available.

Inheritance Tax

Inheritance Tax is the amount of money payable to the government on a person's death based on their net worth which is assessed by a set of rules and guidelines. The rate of tax is calculated in accordance with the tables in force at the date of death.

Three aspects of Inheritance Tax should be considered by the Testator:

1. How much Inheritance Tax will be charged;
2. Who is liable for payment of the tax;
3. On whom will the ultimate burden of tax fall.

Inheritance Tax will also be charged on **all property*** to which the Testator was entitled immediately before his or her death, including:

1. Property over which he or she had a general power of appointment;
2. Settled property in which he or she had an interest in possession;
3. Property subject to a **reservation** – property which the Testator had the benefit of during his/her lifetime;
4. Certain liabilities that will not be taken into account.

* The definition "All Property" excludes:

1. **Revisionary interests** (that only form part of the estate on the Testator's death);

2. That part of the value transferred attributable to property passing to exempt beneficiaries, or conditionally exempted property such as items of national, scientific, historic or artistic interest (and the value will be adjusted where appropriate for business or agricultural property relief).

The Process

- You tell us what you have in mind
- We discuss your plans with you, and help you refine them
- We give you any Inheritance Tax saving advice which is appropriate
- We prepare a draft Will, using clear and simple English
- You call to sign your Will

Home visits can be arranged where needed, and at all times there will be no fuss or delay.

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